

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 238/MP/2017

Coram:

**Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri A.K. Goyal, Member
Shri P. K. Singh, Member**

Date of Order: 13.05.2022

In the matter of

Remit back of the order dated 29.3.2019 in Petition No.238/MP/2017 along with the directions of Appellate Tribunal for Electricity in judgment dated 3.12.2021 in Appeal No. 276 of 2021 and Appeal No. 129 of 2020.

And In the matter of

Darbhangha-Motihari Transmission Company Limited,
Essellnfraprojects Limited, 06th Floor,
Plot No. 19, Film City, Sec- 16 A,
Gautam Buddha Nagar, Noida,
U.P. – 201301

...Petitioner

Vs

1. Bihar State Power Transmission Co. Limited,
Transmission Vidyut Bhawan, 04th Floor, Bailey Road,
Patna, Bihar-800021
2. Bihar State Power Holding Company Limited,
Vidyut Bhawan, Bailey Road,
Patna, Bihar-800021
3. West Bengal State Electricity Distribution Company Limited,
Vidyut Bhawan,
Kolkata-91
4. Power Grid Corporation of India Limited,
HVDC Pusauli, Saudamini,
Plot No. 02, Sector-29, Near IFFCO Chowk,
Gurgaon (Haryana) - 122 001
5. Grid Corporation of Orissa Limited,
Janpath,
Bhubaneshwar-751022



6. Power Department,
Government of Sikkim,
Gangtok- 737101
7. Damodar Valley Corporation Limited,
DVC Towers, VIP Road,
Kolkata- 700054
8. Jharkhand State Electricity Board,
Engineering Building, HEC, Dhurwa,
Ranchi - 834004
9. Maithan Power Limited,
MA-5, Gogna, PO- Maithan DAM,
District:Dhanbad, Jharkhand-828207.

...Respondents

For Petitioner : Shri Sajjan Poovaya, Senior Advocate, DMTCL
Shri Vishrov Mukerjee, Advocate, DMTCL
Shri Rohit Venkat V, Advocate, DMTCL
Shri Yashaswi Kant, Advocate, DMTCL
Ms. Juhi Senguttavan, Advocate, DMTCL

Shri Avinash P. Rao, DMTCL
Shri Vijayanand Semletty, DMTCL
Shri Neeraj Kumar Verma, DMTCL

For Respondents : Ms. Swapna Seshadri, Advocate, PGCIL
Shri Aditya H. Dubey, Advocate, PGCIL
Ms. Ranjana Roy Gawai, Advocate, TPDDL
Ms. Vasudha Sen, Advocate, TPDDL
Shri Shikher Upadhyay, Advocate, TPDDL
Shri V.C. Sekhar, PGCIL
Shri Prashant Kumar, PGCIL
Ms. Supriya Singh, PGCIL
Shri Arjun Malhotra, PGCIL
Shri B.K Saxena, UPPCL
Shri Anurag Bansal, TPDDL
Ms. Shefali Sobti, TPDDL
Shri Umang Anand, BSPTCL

ORDER

Appellate Tribunal for Electricity (hereinafter referred to as "the APTEL") has vide judgment dated 3.12.2021 in Appeal Nos. 276 of 2021 and Appeal No. 129 of 2020 has set aside the order dated 29.3.2019 in Petition No.238/MP/20127 and has remanded the matter to the Commission for passing a reasoned order pursuant to



the directions in the said judgement. The relevant extract of the APTEL judgment dated 3.12.2021 is as follows:

“ORDER

In light of the above, we are of the considered view that some issues raised in the Batch of Appeals have merits and hence the Appeals are allowed. The impugned common order dated 29.03.2019 in Petition No. 195/MP/2017 and 238/MP/2017 passed by Central Electricity Regulatory Commission is hereby set aside to the extent of our findings under Para 23 above. The matter is remitted back to the Central Commission for passing a reasoned order pursuant to our directions are scrupulously complied with expeditiously and in a time-bound manner and for this purpose shall have recourse to all enabling powers available to it under the law. The appeals are disposed of in above terms. Pending IAs, if any, shall stand disposed of.”

2. Accordingly, Petition No.238/MP/2017 is reopened and heard.

Background

3. The brief facts of the matter are as follows:

- a) Darbanga-Motihari Transmission Company Limited (DMTCL) filed Petition No. 238/MP/2017 seeking extension of the scheduled COD and increase in transmission charges due to unforeseen and uncontrollable events post award of ERSS-VI Transmission Scheme implemented by DMTCL under Tariff Based Competitive Bidding (TBCB) route. DMTCL entered into Transmission Service Agreement (TSA) with the Long Term Transmission Customers (LTTCs) on 6.8.2013.
- b) The Commission vide order dated 29.3.2019 in Petition No. 238/MP/2017 decided the claims of the petitioner as under:

“83. The summary of our decisions with regard to Petitioner’s claim is as under:

Sr. No.	Change in law	Allowed/ Disallowed
1	<i>Unexpected requirement of obtaining forest clearance and expenditure incurred on account of obtaining forest clearance.</i>	<i>Allowed</i>
2	<i>Increase in taxes and duties.</i>	<i>Allowed</i>
3	<i>Change in guidelines issued by MoP for compensation towards damages in regard to Right of Way (RoW) for transmission lines.</i>	<i>Disallowed</i>
4	<i>Demonetization</i>	<i>Disallowed</i>
5	<i>Delay in obtaining forest clearance under Force Majeure and extension of SCOD</i>	<i>Allowed</i>



