

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 210/MP/2017

Coram:

Shri I.S. Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Date of Order: 25th July, 2022

In the matter of

Petition under Section 79(1)(c), (d) and (f) of the Electricity Act, 2003.

And

In the matter of

Kudgi Transmission Limited,
TCTC Building, 1st Floor,
P.B. No. 979, Mount Poonamallee Road,
Manapakkam, Chennai – 600 089

..... **Petitioner**

Vs

1) Bangalore Electricity Supply Company Limited,
Krishna Rajendra Circle,
Bangalore – 560 001

2) Chamundeshwari Electricity Supply Corporation Limited,
No. 927, L.J Avenue,
New KantharajUrs Road,
Saraswathipuram, Mysore – 570 009

3) Hubli Electricity Supply Company Limited,
Navanagar,
Hubli – 587 117.

4) Mangalore Electricity Supply Company Limited,
Paradigm Plaza, A.B. Shetty Circle,
Mangalore – 575 001

5) Gulbarga Electricity Supply Company Limited,
Station Road, Gulbarga – 585 101

6) Power Company of Karnataka Limited

Cauvery Bhavan, K. G Road,
Bangalore – 560 001

7) Kerala State Electricity Board,
Vaidyuthi Bhawanam, Pattom,
Thiruvananthapuram – 695 004

8) Tamil Nadu Generation & Distribution Corporation Limited,
NPKRR Malligai, 144 Anna Salai,
Chennai – 600 002

9) Southern Power Distribution Company of Andhra Pradesh Limited,
Srinivasapuram, Thiruchanoor Road,
Tirupati – 517 503

10) Eastern Power Distribution Company of Andhra Pradesh Limited
P&T Colony, Seethammadhara,
Visakhapatnam – 530 013

11) Southern Power Distribution Company of Telangana Limited,
6-1-50, Mint Compound,
Hyderabad – 500 063

12) Northern Power Distribution Company of Telangana Limited,
(Through its Managing Director)
2-5-31/2, Vidyut Bhawan, Nakkalgutta, Hanamkonda,
Warangal – 506 001

13) NTPC Limited,
NTPC Bhawan, SCOPE Complex,
7 Institution Area, Lodhi Road, New Delhi – 110 003

....Respondents

The following were present:

Shri Alok Shankar, Advocate, KTL
Ms. Sumana Naganan, Advocate, BESCO
Ms. Medha M. Puranik, Advocate, BESCO
Shri Anand K.Ganesan, Advocate, NTPC
Ms. Swapna Seshadri, Advocate, NTPC
Ms. Ritu Apurva, Advocate, NTPC

ORDER

The present Petition has been filed by the Petitioner, Kudgi Transmission Limited
("KTL") under Section 79(1)(c), (d) and (f) of the Electricity Act, 2003 (hereinafter

referred to as “the Act”) seeking revision of the quoted transmission tariff payable to it in terms of the Transmission Service Agreement (“TSA”) for the various events occurring after the Bid Due Date. The Petitioner has made the following prayers:

“(a) Admit the present petition;

(b) Declare that the Petitioner is entitled to revision of tariff in terms of Article 12.2 of the TSA for increased cost incurred due to the order of the District Magistrate for accessing the land for laying towers;

(c) Declare the Petitioner is entitled to recover additional costs incurred due to force majeure events in terms of Article 11 of the TSA;

(d) Pass such other and further orders/ directions as the Commission may deem appropriate in the facts and circumstances of the case.”

Background

2. The Petitioner, KTL was incorporated by REC Transmission Projects Company Limited, the Bid Process Coordinator (“BPC”) in terms of the Tariff Based Competitive Bidding Guidelines for the Transmission Service and Guidelines for Encouraging Competition in Development of Transmission Projects issued by the Ministry of Power, Government of India under Section 63 of the Act for the purpose of establishing “Transmission System required for evacuation of power from Kudgi TPS (3x800 MW in Phase-I) of NTPC” (hereinafter referred to as “Transmission System” or “Project”). The Respondents herein are the Long-Term Transmission Customers (“LTTCs”) of the Petitioner and has entered into Transmission Service Agreement with the Petitioner dated 14.5.2013.

3. Pursuant to the competitive bid process conducted by the BPC in accordance with the Competitive Bidding Guidelines, L & T Infrastructure Development Projects Limited (“L & T Infra”) was selected as the successful bidder and awarded the Letter of

Intent on 31.7.2013. Consequent thereto, L & T Infra acquired the 100 % equity share of the Petitioner Company on 30.8.2013 and commenced the work of the Project in accordance with the TSA. The Project involved the development of the following elements:

Sr.	Scope of Work	SCOD	Deemed COD	Date of Charging
Element 1	2 Nos. 400 kV D/C transmission line Kudgi TPS to Narendra (New)	28.2.2015	4.8.2015	6.11.2015
Element 2	765 kV D/C transmission line Narendra (New) to Madhugiri	31.12.2015	19.9.2016	24.9.2016
Element 3	400 kV D/C transmission line Madhugiri to Bidadi	31.12.2015	27.7.2016	24.8.2016

4. The Transmission Licence was granted to the Petitioner by the Commission vide order dated 7.1.2014 in Petition No.191/TL/2013 and the transmission tariff as arrived at pursuant to the competitive bidding process was adopted by the Commission vide order dated 8.1.2014 in Petition No. 190/TT/2013.

5. The Petitioner has contended that the Scheduled Commercial Operation Date (“SCOD”) for the Element 1 was 28.2.2015 and the Petitioner completed the entire scope of work for the first element on 27.3.2015. However, due to non-availability of the inter-connected facility required to be developed by NTPC and PGCIL, the Element 1 could not be tested and charged. Ultimately, the Element 1 was inspected and declared as ready for charging by the Central Electricity Authority on 28.7.2015 and accordingly, in terms of Article 6.2 of the TSA, the Petitioner declared the Element 1 under the commercial operation from 4.8.2015, which has already been allowed by the Commission in its order dated 27.6.2016 in Petition No. 236/MP/2015 filed by the

Petitioner in this regard. It is submitted that despite declaration of commercial operation in terms of the provisions of TSA, the Petitioner was neither paid tariff for the Project nor has the completed line been charged and thus, continued to incur the additional cost in form of O & M from the funds for the Project, security expenses and the litigation expenses for seeking payment for the elements.

6. Similarly, Elements 2 and 3 were required to be completed by 31.12.2015. However, their commercial operation was declared on 19.9.2016 and 27.7.2016 respectively and the delay was primarily due to the non-availability of inter-connection facilities required to be provided by LTTCs, which were being developed by PGCIL and NTPC. The delay in commissioning of the aforesaid elements was also caused on account of Law & Order situation on the ground affecting the construction works and in this regard, the Petitioner filed Petition No. 248/MP/2016 before the Commission seeking declaration that the delay in commissioning of Elements 2 and 3 were for the reasons not attributable to the Petitioner. The said Petition subsequently came to be decided by the Commission vide its order dated 24.1.2019, whereby the Commission has, *inter-alia*, allowed the extension of SCOD from 31.12.2015 till the dates of actual COD of the Elements 2 and 3.

Submissions of Petitioner:

7. In support of the prayers made, the Petitioner has mainly submitted as under:

Law & Order Situation – Change in Law

(a) The Petitioner was vested with powers of a Telegraph Authority under Section 164 of Act on 22.5.2014. As per Section 10 of the Indian Telegraph Act, 1885

(hereinafter referred to as “Telegraph Act”), after being vested with the power of Telegraph Authority, a licensee does not need permission to enter into a land for erecting towers and laying of transmission lines and is required to pay compensation to the land owners for any damage caused to crops while undertaking works in terms of the Telegraph Act. This is also in line with the general principles of works of licensee as recognized in Section 67 and Section 68 of the Act.

(b) Despite such wide and express powers, the Petitioner was not able to undertake works as required under the TSA. The prevailing law and order situation at various sites prevented the Petitioner from entering upon land. The Petitioner sought all possible assistance in relation to the issue and had to even seek police protection for the personnel and machinery of the Petitioner and its contractors. The Petitioner could undertake works on the site/s only under police protection and after paying compensation in advance at the rate fixed by the District Collectors.

(c) In terms of Section 10 of the Telegraph Act read with Section 164 of the Act, and other provisions of the Act, KTL was required to compensate land owners only for damage caused, if any to the crops, trees or any other structure which is likely to cause obstruction. However, the Orders of the District Collectors required the Petitioner to make payments of compensation to the land owners as a pre-condition to enter into the land/s.

(d) Making payments prior to entering into land, irrespective of the damage caused to the property of the land owner is alien to the powers of the telegraph authority under Section 10 of the Telegraph Act and the scheme of the Act. The above understanding is confirmed from the earlier order passed by a District Magistrate upheld by the appropriate State Commission and the APTEL. In this regard, the reliance has been placed on the judgment of APTEL dated 13.5.2014 in IA No. 174 of 2013 in DFR No. 413 of 2013 in the matter of Sh. Ganpat Khanderao Farande v. The Executive Engineer, Maharashtra State Electricity Transmission Co. Ltd.

(e) The orders of the District Collectors is ‘law’ as defined in the TSA and mandating such a condition in total contradiction to the provisions of the Act and the Telegraph Act is ‘Change in Law’ in terms of the TSA. Thus, the orders of District Collectors

directing prior payment are Change in Law events under the TSA entitling relief to the Petitioner as per the provision of the TSA.

(f) The total compensation paid by the Petitioner to the land owners for all the three elements is Rs. 158.47 crore and the said amount is audited by the statutory auditor of the Petitioner and certificate of the auditor to this effect has also been furnished. In the event the Petitioner would have paid compensation for only for the damages caused to the crop in accordance to the Telegraph Act then the compensation would have been much less. This Petitioner has paid an excess/ additional compensation of Rs. 38.53 crore which is beyond the scope of the original cost and has been incurred as a result of the additional compensation imposed by the order of the District Collectors.

(g) As per Article 12 of the TSA, any new condition which becomes mandatory after the cut-off date is to be treated as Change in Law and entitles the TSP to appropriate reliefs as specified in the TSA. Clause 12.2 of the TSA specifies the relief that the Petitioner is entitled to in the event of Change in Law.

(h) A similar provision of Change in Law was interpreted by the APTEL in its judgment in Nabha Power Limited v. Punjab State Power Corporation Limited and Ors. dated 23.4.2014 in Appeal No. 207 of 2012 while dealing with change in railway siding consent wherein the APTEL has, *inter-alia*, held that the change in scope of the railways siding works as a result of change in the conditions in the approval by the competent authority of the Railway leading to change in cost of the Project will be covered under Change in Law provision under change in consent and approvals obtained for the Project under the PPA.

(i) Ministry of Power, Government of India on 15.10.2015 notified guidelines for payment of compensation towards damages in regard to Right of Way for Transmission Lines. While the communication has been titled as guidelines and direction to undertake necessary action been issued, these have not been formally accepted by the State Governments of the States where the Transmission Lines of the Petitioner are located. However, in the event compensation is required to be paid

for land in terms of the said guidelines for the tower base, diminution of land value, land through which the conductor passes through, then the Petitioner would require to approach the Commission again seeking revision of tariff. Moreover, around 400 petitions have been filed before the District Courts across State of Karnataka whereunder compensation has been claimed for heads alien to the provisions of Telegraph Act and the Act, which are being defended by the Petitioner in accordance with the provisions of law. However, in the event compensation is awarded in one or more of such petitions then such payment shall also be akin to increased cost due to Change in Law and the Petitioner would require to approach the Commission for revision of tariff.

Additional expenditure due to delay

(j) As per the TSA, development of interconnection facilities is the responsibility of the LTTCs. It is a matter of record that the development of interconnection facilities was the specific obligation of the PGCIL and NTPC and they were not made available prior to the SCOD of each of the elements of the Project. As a result of such delay the Petitioner could not commission the various elements of the Projects by their respective SCOD. In terms of the TSA, Element 2 and 3 should have been commissioned by 31.12.2015. However, as a result of non-availability of interconnection facilities for Element 2 and 3, the construction period of Element 2 and 3 was extended to September 2016 from the original schedule of December 2015. The delay was for reasons entirely beyond the control of the Petitioner and adversely affected the completion schedule of the Project despite best efforts by the Petitioner.

(k) With respect to Elements 2 and 3, the Petitioner despite best efforts could not complete the construction by the original scheduled commercial operation date and incurred additional interest during construction. Interest during construction for the period of January 2016 to September 2016 is Rs. 75.48 crore and Incidental expenditure incurred as a result of delay is about Rs. 62 lakh.

Delay in payment of Tariff and Charging of Lines

(l) Despite the Petitioner completing all the works on each of the element and declaring commercial operation in terms of the TSA, the tariff payments in terms of the TSA did not commence. TSP is entitled to tariff as per the TSA from the date of commercial operation date of each of the element of the Project. As Per Clause 10.1 of the TSA, the Petitioner is entitled to tariff from the date of Commercial Operation of the Element.

(m) Delay in making payments has direct impact on the finances of the Petitioner. The Petitioner in the financial model had assumed that the tariff payments from First Element would start accruing to the Petitioner when Element 2 and 3 are under construction. Since, such payments were delayed and still pending to be released even after the order of this Commission resulting in promoters of the Petitioner and the lenders required to infuse more funding for the construction of Element 2 and 3 and O&M of Element 1. Additional funding brought in by the lenders carries interest on it and such expense is direct consequence of the default of the beneficiaries.

(n) The net impact of the default in the delay in making payment of tariff is direct and the Petitioner must be compensated for the additional financial implications as a result of delay in making payment of tariff for each element. It is submitted that merely directing payment of delayed payment surcharge in terms of the TSA on the tariff invoices may not absolve the financial liability already created/ incurred by the Petitioner and compensation either as one time payment or revision of tariff is required to obviate the additional financial burden incurred by the Petitioner.

Delay in Charging

(o) Each of the Elements was commissioned in terms of the TSA prior to the date of actual charging of such elements. The date of commissioning and actual charging of each of the element is as under:

Element	Date of Commercial Operation	Date of Charging
Element 1	4.8.2015	16.11.2015
Element 2	19.9.2016	24.9.2016
Element 3	27.7.2016	24.8.2016

(p) Till the time the transmission lines are actually charged, TSP has to continue to incur expenditures for protection thereof from theft of wires and conductors and other expenses. Such costs are incurred solely for reasons not attributable to the Petitioner and were never likely to be incurred and the same should be reimbursed to the Petitioner at one go or as part of tariff payments. The Act and the Tariff Policy clearly mandate that all the costs that are reasonably incurred must be allowed to be recovered through tariff. Therefore, costs which could not have been projected to be incurred at the time of bidding are incurred only due to defaults of PGCIL, NTPC and LTTC's or other reasons beyond the control of the TSP, must be considered as legitimate basis for revision of tariff.

(q) The Commission vide its order dated 16.10.2015 in Petition No. 73/MP/2014 in the matter of Jabalpur Transmission Company Limited v. Adhunik Power and Natural Resources Limited and Ors. has recognized the additional cost incurred as result of Change in Law and Force Majeure events and granted liberty to approach the Commission after commercial operation to claim appropriate relief.

(r) The powers of this Commission to review tariff of projects which have been awarded on competitive bidding basis has been acknowledged and upheld by the Supreme Court in Energy Watchdog v. CERC in C.A No 5399 of 2016 passed on 11.4.2017.

8. Notice was issued to the Respondents to file their reply and the Petitioner to file its rejoinder, if any. Pursuant to the above, the Respondents and the Petitioner have filed their reply and rejoinder, which are captured in the subsequent paragraphs.

Reply of Respondent No.1:- Bangalore Electricity Supply Company Limited (BESCOM)

9. The Respondent No.1 vide affidavit dated 4.5.2018 filed its Statement of Objections and has mainly submitted as under:

(a) Contention of the Petitioner that it is entitled for revision of tariff on account of

Change in Law is untenable and ought not to be granted. Article 12 of the TSA deals with the event of Change in Law. The order of District Collector awarding compensation is in terms of Telegraph Act and does not constitute Change in Law under Article 12 of the TSA as the same was prevailing way before the Petitioner participated in the bid. It ought to be noted that the Petitioner herein has not produced any documentary proof of increase in the cost as result of the as result of the alleged Change in Law as per Article 12.2.3 of the TSA.

(b) As per Section 16(3) of the Telegraph Act, any dispute with regard to sufficiency of the compensation payable to the land owners is to be determined by the District Judge. If the compensation determined by the District Collector was not acceptable by the Petitioner, the Petitioner had a right to approach the District Judge seeking re-determination of compensation. The Petitioner having not exercised its rights under Telegraph Act, now cannot seek revision of tariff before this Commission. As per Section 16(4) of the Telegraph Act, the decision of the District Judge on compensation payable is final. The grounds urged in support of the Petition indicate that according to the Petitioner, the order directing payment of compensation de hors the damage caused is opposed to the provisions of the Telegraph Act and in such circumstances, the Petitioner ought to have taken recourse to the remedy available in law to mitigate the loss.

(c) The averment of the Petitioner that it is entitled for revision of tariff on account of delay in developing interconnection facility by the LTTCs is also untenable. Article 4.2.1(b) of the TSA provides for arranging and making available the interconnection facilities to enable the TSP to connect the Project. Accordingly, as per the request of the Petitioner, the Respondent had written letter to PGCIL on 8.12.2015 and to CEA on 3.5.2016 and 1.6.2016 requesting to make arrangement to provide interconnection facilities to Elements 2 and 3. The Respondent No.6, on behalf of Discoms of Karnataka had also requested PGCIL and NTPC to make arrangements to provide interconnection facility vide letter dated 24.2.2015. Thus, the Respondents had fulfilled their obligation under the TSA.

(d) As per Article 4.1 (c), TSP shall at its own cost and expense observe, comply

with, perform, undertake and be responsible for entering into a Connection Agreement with CTU/STU (as applicable) in accordance with Grid Code. Thus, it was the responsibility and the obligation of the Petitioner to enter into Connection Agreement/ Tripartite agreement and undertake the work of the connection of the Project to inter-connection facilities.

(e) As per Regulation 4.5 of the Grid Code, a Connection Agreement shall be signed by the applicant in accordance with the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in inter-State Transmission and related matters) Regulations, 2009 (“Connectivity Regulations”). Regulation 8(5) of the Connectivity Regulations provides that the applicant or inter-State transmission licensee, as the case may be, shall sign an agreement with CTU or inter-State transmission licensee owning the sub-station or pooling station or switchyard or the transmission line as identified by the nodal agency where connectivity is being granted. In the present case, the Petitioner was required to execute the tripartite agreement /Connection Agreement with NTPC and PGCIL. However, the Petitioner has erred in not executing agreement/ tripartite agreement in accordance with the law.

(f) Paragraph 1.6 of the Detailed Procedure issued under the Connectivity Regulations states that the applicant granted Connectivity will be required to sign Connection Agreement with CTU prior to the physical inter-connection. In case the Connectivity is granted to the ISTS of an inter-State transmission licensee other than CTU, a tripartite agreement shall be signed between the applicant, CTU and such inter-State transmission licensee in line with the provisions of the regulations. Further, Paragraph 5.4 of the Detailed Procedure states that the applicant shall have to sign the Connection Agreement with CTU prior to the physical inter-connection as per the format given at CON-6.

(g) Paragraph D of the Format Con-6 of draft Connection Agreement states that the Parties shall enter into this Connection Agreement to record the terms and conditions upon which the Parties will carry out their respective Connection Works, in addition to the estimated cost required to be carried out by the CTU for works related to the

interconnection, in accordance with the Connection Agreement. In case of a generating plant seeking connection to the inter-State transmission system not owned by CTU, a tripartite Connection Agreement would be signed between CTU, the inter-State Transmission licensee and the applicant since the planning of the inter-State transmission system, insulation coordination and system studies, etc. are the responsibility of CTU. The responsibilities of the three parties would be defined accordingly in the tripartite agreement.

(h) Paragraph E of the Format Con-6 of the draft Connection Agreement states that the parties shall separately take up modalities for implementation of works on mutually agreed terms and conditions. The scope of works, time schedule for completion of works, including timelines for various milestones to be achieved for completion of the works shall form an appendix to the agreement and shall form the basis for evaluating if the works by the parties is being executed in time. Penalties for non-completion of works in time by one party resulting in financial losses to the other party may be appropriately priced, as per the mutual agreement, for indemnification of each other against losses incurred in this regard and form a part of this Agreement.

(i) Thus, the Petitioner was required by law to execute tripartite agreement/ Connection Agreement with NTPC and PGCIL. However, the Petitioner has erred in not executing Connection Agreement /tripartite agreement in accordance with the law as stated above. The Respondent was in no way responsible for commissioning of the Project or inter-connection facilities and no liability can be foisted on it for payment of transmission charges for any failure of any other party under the TSA. Since the Petitioner has failed to achieve commissioning on the SCOD, the Petitioner is liable to make good the losses suffered by the Respondent and other LTTCs on account of its failure.

(j) As regards non-payment of tariff, the Respondent or the other LTTCs are not responsible for the same. The Commission vide its order dated 27.6.2016 in Petition No. 236/MP/2015 has held that NTPC and PGCIL are liable to pay transmission charges for Element 1. Further as per Article 5.1.3 of the TSA, the TSP shall be

responsible for obtaining all consents, clearance and permits. The role of LTTCS is only to assist and support the TSP in obtaining the same. Therefore, it was the responsibility of the Petitioner to clear issues pertaining to Right of Way. Insofar as the role of LTTCS is concerned, the Respondent had vide its letter dated 8.12.2015 requested KIADB to sort out the RoW issues so that the transmission line could be completed well in time.

(k) The transmission charges that are payable to the Petitioner were determined by way of competitive bidding and the same are adopted by the Commission under Section 63 of the Act in Petition No. 190/TT/2013. The Commission has also held that the competitive bidding has been carried out by the BPC through a transparent process in accordance with the Guidelines and standard Bid Documents. The tariff determined by way of competitive bidding cannot be revised once it is adopted by the Commission under Section 63 of the Act. Therefore, the Petitioner's prayer for revision of tariff is untenable and ought not to be granted.

Reply of Respondent No.13, NTPC

10. The Respondent No.13, NTPC vide its affidavit dated 30.7.2019, has filed its reply and has mainly submitted as under:

(a) The quoted transmission tariff of the Petitioner for all three Elements has already been paid by NTPC in terms of the order dated 6.11.2018 passed by the Commission in Petition No. 261/MP/2017. Therefore, any increase in the transmission tariff shall directly impact NTPC.

(b) From the perusal of the Petition, it is not clear as to which provision is being cited by the Petitioner to claim additions to the quoted transmission tariff. At Para 31 of the Petitioner, the Petitioner has cited Article 12 of the TSA which deals with Change in Law and at Para 42 of the Petition, the Article 11 has been relied on which deals with Force Majeure. From the prayer clause, it is seen that the Petitioner is claiming the recovery of additional cost both under Change in Law and Force Majeure. This is an entirely erroneous approach on the part of the Petitioner. The Petitioner has not

understood the scope of the provisions of the TSA dated 14.5.2013.

(c) The Petitioner has filed multiple proceedings before the Commission claiming relief of time extension/ extension of SCOD due to Force Majeure events and claiming the relief of transmission tariff being paid from the date the Element 1, Element 2 & Element 3 were ready but could not be put to use due to non-availability of the inter-connection facilities. The Petitioner has also been successful in getting such relief from the Commission and is seeking to get a double recovery on the very same grounds by filing the present Petition.

(d) The scope of Force Majeure and Change in Law clauses qua Competitive Bidding Transmission Service Agreement came to be considered by APTEL in a judgment dated 6.4.2016 in Appeal No. 86 of 2015 in the matter of Western Region Transmission (Maharashtra) Private Limited v. CERC and Ors. wherein the APTEL has observed that (i) the only relief available for Force Majeure events under the TSA is an extension of COD without having to pay liquidated damages, (ii) an increase or enhancement in tariff cannot be claimed for Force Majeure events, and (iii) the framework of the competitive bidding under Section 63 of the Act permits time extension in case of Force Majeure and not the other reliefs.

(e) However, from the Petition, it transpires that the Petitioner is making claims both under Force Majeure and Change in Law for the very same events. The Petitioner has claimed that the term 'relief' on account of Force Majeure event is an inclusive term which permits grant of restitution relief to the Petitioner. This is an entire misconception and against the express provisions of the TSA and the judgment of APTEL.

(f) The Petitioner had filed Petition No. 236/MP/2015 to recover the transmission charges from the date of completion of Element 1 of KTL which could not be put to regular use because of non-availability of interconnection facilities both at the generator end (NTPC) as well as the downstream transmission licensee end (PGCIL). The exact case of the Petitioner was that while Element 1 was ready for charging on 28.7.2015 and the TSA permitted the Petitioner to declare the COD w.e.f. 4.8.2015, the delay on behalf of NTPC and PGCIL should not disentitle the

Petitioner from claiming the transmission charges. The Commission after detailed hearing in the matter held that the deemed COD has occurred on 4.8.2015 and directed both NTPC and PGCIL to pay the transmission charges from 4.8.2015 onwards to the Petitioner. Therefore, there is actually no impact on the Petitioner due to delay in charging of Element 1 since the transmission charges from 4.8.2015 have been paid to the Petitioner. This being a bid tariff, the Petitioner is assumed to have included all tariff parameters in its quoted tariff.

(g) The Petitioner had also filed Petition No. 248/MP/2015 claiming the delay in interconnection facilities of Element 2 & Element 3 to be on account of Force Majeure events and had sought declaration that it is entitled to commission the Project without interconnection facility being available. The Commission vide order dated 24.1.2019 allowed the Petition, *inter alia*, revising the SCOD of the Element 2 & Element 3 from 31.12.2015 till the date of actual COD. The Petitioner has also filed Petition No. 135/MP/2018 seeking payment of transmission tariff between the date of commissioning and of date of charging of Element 2 & Element 3, which is pending decision of the Commission.

(h) In view of the above Petitions filed by the Petitioner on the aspect of lack of interconnection facility, it is not understood as to how the very same reasons are being claimed to seek monetary relief under Change in Law under Article 12, which would lead to increase in quoted transmission tariff of the Petitioner.

(i) Apart from the above, NTPC had also filed Petition No. 261/MP/2017 before this Commission challenging the levy of LTA charges by PGCIL on NTPC by a bill of 6.11.2017. This Commission passed a detailed order on 6.11.2018 directing NTPC to pay the transmission charges of all three elements of the Kudgi transmission system till the COD of its respective units. NTPC has duly complied with the order dated 27.6.2016 passed in Petition No. 236/MP/2015 and order 6.11.2018 in Petition No. 261/MP/2017.

(j) NTPC in no way responsible for the interconnection facility for Element 2 & Element 3 and the alleged delay on account of the same cannot prejudice NTPC.

(k) With regard to the grounds being raised by the Petitioner on the issue of interconnection facility, the Petitioner has already been successful in declaring the COD of Element 1 on 4.8.2015, Element 2 on 19.9.2016 and Element 3 on 27.7.2016. NTPC/PGCIL has been directed by the Commission vide order dated 27.6.2016 (in Petition No. 236/MP/15) which was reviewed vide order dated 11.10.2017 (in Petition No. 42/RP/2016) to pay the transmission charges with regarding to Element 1 from 4.8.2015. The transmission charges for Element-I have already been paid to CTU after the bills were raised. Further, after revision of RTA by SRPC as per direction of the Commission in order dated 6.11.2018 (in Petition No 261/MP/2017) and subsequent bill raised by CTU, the transmission charges pertaining to Kudgi ATS has also been paid by NTPC within the stipulated time. So far as NTPC is concerned, there has been no default of payment of transmission tariff.

(l) As regards Law & Order situation, this issue has already been considered by this Commission in its order dated 24.1.2019 in Petition No. 248/MP/2016 and necessary relief has been granted to the Petitioner by holding the Section 164 permission to be Force Majeure. Once again, the Petitioner is making a parallel claim of the compensation which has been made by the Petitioner to the landowners to the extent of Rs 38.53 crore. This is not a new condition which has become mandatory on a date which is after 7 days prior to the bid deadline and which can be claimed as the Change in Law. It cannot be that the very same grounds can be claimed as a Force Majeure and then as a Change in Law in parallel proceedings.

(m) Insofar as land acquisition is concerned, as per Article 5.1.4(d), it was the Petitioner's responsibility to seek access to the site and other places, where the Project is being executed at its own costs including payment of any crop compensation or any other compensation as may be required. There is a negative covenant that no change should be allowed in transmission charges on account of any variation of such cost. Therefore, there is no basis at all for the Petitioner to seek any relief under the Change in Law against an express provision in the TSA from claiming such amount by variation of the transmission charges.

(n) The submission that a wrong order passed by the District Collector requiring the Petitioner to pay addition compensation is a Change in Law under Article 12.1.1 of the TSA is not correct. This, by no stretch of imagination is any new condition which has become mandatory after the date 7 days prior to the bid deadline. The submission of the Petitioner is that it would not take the legal remedies available to it against a wrong order passed by the District Magistrate requiring it to pay so called excess compensation to the land owners, but claim the said amount as a Change in Law under the TSA. This approach is not consistent with the principle under Article 12 which intends to provide relief for Change in Law during construction period and during operation period as per the said formulas for Changes in Law and not mere increase/decrease in revenues or costs to the TSA.

(o) The Petitioner is proceeding on the basis that any excess amount paid by it will be recoverable under the TSA as a Change in Law, which is again misconceived. The order of the District Magistrate has to first be established, whether the same has been covered by Article 12.1, and thereafter be correlated to either Article 12.2.1 (during construction period) for which a formula has been prescribed or correlated to Article 12.2.2 (during the operation period) for which a separate formula is prescribed. In any event, the order of the District Magistrate cannot be a Change in Law at all in view of clear stipulation contained in Article 5.1.4 and Article 5.1.5 of the TSA.

(p) Perusal of the Petition and documents placed on record reveals that the order of District Magistrate dated 23.1.2015 has only determined the compensation as per the provisions of the Telegraph Act and decided that the payment would be in two installments of 65% and 35% respectively. This does not lead to the preposition of the Petitioner that it has paid excess compensation amount. Further, the details sought to be given at Page 315 and Page 316 of the Petition are also misleading and do not support the case of the Petitioner. The chart given at Page 316 and the figures appearing there do not flow from the capitalised cost statement at Page 315. Further, the table at Page 316 is only the Petitioner's whimsical calculation of what it would have to pay as compensation in terms of the District Magistrate's order and as per

the Act. Pursuant to the imaginary calculation, the Petitioner has arrived at a figure of Rs. 38,53,19,661/-

(q) Reliance placed by the Petitioner on the Judgment of the APTEL dated 23.4.2017 in Appeal 207 of 2012 (NPL v. PACRC) has no application at all. In the said case, the Change in Law was resulting from an order of the Railways which changed scope of work itself. The case is clearly distinguishable and does not help the Petitioner.

(r) Reliance on the Government of India Guidelines dated 15.10.2015 for payment of compensation towards ROW is a vague submission and is not a Change in Law as contended by the Petitioner. Similarly, NTPC is not concerned with any number of Petitions which has been filed across the Courts in the State of Karnataka on the aspect of compensation. Article 5.1.4 clearly bars the Petitioner from claiming such amount through an escalation in tariff.

(s) As to the claim of the Petitioner for additional expenditure due to delay, the Petitioner is once again seeking non-availability of interconnection facility a force majeure. It is preposterous on the part of the Petitioner to claim additional IDC of Rs. 75.48 crore and additional IEDC of Rs 62 lakh. The Petitioner seems to be under the misapprehension that it is entitled to monetary compensation in the case of Force Majeure. The contention that the relief of Force Majeure is not confined to extension of time but can also entitle the Petitioner for payment of extra charges is against the judgment of APTEL dated 6.4.2016 in Appeal No. 86 of 2015.

(t) The claim for IDC and IEDC proceeds on the basis that tariff is being fixed by this Commission under Section 62 of the Act read with the Tariff Regulations. The concept of grant of additional IDC and IEDC is necessarily related to the concept of delay in implementation of transmission projects qua the investment approval obtained by the transmission licenses whose tariff gets determined under Section 62 of the Act. In tariff adoption under Section 63 of the Act, there is no concept of additional IDC/IEDC and the Petitioner is accepted to implement the transmission system by SCOD. If the Project gets delayed, then the Petitioner is required to pay liquidated damages which may be waived off if the delay is held to be for Force

Majeure reasons. But the additional IDC incurred by the Petitioner due to delay is nowhere to be compensated to the Petitioner.

(u) This Commission has allowed time extension on account of Force Majeure to a transmission licensee under Section 63 of the Act but with the clear stipulation that no additional IDC or IEDC would be permitted in tariff. In this regard, reliance has been placed on the order dated 29.3.2019 passed by the Commission in NRSXXXI (B) Transmission Limited v. U.P Power Corporation Limited in Petition No.195/MP/2017.

(v) As regards delay in payment of tariff and charging of the line, it is clear from the perusal of para 45 to para 47 of the Petition that the Petitioner is not at all clear about the scope of its own Petition. Any delay in payment of transmission is a bilateral issue to be dealt with by the Petitioner as per Article 10 of the TSA. It is not understood that as to how delay in payment is a Force Majeure or Change in Law under the TSA.

(w) Reliance placed by the Petitioner on the order passed by this Commission in *Jabalpur Transmission Company Limited v. Aadhunik Power and Natural Resources Limited* has no application and the order only amounted to granting liberty to the transmission licensee in that matter to approach the Commission along with details supported by documentary evidence. It is not a declaration of any principles that multiple claims citing the very same reasons can be made by transmission licenses by merely changing the provision of the TSA under which such claim is being made.

(x) Similarly, reliance on the judgment of the Hon'ble Supreme Court in the *Energy Watchdog Case* also does not help the Petitioner. The Hon'ble Supreme Court in paras 18 & para 19, in the case of Energy Watchdog only held that while adopting tariff under Section 63, the powers under Section 79 (1) (b) of the Act are also available if there are no guidelines or if the guidelines do not deal with the particular situation.

Written submissions of the Petitioner:

11. Pursuant to the liberty granted by the Commission, the Petitioner has filed its

written submissions dated 5.10.2021 mainly reiterating the submissions made in the Petition and furnishing certain additional details as called for. In the said written submissions, the Petitioner has made the following additional submissions:

(a) The entitlement of a developer for IDC and IEDC for extended construction period for reasons beyond its control is no longer res-integra. The Commission vide order dated 24.8.2016 in Petition No. 32/MP/2014 in the matter of East North Interconnection Company Ltd. v. Jodhpur Vidyut Vitran Nigam Ltd. and Ors. has held that the developer is entitled to monetary relief for the Force Majeure event impacting the construction period.

(b) APTEL in its judgment dated 20.10.2020 in Appeal No. 208 of 2019 in the matter of Bhopal Dhule Transmission Company Ltd. v. CERC and Ors. ("Bhopal Dhule Judgment") has also held that a developer is entitled to relief in the event for the reasons beyond its control, the SCOD prescribed in the TSA is revised to the actual COD achieved by the developer. APTEL vide its decision dated 13.10.2021 in Appeal No. 445 of 2019 in the matter of Powergrid Corporation of India Limited v. CERC and Ors. has also held that the Appellant therein is entitled for IEDC as per actual after prudence check especially when the delay was not attributable to the developer.

(c) The terms of the TSA of the Petitioner in the present Petition is also similar to those in the aforementioned precedents. Accordingly, reading the above orders with the finding of the Commission in Petition No. 248/MP/2016, it is evident that the time from January, 2016 to September, 2016 was a period for which IDC and IEDC were incurred for beyond the control of the Petitioner and the Petitioner must be compensated for the same. The amount of Rs. 75.48 crore was incurred as IDC from January, 2016 to September, 2016 and the Petitioner also incurred the incidental expenditure of Rs. 62 lakh as a result of the said delay.

(d) As per Article 11.7 of the TSA, the party affected by the Force Majeure event will be entitled to all such reliefs as are necessary to mitigate the effect of an event of Force Majeure. In terms of the judgment of APTEL and orders of this Commission, the relief for Force Majeure event affecting the TSP needs to be adequate and need

not be restricted to the waiver of the obligations under the TSA. The liability to relieve the affected party from performance of the TSA obligations is only one aspect of the relief allowed under the TSA. In terms of Article 11.7(b) of the TSA, upon the affected party establishing that its performance has been affected due to events beyond its control, this Commission has adequate powers to grant reliefs to the affected party to ensure that the affected party is restituted to a position as if the Force Majeure event had not happened. Thus, the Petitioner is entitled for revision in transmission tariff for the additional expenditure incurred by it on account of IDC and IEDC due to the extended construction period and delay in commissioning of Element 2 & Element 3.

(e) Hon'ble Supreme Court in the case of *Dhanrajmal Gobindram v. Shamji Kalidas & Co.*, [(1961) 3 SCR 1020: AIR 1961 SC 1285] held that the intention behind the relief for Force Majeure is to save the performing and affected party from the consequences of anything over which it has not control.

(f) During execution of the Project, the order of the District Collector fixed the rate of compensation payable to the land owners as a precondition for entry into land without prejudice to any damage caused to the crop. The payment of compensation before the actual damage pursuant to the order of the District Collector as a pre-condition to enter the land for executing the works by the Telegraph Authority amounts to imposition of a new condition upon the Petitioner, which could not be contemplated at the time of placing the bid and is completely contrary to the extant provisions of the Act and the Telegraph Act.

(g) The orders of the District Collectors are 'law' as defined in the TSA and the additional requirement of payment of compensation prior to entering the land and irrespective of actual damage falls under the ambit of Change in Law as defined under Article 12.1.1. The Petitioner had to incur the excess/ additional expenditure of Rs. 38.53 crore towards compensation paid to the landowners which is beyond the scope of original cost and has been incurred as a result of the new condition imposed on the Petitioner to pay additional compensation before entering the land irrespective of actual damage caused pursuant to the order of District Collectors.

(h) The averments of the Respondents that the orders of the District Collector could have been challenged by the Petitioner are without merit as challenging the said orders would have resulted in longer Project implementation schedule resulting in more IDC and IEDC being incurred.

Additional Submission of Respondent No.13

12. In response, the Respondent, NTPC also filed its additional submission dated 8.11.2021 and mainly submitted as under:

(a) As to the reliance on the Commission's order dated 24.8.2016 in Petition No. 32/MP/2014 in the case of East North Interconnection Co. Ltd. v. Jodhpur Vitran Nigam Ltd. and Ors., the prayers of the Petitioner therein clearly indicate that the prayer for reimbursement of additional capital expenditure was only due to Change in Law event i.e. Forest Clearance which had been claimed. Force Majeure events there were being prayed by the Petitioner in the above case were simply in terms of an extension in the SCOD. In the above background, the Commission had passed the order dated 24.8.2016 and the finding at Para 48(g) of the order is specific to the provisions of Article 6.1.3 of the TSA in that case.

(b) Similarly, perusal of the judgment of APTEL dated 20.10.2020 in Appeal No. 208 of 2019 as relied upon by the Petitioner shows that the decision to permit IDC and IEDC was given since the event cited by the Petitioner therein amounted to Change in Law as provided in the TSA. The decision to permit IDC and IEDC for the extended time period due to Change in Law does not mean that the IDC and IEDC would be paid even if it is a Force Majeure event like in the present case. The said judgment is carefully worded and APTEL is aware of its earlier judgment in the case of Western Region Transmission (Maharashtra) Ltd. v. CERC and Ors. wherein it has denied cost escalation due to Force Majeure events.

(c) An event of 'Change in Law' entitles a party to be restored to the same economic position as if the 'Change in Law' has not occurred. Therefore, the principles governing the 'Change in Law' cannot be applied directly to the case of 'Force Majeure'. The TSA is a document which has been signed by all parties with open

eyes. It provides for the consequences in the case of 'Change in Law' and another set in the case of 'Force Majeure'. If the intention was to give the same relief for both sets of events, the TSA could have provided the same in very simple terms. To the contrary, the TSA makes a distinction between a 'Change in Law' event and of 'Force Majeure' event and therefore there can be no question of giving the same relief for both issues. It is also wrong and denied that the TSA envisages not just waiver of obligations under the TSA as a relief of 'Force Majeure' but further reliefs can be granted to restore a party to the same position as if the Force Majeure' event has not occurred. Such restitution is only to the extent of 'Change in Law' and not for 'Force Majeure'.

(d) Reliance placed by the Petitioner on the judgment of APTEL dated 13.10.2021 in Appeal No. 445 of 2019 is misplaced. The question in the above case was whether when time overrun is being condoned under a tariff determination process as per Section 62 of the Act, can IEDC be artificially restricted to a percentage of hard cost. Determining this question, the APTEL held that if time overrun has been condoned as per Regulation 11 of the Tariff Regulations, 2014, IDC and IEDC are to be capitalised and cannot be restricted. The said judgment will not have any application to the present case which is not under Section 62 but under Section 63 of the Act.

(e) Reliance placed by the Petitioner on the decision of Hon'ble Supreme Court in *Dhanrajmal Gobindram v. Shamji Kalidas & Co.* [(1961) 3 SCR 1020 : AIR 1961 SCR 1285] supports what is being submitted by NTPC.

(f) It is immaterial whether the payment of compensation before actual damage pursuant to the order of the District Collector is a pre-condition to enter the land for execution of the Telegraph Authority. The order of District Collector being a law is not doubted. However, the issue is whether there is Change in Law after the cut-off date. A wrong order passed by the District Collector requiring the Petitioner to pay additional compensation cannot be termed as a necessary condition which has become mandatory after 7 days of the bid deadline. It is not that anything which is paid by the Petitioner to an authorization becomes recoverable under Change in Law in terms of the TSA.

(g) Clause 12 of the Telegraph Authority Act is very clear about the power of local authority regarding fixing the conditions to grant the permission.

Additional Submission by Respondent No.1, BESCO

13. The Respondent No.1, BESCO has filed its additional submissions vide affidavit dated 21.11.2021 and has mainly submitting as under:

(a) The Commission's in its order Petition No.34/MP/2014 in the matter of East North Interconnection Co. Ltd. v. JVVNL and Ors had rejected the Petitioner's claim for IEDC and IDC therein. Since the tariff of the present Project is determined through competitive bidding process, no additional cost or IEDC or IDC can be claimed.

(b) In the judgment of APTEL dated 20.10.2020 in Appeal No. 208 of 2019, the relief of IDC and IEDC was granted as per Change in Law provisions in the said contract. Therefore, no reliance can be placed on the above judgment for claiming the IDC and IEDC for the extended Project period on account of Force Majeure event.

(c) Similarly, in the judgment of APTEL dated 13.10.2021 in Appeal No. 445 of 2019, APTEL had granted IDC and IEDC for the time overrun on the basis of Tariff Regulations, 2014. Whereas the present Project is governed by the Section 63 of the Act and the provisions of TSA do not contemplate IDC and IEDC for extended construction period on account of Force Majeure event. The Petitioner has also not produced any documents indicating that it had to incur additional interest on account of Force Majeure events.

(d) Hon'ble Supreme Court in Civil Appeal No. 673 of 2012 in the matter of South East Asia Marine Engineering and Construction Ltd. v. Oil India Ltd., has held that Change in Law provision in the contract has to be interpreted strictly. The orders of District Collector awarding compensation cannot be construed to be Change in Law under the TSA.

Rejoinder by the Petitioner

14. The Petitioner filed its common rejoinder to the additional submissions filed by

the Respondents vide affidavit dated 30.11.2021, wherein it mainly submitted as under:

(a) The Petitions filed by the Petitioner and which are pending before the Commission are for recovery of tariff from the date of commissioning to date of charging (for Element 2 & Element 3) and the other is the instant Petition for revision of quoted tariff. The Petition No. 248/MP/2016 and the instant Petition were connected and were also heard together by the Commission since the instant Petition is consequent revision of tariff for delay in commissioning for events beyond the control of the Petitioner adjudicated in Petition No. 248/MP/2016. While Petition No. 236/MP/2015 and Petition No. 135/MP/2018 relate to tariff payable from COD of the respective elements, the present Petition relates to additional cost incurred prior to the COD of the respective elements which has impacted the cost of the Petitioner.

(b) There is no basis to state that TSA prohibits revision of tariff in the event the Petitioner is impacted by an event of Force Majeure. While the Model PPA approved by the Ministry of Power specifically records that there shall be no tariff escalation as a result of a Force Majeure event, there is no such provision in the Model TSA on which the TSA executed by the Petitioner and the LTTCs is based. The scheme of the Model TSA and Model PPA is not the same.

(c) The admissibility of IDC and IEDC is to be considered as per the terms of the TSA. In the event tariff is not revised for the events beyond the control of the developer, TSP then it would frustrate the provision of Article 11.7(a) of the TSA. The same has been recognized by the APTEL in the Bhopal Dhule Judgment. In the absence of any specific guidance in the TSA of treatment of cost of Force Majeure event, the relevant criteria would be relying on the provisions of Tariff Regulations and allow recovery of addition cost in terms of the Tariff Regulations.

(d) The TSA specifically provides compensation mechanism in the event of the additional cost incurred in the event of Change in Law. The difficulty arises when an event beyond the control of the Petitioner whether Change in Law or Force Majeure causes an extension of the anticipated duration of construction. It is only in such

circumstances that IDC and IEDC becomes a question. For the purpose of extended construction period directly as a result of Change in Law event and as also Force Majeure event the consequences are not specifically provided in the TSA and it was this vacuum which was filled by APTEL vide Bhopal Dhule Judgment entitling the developer for IDC and IEDC. The intent of Force Majeure and Change in Law clauses in the TSA is the same i.e. TSP should not be penalized for anything which was not conceivable at the time of bidding and accordingly, the additional cost shall be passed on to the LTTCs in the form of tariff.

(e) Since the record of payments to all land owners runs in thousands of pages, it is difficult to produce them with the affidavit. However, all the records have been maintained in a meticulous manner and the Petitioner is willing to provide the proof of actual payments made through access to appropriate web-link if the Commission so directs. As regards the payment that would have been made under the earlier dispensation, as no actual payment was made thereunder, the Petitioner had estimated on best assessment basis the amount to be Rs. 81 crore. The increase in the compensation amount claim from Rs. 81 crore to Rs. 118 crore as per the new legal dispensation is clearly justified. The decision cited by BECOM in South East Asia Marine Engineering in Civil Appeal No. 673 of 2012 is distinguishable and does not support the case of BESCOM.

(f) There is no provision in the Telegraph Act which authorizes District Collector to determine the compensation for entry on land without proof of actual damage. Therefore, the provisions relating to challenge to the determined compensation before the Court of District Judge was not possible. Further, it is pertinent to note that in the event order(s) of DCs were challenged the same would have completely stalled the Project resulting into huge delay and consequent increase in overall cost of the Project.

15. The present Petition was heard on 13.1.2022, and the Commission, after directing the parties to file written submissions vide ROP dated 13.1.2022, reserved

order in the matter. However, as the Petition could not be disposed of, prior to the earlier Chairperson demitting office, the Petition was re-heard on 12.7.2022. During the course of hearing, learned counsel for the parties submitted that the matter has already argued at length and prayed to pass order based on the earlier submissions and documents available on record and the Commission reserved order in the matter thereafter.

Analysis and Decision

16. We have considered the submissions made by the Petitioner and the Respondents and perused the documents on record. The following issues arise for our consideration:

Issue No. 1: Whether the Petitioner is entitled to Change in Law compensation under Article 12 of the TSA for the increased cost incurred due to orders of District Collector/ Magistrate for accessing the land for laying the transmission towers?

Issue No. 2: Whether the Petitioner is entitled to recover the additional costs incurred due to occurrence of Force Majeure event(s) in terms of Article 11 of the TSA?

The above issues have been dealt with in succeeding paragraphs.

Issue No. 1: : Whether the Petitioner is entitled to Change in Law compensation under Article 12 of the TSA for the increased cost incurred due to orders of District Collector/Magistrate for accessing the land for laying the transmission towers?

17. The Petitioner has submitted that in terms of Section 10 of the Telegraph Act read with Section 164 of the Act and other provisions of the Act, the Petitioner was required to compensate the land owners only for damages caused, if any to the crops, trees or any other structure which is likely to cause obstruction. However, the orders of

the District Collectors required the Petitioner to make payments of compensation to the land owners as a pre-requisite to enter into the lands. The Petitioner has submitted that making payments prior to entering into land irrespective of damage caused to the property of land owner is alien to the powers of telegraph authority under the provisions of the Telegraph Act and the Act. It has been submitted by the Petitioner that the orders of the District Collectors qualify to be 'Law' as defined in the TSA and the additional requirement of payment of compensation prior to entering into land *de hors* the actual damage falls under the ambit of Change in Law as defined in Article 12.1.1 of the TSA. The Petitioner has submitted that due to aforesaid changed legal dispensation for accessing the land for laying of transmission towers, the Petitioner has been required to incur an excess/additional expenditure of Rs. 37.51 crore over and above the amount of compensation which the Petitioner would have paid as per the earlier legal dispensation in terms of the Telegraph Act for compensating the landowners limited to the damages caused while laying the transmission towers.

18. The Respondents have submitted that orders of the District Collector awarding the compensation in terms of Telegraph Act do not constitute Change in Law under Article 12 of the TSA as the same was prevailing way before the Petitioner participated in the bid process. The Respondents have submitted that the Petitioner had a right to approach the District Judge seeking re-determination of the compensation under Section 16(3) of the Telegraph Act and the Petitioner having not exercised its rights thereunder, cannot seek revision of the tariff before this Commission. It has been submitted by the Respondents that as per Article 5.1.4 (d) of the TSA, it was the responsibility of the Petitioner to seek access to the site and other places where the

Project is being executed at its own costs including payment of any crop compensation or any other compensation as may be required. Respondents have further submitted that perusal of District Magistrate order dated 23.10.2015, reveals that it has determined the compensation as per the provisions of the Telegraph Act and decided that the payment would be in two installments (65% and 35%) respectively and this does not lead to the proposition of the Petitioner that it has paid excess compensation amount. It has been also submitted that while orders of the District Collector might be “Law” under the TSA, however, the issue is whether there is a Change in Law after the cut-off date. In this regard, reliance has been placed on Section 12(c) of the Telegraph Act to point out the power of the local authority regarding fixing the conditions for grant of permission under Section 10 of the Telegraph Act.

19. We have considered the submissions made by the parties. The Petitioner has sought revision of tariff for increased cost incurred due to orders of District Magistrate by invoking the provisions of Article 12 (Change in Law) of the TSA. Article 12 of the TSA reads as under:

“12.1 Change in Law

12.1.1 Change in Law means the occurrence of any of the following after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the TSP or any income to the TSP:

- *The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- *A change in the interpretation or application of any Law by Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- *The imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier:*

- *A change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents Clearances and Permits;*
- *Any change in the licensing regulations of the Appropriate Commission, under which the Transmission License for the Project was granted if made applicable by such Appropriate Commission to the TSP:*
- *any change in the Acquisition Price; or*
- *any change in tax or introduction of any tax made applicable for providing Transmission Service by the TSP as per the terms of this Agreement.”*

20. Perusal of the above provisions reveals that for an event to be declared as ‘Change in Law’, its occurrence has to be after seven days prior to the bid deadline and should result into any additional recurring/ non-recurring expenditure by TSP or any income to TSP. In the present case, bid (RfP) deadline was 2.7.2013 and accordingly, the cut-off date works out to 25.6.2013.

21. Further, the TSA defines “Law” and “Consents, Clearance and Permits” 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;*

*“**Consents, Clearances and Permits**” shall mean all authorizations, licenses, approvals, registrations, permits, waivers, privileges, acknowledgements, agreements, or concessions required to be obtained from or provided by any Indian Governmental Instrumentality for the development, execution and operation of Project including without any limitation for the construction, ownership, operation and maintenance of the Transmission Lines and/or sub-stations;*

22. It is also pertinent to take note of Article 12.3 of the TSA, which reads as under:

“12.3 Notification of Change in Law Event

12.3.1 If the TSP is affected by a Change in Law in accordance with Article 12.1 and wishes to claim relief for such Change in Law under this Article 12, it shall give notice to Lead Long Term Transmission Customer of such Change in Law as soon as

reasonably practicable after becoming aware of the same.

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

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

23. As per the above provision, if the TSP is affected by the Change in Law in accordance with Article 12.1 and wishes to claim relief for such Change in Law as available under Article 12, it is required to give notice to the lead LTTC of such Change in Law as soon as reasonably practicable after becoming aware of the same. In the said notice, the TSP is required to provide, *inter alia*, details of Change in Law and its effect on the TSP.

24. However, at the outset, it has to be noted that no such notice, issued by the Petitioner in compliance of Article 12.3 of the TSA to the lead LTTC, has been placed on record. Issuance of such notice is *sine qua non* for making any claim under change in law. Thus, the Petitioner having not complied with requirement of issuance of Notice to the lead LTTC for exercising its right to claim the Change in Law relief, the Change in Law claim of the Petitioner is not sustainable on this ground alone.

25. Further, the orders of District Collectors/Commissioners as relied upon by the Petitioner in support of its claim appear to have been passed in exercise of power vested to them under Section 16 of Telegraph Act. The relevant extract of one of such order passed by the District Commissioner, Bijapur District dated 23.1.2015 is as under:

“ORDER

8. *By virtue of the powers vested in the undersigned under Section 16 (10 of the ITA, 1885 R/W Sec 164 of EA, 2003, it is ordered that telegraph/power authority (in this case M/s KTL) may exercise the powers mentioned in Section 10 of ITA, 1885 in respect of privates property as long as the compensation as proposed at para 7 above of this order, is complied with by the telegraph/power authority. In case any person resists the exercise of these powers or persons having control over the property does not give all facilities for this being exercised, he/she shall be deemed to have committed an offence under section 188 of the Indian Penal Code (45 of 1850). This is ordered as per the powers vested with the undersigned at Sec 16(2) of ITA, 1885.*

9. *If any dispute arises on account of sufficiency of compensation or sharing of compensation, the affected party may seek remedy from District Judge as per provisions of Sec 16(3) and 16 (4) of ITA, 1885.”*

26. Indisputably, the aforesaid provisions of the Telegraph Act were already in force as on the cut-off date. The order(s) have been passed by the District Collector/Magistrate in terms of such provisions of Telegraph Act. In our view, such orders passed by the District Collector/Magistrate cannot be considered as Change in Law. Further, it appears that in the such orders, compensation has been prescribed on a flat amount based on the type of towers rather than standing crops and this appears to be the basis for the Petitioner’s Change in Law plea citing that it amounted to imposition of a new condition or change in the terms and condition prescribed for obtaining any Consents, Clearances and Permits. However, in our view, such contention is misplaced. Nothing has been placed on record by the Petitioner which would show that such prescription in the orders amounted to a new or change in the terms and conditions prescribed earlier which the Petitioner could not have taken into account at the time of bidding.

27. Article 5.1.4 of the TSA, which provides for the responsibility of TSA as under:

“5.1.4 The TSP shall be responsible for:

.....

(d) Seeking access to the Site and other place where the Project is being executed,

as its own cost, including payment of any crop compensation or any other compensation as may be required...”

In terms of the aforesaid provision, it is the responsibility of TSP to seek access to the site and other places where the Project is being executed at its own costs including the payment of any crop compensation or any other compensation as may be required. Therefore, it was incumbent on the prospective bidder to factor in such compensation while placing its bid. Admittedly, it is not the case that the rate of compensation has been revised by the State Government after the cut-off date or the Guidelines issued by the Ministry of Power, Government of India regarding compensation having been acted upon by the State Government leading to increase in the liability after the cut-off date.

28. The Petitioner has, however, vehemently submitted that in terms of the aforesaid orders of District Collector, there has been change in the legal dispensation under the Telegraph Act. It has been submitted that in the Petition, the Petitioner has clearly set out the difference in the legal dispensation under the Telegraph Act for payment of compensation for damages to the crop, etc. to the land owners (no compensation otherwise payable for installing the transmission tower on the land) and the subsequent dispensation which resulted in payment of higher compensation for use of land belonging to the land owners notwithstanding the damages, if any, having being caused to crop.

29. We have considered the submissions of the Petitioner. However, we find the aforesaid contention of the Petitioner against its own conduct at the relevant point of time. It may be noted that the Petitioner had filed a Petition No. 248/MP/2016 seeking,

inter-alia, extension of SCOD of Element 2 & Element 3 due to occurrence of Force Majeure events including Right of Way and Law & Order issues being faced by it and the said Petition had also been listed and heard together with the present Petition initially. In the said Petition, the Petitioner had placed on record detailed correspondence with regard the RoW and Law & Order issues including its letters to the District Collector(s) for issuance of appropriate orders after the Petitioner having faced the obstruction/resistance by the land owners. Such letter(s) being instructive and relevant to the aforesaid contention of the Petitioner, we consider it appropriate to refer to one of such letter in the present case. The relevant extract of the Petitioner's letter dated 9.6.2015 to the District Collector, Ramnagara is as under:

"As you are kindly aware, Kudgi Transmission Limited (Transmission Service Provider) have been mandated by REC Transmission Projects Company Limited (Bid Process Coordinator appointed by Ministry of Power, Govt. of India) to develop the following Transmission system for evacuation of Power from NTPC Kudgi (3x800MW Phase-I) Thermal Power Station on Build, Own, Operate and Maintain (BOOM) basis:

*.....
For this Transmission System Ministry of Power, Govt. of India has accorded approval u/s 164 of the Electricity Act 2003 vide letter ref. No. 11/12/2014-PG dated 22nd May, 14. Based on this approval, we have commenced construction activities in all the above sections.*

As you are aware, some part of 400 kV Madhugiri-Bidadi line is passing through Ramnagara District and upon payment of crop/tree compensation which was arrived on mutual consensus basis, substantial progress is achieved in this section of line.

However, after receipt of agreed compensation, the land owners in Ramnagara District have stopped entire construction activities with demands for higher compensation. This issue was brought to your kind notice on 5th May'15.

Further, on 12th May'15, the matter was discussed in detail in your good office in Ramnagara and following compensation was suggested by us for the tower locations falling in Ramnagara district. However, keeping proximity of bidadi to Bangalore in view, two separate compensations were suggested.

S. No.	Type of Tower	Compensation for Bidadi Area	Compensation for other locations of Ramnagara district (excluding Bidadi area)
1	'A' type tower	3.60 lakh	1.80 lakh
2	'B' type tower	4.20 lakh	2.00 lakh
3	'C' type tower	5.25 lakh	2.40 lakh
4	'D' type tower	6.30 lakh	3.20 lakh

In addition to this, any compensation towards the damage of crop/tree shall be paid as per the assessment report of Horticulture/Agriculture/Forest/revenue depts., wherever applicable.

.....
In view of the vital nature of project, we solicit your good office intervention at this critical juncture in extending support by causing suitable instruction for the following:

(i) To enable our personnel to take up construction activities in 400 kV Madhugiri-Bidadi Transmission line without any stoppage from land owners

(ii) To cause suitable instructions to the concerned authorities for providing necessary security to our personnel working on the above Transmission line

(iii) To cause suitable instructions to concerned Authorities such as Police, Revenue, Horticulture and Agriculture for providing necessary support during construction activity in arriving at the compensation towards crop damages payable to and owners as per IS 5613 (Part 3/Sec 2), Section 10 of Indian Telegraph Act, 1885 and Section 164 of the Electricity Act, 2003.

(iv) Any other orders deem fit under given circumstances.”

Perusal of the aforesaid letter reveals that in order to resolve the issues relating to the compensation demands of the land owners, the Petitioner had itself proposed the compensation to be paid depending upon the type of transmission towers (*de hors* the actual crop damage as alleged) to be installed in the lands of land owners. Similar proposal for payment of compensation based on the type of towers/ areas covered thereunder was also made by the Petitioner for the Bijapur District vide its letter dated 21.8.2014. While the efforts made by the Petitioner for resolving the issues relating to compensation with landowners are appreciable, however, the aforesaid goes against the arguments of the Petitioner that in terms of the order(s) of the District Collectors awarding the compensation for installation of transmission towers on the land amounted to change in the legal dispensation and consequently, constitute a Change in Law under the TSA.

30. In view of the forgoing observations, we are of the view that in the facts and circumstances of present case, orders of District Collector/Magistrate passed under Section 16 of the Telegraph Act do not amount to Change in Law and resultantly, the Petitioner is not entitled to the expenditure incurred for accessing the land for laying the transmission towers.

31. This issue is answered accordingly.

Issue No.2: Whether the Petitioner is entitled to recover the additional costs incurred due to occurrence of Force Majeure events in terms of Article 11 of the TSA?

32. The Petitioner has submitted that it was affected by Force Majeure events such as development of interconnection facilities and law and Order situation. We observe that Petitioner had filed Petition No. 248/MP/2016 claiming Force Majeure events for Element 2 and Element 3. The Commission vide order dated 24.1.2019 in Petition No. 248/MP/2016, has already examined the events which were allowed as Force Majeure events of Element 2 & Element 3 as follows:

“81. We have in this order decided that the (i) Law & Order issues in various villages, including the districts of Tumkur, Ramanagara and Bellary etc., and (ii) denial of approval by KIADB for undertaking works on lands notified by KIADB are force majeure events which caused delay in the execution and completion of Elements 2 and 3 by the Petitioner. Also, in the light of the force majeure events affecting the performance of the obligations, we have held in para 74 above that the Petitioner is entitled for revision in the SCOD of Elements 2 and 3 from 31.12.2015 till the dates of actual COD of these elements, in terms of Article 4.4.2 of the TSA. In this background, the demand made by BESCO vide letter dated 5.1.2016 requesting the Petitioner to pay the LD amount to all the LTTCs in proportion to their share as per Schedule-1 of TSA due to delay in completion of the Project, is not sustainable in law. Accordingly, the letter of BESCO dated 5.12.2016 is set-aside. Consequent upon this, the LTTCs are directed to return the Contract Performance Guarantee submitted by the Petitioner, within 15 days from the date of this order.”

33. The Petitioner has now claimed IDC and IEDC for the period from January, 2016 to September, 2016 on the basis of the above order while submitting that it was no longer in dispute that the Petitioner could not achieve the SCOD as per the TSA for the reasons beyond the control of the Petitioner. However, it is pertinent to note that despite the Petitioner having filed the Petition No. 248/MP/2016 before the Commission seeking various reliefs on account Force Majeure events in respect of the Element 2 & Element 3, the Petitioner did not claim any reliefs of IDC and IEDC therein and has chosen to raise its claim of IDC and IEDC on account of the said Force Majeure events in a separate Petition, which appears to be an afterthought.

34. We deal with issue of IDC/ IEDC for allowed Force Majeure event hereinafter.

35. The Petitioner has submitted that with respect to Element 2 & Element 3, the Petitioner despite its best efforts could not complete the construction by SCOD and incurred an additional IDC to tune of Rs. 75.48 crore for the period between January, 2016 to September, 2016 and also an IEDC to tune of Rs. 62 lakh as a result of the said delay. It has been contended by the Petitioner that in terms of Article 11.7(b) of the TSA, the relief for Force Majeure event affecting the licensee needs to be adequate and need not be restricted to the waiver of obligations under the TSA. It has been further contended that entitlement of the licensee for IDC and IEDC for the extended construction period for the reasons beyond its control is no longer *res-integra*. In this regard, reliance has been placed on the order of the Commission dated 24.8.2016 in Petition No. 32/MP/2014 and the judgment of APTEL dated 20.10.2020 in Appeal No. 208 of 2019 (Bhopal Dhule Transmission Co. Ltd. v. CERC and Ors.) and APTEL's

judgment dated 13.10.2021 in Appeal No. 445 of 2019 (PGCIL v. CERC and Ors.).

36. The Respondent, BESCO has submitted that in the Bhopal Dhule Judgment, the APTEL granted relief of IDC and IEDC as per the Change in Law provisions in the contract and not on account of the Force Majeure event. Similarly, reliance on the judgment of APTEL dated 13.10.2021 in Appeal No. 445 of 2019 is misplaced as APTEL therein granted IDC and IEDC for time overrun on the basis of Tariff Regulations, 2014, whereas in the instant Project, the tariff has been discovered through competitive bidding process under Section 63 of the Act and the TSA does not contemplate IDC and IEDC for extended construction period on account of Force Majeure.

37. The Respondent NTPC has submitted that the scope of Force Majeure and Change in Law clause qua competitive bidding TSA had been considered by APTEL in its judgment dated 6.4.2016 in Appeal No. 86 of 2015 (Western Region Transmission (Maharashtra) Pvt. Ltd. v. CERC and Ors.), wherein it has been held that (i) the only relief available under the Force Majeure event is an extension of SCOD without having to pay liquidated damages, (ii) increase or enhancement in tariff cannot be claimed under Force Majeure, and (iii) framework of competitive bidding under Section 63 of the Act permits time extension in case of Force Majeure and not the other reliefs. NTPC has further submitted that order of the Commission dated 24.8.2016 in Petition No. 32/MP/2014 and the judgment of APTEL dated 13.10.2021 in Appeal No. 445 of 2019 are distinguishable and not applicable to the present case. NTPC has further submitted that in Bhopal Dhule Judgment, the decision to permit IDC and IEDC was given since

the event cited by the Petitioner therein amounted to Change in Law as provided under the TSA. However, it does not mean that IDC and IEDC would be paid even if it is a Force Majeure event like in the present case. It has been submitted that the principles governing the 'Change in Law' cannot be applied directly to the case of 'Force Majeure' as the TSA provides for one set of consequences in the case of 'Change in Law' and another set in the case of 'Force Majeure'. If the intention was to give the same relief for both sets of events, the TSA could have provided the same in very simple terms. To the contrary, the TSA makes a distinction between a 'Change in Law' event and 'Force Majeure' event and therefore, there can be no question of granting the same relief for both issues.

38. *Per contra*, the Petitioner has submitted that there is no basis to state that the TSA prohibits revision of tariff in the event the Petitioner is impacted by an event of Force Majeure. It has been submitted that while the model PPA approved by the Ministry of Power, Government of India specifically records that there shall be no tariff escalation as a result of Force Majeure event, there is no such provision in the model TSA on which the TSA executed by the Petitioner and LTTCs is based. Such absence clearly indicates that the TSA intended to grant relief to the licensee in the appropriate cases. Thus, admissibility of IDC and IEDC is to be considered as per the terms of the TSA and in case, the tariff is not revised for the events beyond the control of the licensee then it would frustrate the Article 11.7(a) of the TSA. The Petitioner has submitted that interpretation of the Bhopal Dhule Judgment as offered by the Respondents is erroneous. TSA specifically provides compensation mechanism in the event of additional cost incurred for Change in Law. The difficulty arises when the

Change in Law or the Force Majeure event is beyond the control of the Petitioner and causes an extension of anticipated duration of construction and only in such circumstances, the IDC and IEDC become a question. For the purpose of extended construction period directly as a result of Change in Law and Force Majeure event, the consequences are not specifically provided in the TSA and it was in this vacuum that the APTEL in Bhopal Dhule Judgment held the licensee entitled to IDC and IEDC.

39. We have considered submissions of the Petitioner and the Respondents. The available reliefs for Force Majeure event are provided under the Article 11.7 of the TSA, which reads as under:

“11.7 Available Relief for a Force Majeure Event

Subject to this Article 11

(a) No party shall be in breach of its obligations pursuant to this Agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

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

(c) For the avoidance of doubt, it is clarified that the computation of Availability of Element(s) under outage due to Force Majeure Event as per Article 11.3 affecting the TSAP shall be as per Appendix IV to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 as on seven (7) days prior to the Bid Deadline. For the event(s) for which the Element(s) is/are deemed to be available as per Appendix IV to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009, then only the Non-Escalable Transmission Charges as applicable to such Element(s) in the relevant Contract Year shall be paid by the Long Term Transmission Customers as per Schedule 5, for the duration of such event(s).

(d) For so long as the TSP is claiming relief due to any Force Majeure Event under this Agreement, the Lead Long Term Transmission Customer may, from time to time on one (1) day notice, inspect the Project and the TSP shall provide the Lead Long Term Transmission Customer’s personnel with access to the Project to carry out such inspections, subject to the Lead Long Term Transmission Customer’s personnel complying with all reasonable safety precautions and standards.”

40. As per Article 11.7(a), the affected party shall not be in breach of its obligation pursuant to the agreement to the extent its performance of its obligations was prevented, hindered or delayed due to Force Majeure event and as per Article 11.7(b), the affected party shall be entitled to claim relief for Force Majeure event affecting its performance in relation to its obligations under the agreement. Under the TSA, the obligations of the licensee, among the others, include achieving the commercial operation of the Project/elements within the SCOD specified in the TSA. Further, in the event of performance of the said obligation is affected by Force Majeure event, Article 4.4.2 of the TSA provides as under:

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

41. Thus, the relief available to the licensee in the event its obligation to achieve the commercial operation of the Project within the stipulated time is affected by the occurrence of Force Majeure event is an extension of SCOD of the Project and consequently, non-applicability of liquidated damages for such delay under the TSA. As noted above, the Commission vide order dated 24.1.2019 has already held that the Petitioner is entitled to revision of SCOD in respect of Element 2 & Element 3 from 31.12.2015 till the date of actual COD of these elements and has also directed the lead LTTC to return the bank guarantee submitted by the Petitioner towards the claim of liquidated damage. The contention of the Petitioner that it is also entitled to IDC and

IEDC for the extended construction period under Article 11.7(b) of the TSA, in our view, is misplaced. It is well settled that a party cannot claim anything more than what is covered by the terms of contract for the reason that the contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. The contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meaning unless there is some ambiguity. Moreover, the terms of the contract have to be construed strictly without altering the nature of the contract as it may affect the interest of either of the parties adversely. In our view, the clear language of the Article 11.7(b) of the TSA does not entitle the Petitioner to claims the financial reliefs in the form of IDC and IEDC for the Force Majeure event.

42. The Petitioner has relied upon the APTEL's judgement dated 20.10.2020 in Bhopal Dhule Case and has submitted that in the said judgment, the APTEL has held that a licensee is entitled to relief in the event for reasons beyond its control, the SCOD prescribed in the TSA is revised to the actual COD. The relevant extract of the said judgment reads as under:

"8.7 The Central Commission's reasoning in the Impugned Order reads in two exceptions to the grant of Change in Law relief under Article 12.1.2 of the TSA namely: (a) that IDC is not a direct consequence of the Change in Law events and therefore must be denied; and (b) that no relief can be allowed for additional IDC incurred since IDC is not a component that is disclosed or evaluated at the time of bidding. CERC has in the same breath held that uncontrollable events in the form of Changes in Law have impacted the Project, but that the Appellant deserves no compensation for the same. Neither of these find any mention in the text of Article 12 of the TSA.

8.8 Since the spirit of Article 12 of the TSA is to ensure monetary restitution of a party to the extent of the consequences of Change in Law events, such exceptions cannot be read into Article 12 of the TSA. The Appellant has submitted that a crucial factor for the Appellant whilst bidding for the Project was that uncontrollable Change in Law events

would be duly accounted for in accordance with Article 12 of the TSA. By the Impugned Order, the Central Commission has wrongly altered the meaning of the Change in Law clause of the TSA long after award of the bid and commissioning of the Project.

.....
8.11. Such a denial of the IDC by the Central Commission is in contravention of the provisions of Article 12.1.1 of the TSA in the facts and circumstances of the present case. By adopting such an erroneous approach, the Central Commission has rendered the Change in Law clause in the TSA completely nugatory and redundant. Such an interpretation by the Central Commission is causing the Appellant grave financial prejudice as it has no other means of recovering the IDC which it was constrained to incur for no fault of its own.

.....
8.14 Further, the Hon'ble Supreme Court in the Energy Watchdog Judgement dated 11.04.2017 held that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by, such change in law is to restore, through the monthly tariff payments, the affected party to the economic position if such change in law has not occurred.

8.15 We are of the view that the Central Commission erred in denying Change in Law relief to the Appellant for IDC and corresponding Carrying Costs on account of admitted Change in Law events after having arrived at unequivocal findings of fact and law that Change in Law events adversely affected the Appellant's Project in accordance with the TSA. Therefore, the impugned order passed by the Central Commission is liable to be set aside as the same is in contravention of settled law laid down by the Hon'ble Supreme Court (Supra) and also the previous orders passed by the Central Commission in Petition Nos. 73/MP/2014 read with 310/MP/2015 and 174/MP/2016 wherein the same issue has been dealt by the Commission differently. In view of these facts, the Appellant is entitled for the change in law relief as prayed for in the instant Appeal. The issue is thus, decided in favour of the Appellant

9. Issue No. 2:

9.1 The Change in Law relief as prescribed under Article 12.2.1 of the TSA is as follows:

.....
Since the Change in Law events approved by the Central Commission in the Impugned Order took place during the construction period of the Project i.e. before all the elements of the project were declared under commercial operation. Hence, the Appellant is squarely covered by Article 12.2.1 of the TSA which provides for a formula in accordance with which the Non-Escalable Transmission Charges of the Appellant is to be increased.

9.2 The Appellant has submitted the total IDC incurred on original project cost. The Appellant has also placed on record copy of Certificate dated 04.08.2016 issued by the Appellant's Chartered Accountant certifying that the increase in IDC incurred by the Appellant was Rs. 84.01 Crores, as submitted to the Commission. Therefore, we are of the opinion that in terms of Articles 12.2.1 and 12.2.3 of the TSA, the Appellant is entitled to claim the relief regarding the Change in law (during the construction period) as allowed in this order as per the provisions laid down under the TSA...."

43. Noticeably, in the aforesaid judgment, APTEL has held the licensee's entitlement

for IDC on account of the Change in Law event after reaching a conclusion that Change in Law events adversely affected the licensee's Project in accordance with the TSA. It is pertinent to note that in the said case, the Commission vide order dated 24.4.2019, *inter-alia*, had held that the delay in grant of forest clearance to the licensee therein was on account of change in MoEF Guidelines dated 13.2.2012 and the change in the format to be issued by District Collectors in lieu of FRA clearances by MoEF vide letter dated 5.7.2013 constituted Change in Law events. However, the Commission vide said order rejected the claim of the licensee therein for IDC on the ground that IDC is not a direct consequence of the Change in Law event and that no relief can be allowed for additional IDC since IDC is not a component that is disclosed at the time of bidding. However, such denial of IDC by the Commission in the order dated 24.4.2019 came to be set-aside by the APTEL in the aforesaid judgment, *inter alia*, on the ground that such denial of IDC is in contravention of the provision of Article 12.1.1 of the TSA. Evidently, the APTEL in the aforesaid judgment has held that the licensee is entitled to IDC under Article 12 of the TSA and had allowed the appropriate relief under Article 12.2 of the TSA. The APTEL, however, has not examined the entitlement of the licensee to IDC and IEDC on account of the Force Majeure events. Therefore, the judgment of APTEL in the said Appeal is not applicable in the present case.

44. The Petitioner has further relied upon the judgment of APTEL dated 13.10.2021 in Appeal No. 445 of 2019 in the matter of PGCIL v. CERC and Ors. to contend that in the said judgment, the APTEL has held that the licensee/Appellate therein is entitled to IEDC as per actuals after the prudence check especially when the delay was not attributable to the licensee. It is noted that in the said judgment, the issue was

pertaining to condonation of time over run and consequent to IDC while determination of tariff under Section 62 of the Act. Whereas in the present case, the transmission project has been conceived through competitive bidding process and is governed by the Section 63 of the Act. Therefore, the above judgment dated 13.10.2021 is not applicable in the present case.

Other Reliefs sought by Petitioner

45. In addition to the above, the Petitioner has also sought reliefs on the grounds of delay in payment of transmission tariff and additional costs incurred due to delay in charging of transmission lines and other expenses. The Petitioner has submitted that despite the Petitioner completing all works on each of the elements and declaring the commercial operation in terms of TSA, the tariff payments in terms of TSA did not commence. The Petitioner has submitted that as per Article 10.1 of the TSA, the Petitioner/ TSP is entitled to tariff as per TSA from the date of commercial operation of each of the element of the Project.

46. The Respondent, BESCO has submitted that the Respondent or the other LTTCs are not responsible for non-payment of tariff. The Commission vide order dated 27.6.2016 in Petition No. 236/MP/2015 has held that the NTPC and PGCIL are liable to pay the transmission charges for Element 1.

47. We have considered the submissions made by the Petitioner and the Respondents. As rightly pointed out by the Respondents, it is not clear as to under which clauses of TSA the aforesaid reliefs have been sought by the Petitioner. It is pertinent to note that in respect of Element 1, the Petitioner has already been held to be

entitled to the transmission charges in respect of the said element from the date of its deemed COD i.e. 4.8.2015 by the Commission in its order dated 27.6.2016 in Petition No. 236/MP/2015 read with order dated 11.10.2017 in Petition No. 44/RP/2016. The relevant extract of the aforesaid decisions reads as under:

“32. From the above letter, it emerges that the petitioner was ready to charge Line-A in terms of Article 6.2 of the TSA, but could not charge the same due to non-availability of required interconnection facility. It is noted that as per the provision of the TSA, there is no pre-required element for COD of the instant line. Therefore, we consider deemed COD of the 400 kV D/C Kudgi TPS –Narendra (New) Transmission line-A from 4.8.2015 in terms of the provisions of the 6.2.2 of the TSA i.e., 7 days after the energisation of the transmission lines. It is further noted from the letter of CEA that the Line-B was ready in all respects other than Multi circuit tower. However, due to non- availability of multi-circuit tower, Line-B (400 kV D/C Kudgi TPS-Narendra (New) Transmission line) could not be charged. Since, the multi circuit tower is within the scope of PGCIL, we allow deemed COD of 400 kV D/C Kudgi TPS-Narendra (New) Transmission line-B from 4.8.2015 as there is no pre required element for COD of the instant line.

.....

42. It is noted that 400 kV D/C Kudgi TPS-Narendra (New) transmission line is connectivity line for NTPC Kudgi STPP and obtained clearance from CEA on 28.7.2015. However, NTPC Kudgi STPP switchyard obtained clearance from CEA on 24.8.2015 and charged the switchyard on 16.11.2015, after PGCIL`s sub-station was made ready. 400 kV Narendra (new) sub-station pertaining to PGCIL was charged on 15.11.2015. In view of the above, the transmission charges shall be payable by NTPC and PGCIL in the following manner:

(a) It is noted that the petitioner completed its entire scope of the work on 27.3.2015. However, due to non-availability of inter-connection facility required to be developed by NTPC and PGCIL at each end, it could not commission the transmission line. Therefore, the transmission charges for the period from 4.8.2015 to 23.8.2015 shall be shared by both NTPC and PGCIL in the ratio of 50:50.

(b) CEA vide its letter dated 24.8.2015 accorded the approval for energisation of 11 no. bays of 220 kV and 4 No. bays of 400 kV and 60-60 MVA, 400 kV station transformer and associated equipment at Kudgi STPP of NTPC. From the letter of CEA, it is observed that the bays pertaining to NTPC was ready in the month of August, 2015. However, PGCIL Narendra (New) sub-station was charged through PGCIL Kolhapur-New Narendra line from 15.11.2015. Subsequently, 400 kV Kudgi Switchyard was charged on 16.11.2015. Therefore, the petitioner`s transmission line could not be utilized due to non-completion of elements under the scope of PGCIL. Accordingly, PGCIL shall pay the transmission charges to the petitioner for the period from 24.8.2015 to 15.11.2015.

(c) As per Regulation 8(5) of the Sharing Regulations, the charges for connectivity line of NTPC are required to be paid by NTPC till date of COD of first unit of Kudgi or date of start of LTA, whichever is earlier. Accordingly, from the period 16.11.2015, NTPC shall pay the transmission charges to the petitioner in terms of the Regulation 8 (5) of the Sharing Regulations.

(d) As per Regulation 11 of the Sharing Regulations, CTU is responsible for raising the bills of transmission charges to ISTS transmission licensees. Accordingly, CTU is directed to raise the bills to PGCIL and NTPC for the period from 4.8.2015 to 23.8.2015 in the ratio of 50:50 and to PGCIL for the period from 24.8.2015 to 15.11.2015 and to NTPC from 16.11.2015. After collecting the transmission charges, CTU shall disburse the same to the petitioner immediately.”

Order dated 11.10.2016 in Petition No. 42/RP/2016

“17It is however noted that in the impugned order, the Review Petitioner was directed to pay the transmission charges from 24.8.2015 to 15.11.2015 on the basis of the submission that its sub-station was ready for COD on 15.11.2015. However, the Review Petitioner declared commercial operation of Narendra sub-station on 11.12.2015. Therefore, the Review Petitioner becomes liable for payment of transmission charges to KTL for the period 24.8.2015 till 11.12.2015. To this extent, the impugned order shall stand modified.....”

48. Similarly, for Element 2 & Element 3, as already noted above, the Commission vide order dated 24.1.2019 in Petition No. 248/MP/2016 has already held the Petitioner is entitled for revision in SCOD of these elements from 31.12.2015 till the dates of actual COD on account of Force Majeure events. Therefore, the relief sought in the present Petition cannot be entertained. It is pertinent to mention that the Petitioner has also sought the similar relief in Petition No. 135/MP/2018 i.e permitting the transmission charges for these elements from the date of their deemed COD upto the date of their charging, which will be dealt with in accordance with law.

49. The Petition No. 210/MP/2017 is disposed of in terms of the above discussions and findings.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member