Sr. No.	Change in law	Allowed/ Disallowed
6.	<i>Extension of SCOD due to (i) Prohibition on sand mining in Bihar due to NGT order, (ii) Flooding of Gandhak River and flooding of Motihari Sub-station land, (iii) Ground improvement at Motihari Sub-station land due to geo-technical surprise, (iv) Work affected because of (a) kidnapping of project staff in Motihari Transmission Line consequent to a "Theft", (b) Manhandling with TBEA officials at Darbhanga Sub-station site, (c) Delay in Railway Crossing work at Darbhanga line due to public agitations, (iv) Delay in hardware material supply at Mothihari line due to Chennai flood (v) Delay in Railway line crossing approvals for Motihari Transmission Line, (vi) Delay due to severe right of way (RoW) issues in transmission line and (vii) Delay due to assembly elections in Bihar State to be falling under Force Majeure as their period is subsumed in the aforementioned extended COD.</i>	<i>Not considered on merits as the additional time claimed is subsumed in extended SCOD.</i>
7	<i>Change in gantry coordinates and connection agreement at PGCIL Muzaffarpur Sub-station for 400 kV D/C Muzaffarpur-Darbhanga Transmission Line, increase in number of power line crossings and high density of trees in 400 kV Muzaffarpur-Darbhanga Transmission Line.</i>	<i>The Additional time claimed is subsumed in extended SCOD.</i>
8.	<i>Work affected due to increase in number of power line crossings in both Darbhanga and Motihari Line and due to high tree density in 400 kV Muzaffarpur-Darbhanga Transmission Line.</i>	<i>Disallowed</i>
9.	<i>IDC and IEDC beyond scheduled COD till actual COD.</i>	<i>Disallowed</i>
10.	<i>Additional expenditure in terms of Commission's order dated 1.9.2017 in Petition No. 209/TT/2016.</i>	<i>Disallowed</i>

- c) Aggrieved with disallowance of certain claims by the Commission in order dated 29.3.2019 in Petition No. 238/MP/2017, DMTCL filed Review Petition No. 8/RP/2019 seeking review of the order dated 29.3.2019 on disallowance of compensation towards damages paid to settle RoW issues due to change in guidelines of Ministry of Power, change in gantry coordinates, increase in number of power line crossings, IDC and IEDC from scheduled COD to actual COD and additional expenditure in terms of order dated 1.9.2017 in Petition No.209/TT/2016. The Commission vide order dated 13.1.2020 rejected the said review petition being devoid of merit.
- d) Aggrieved with the order dated 29.3.2019 in Petition No. 238/MP/2017 and order dated 13.1.2020 in Review Petition No. 8/RP/2019, DMTCL filed Appeal



before APTEL bearing Appeal No. 276 of 2021. Another transmission licensee, namely NRSS XXXI (B) Transmission Limited (NTL), challenged the order dated 29.3.2019 of the Commission in Petition No. 195/MP/2017 before APTEL by filing Appeal No. 129 of 2020. Since some of the issues raised in both appeals were common, APTEL disposed of these Appeals vide common judgment dated 3.12.2021 in Appeal No. 129 of 2020 and Appeal No. 276 of 2021.

- e) Six issues were considered by APTEL in its judgment dated 3.12.2021 in Appeal No. 129 of 2020 and Appeal No. 276 of 2021. The first three issues are common in both the Appeals. The six issues considered are as follows:

“Issue No. 1-Whether in the facts and circumstances of the case, the Central Commission is justified in passing the Impugned Order disallowing relief in terms of IDC and IEDC to the Appellant even after declaring forest clearance as a Change in Law event?”

Issue No. 2-Whether the Commission is justified in disallowing claims with respect to change in Kurukshetra and Malerkotla sub-station gantry coordinates and subsequent change in connection arrangement for 400kV D/C Kurukshetra-Malerkotla Transmission Line as Force Majeure event though these changes occurred as a consequence of inaccuracies in the Survey Report prepared by the Bid Process Coordinator, REC Transmission Projects Company Ltd. (“RECTPCL”)?”

Issue No.3- Whether the Commission has not granted relief to the Appellant for the loss of first year tariff on account of Force Majeure and Change in Law events which delayed COD?”

Issue No. 4 -While extending the SCOD and holding that the delay was not on account of DMTCL, CERC has erroneously disallowed recovery of amounts paid by DMTCL to PGCIL along with interest pursuant to its order dated 01.09.2017 passed in Petition No. 209/TT/2016. DMTCL was held liable to pay these amounts on account of delay in COD of the Project.

Issue No. 5-CERC has erred in disallowing claims with respect to the work affected on account of increase in number of power line crossings due to inaccuracies in the Survey Report prepared by the Bid Processing Coordinator (“BPC”) (i.e. PFC Consulting Ltd. (“PFCCL”)) as Force Majeure and Change in Law event.



Issue No. 6-CERC has erred in disallowing additional cost incurred on account of ground improvement work at Motihari sub-station land due to Geotechnical surprise as a Force Majeure event.”

- f) As regards Issue No.1 regarding disallowance of IDC and IEDC, APTEL observed as follows:

“16.8 The Appellant has submitted that IDC and IEDC are a direct consequence of delay in SCOD. Once the Commission has declared forest clearance as Force Majeure event and amount paid for it as Change in Law, also allowed extension of SCOD, Commission ought to have allowed the consequential cost implication. In this regard our attention was drawn towards Articles 11 and 12 of the TSA which states that:

“11. FORCE MAJEURE

...

88.2. Available Relief for a Force Majeure Event

Subject to Article 11

(a) no party shall be in breach of its obligations pursuant to this Agreement except 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. ...

88.. CHANGE IN LAW

...

12.2 Relief for Change in Law

12.2.1 During Construction Period: During the construction period, the impact of increase or decrease in the cost of the project in the transmission charges shall be governed by the formula given below:

For every cumulative increase/decrease of each Rupees One Crore Fifteen Lakh Eighty Thousand Only (Rs. 1.75 Crore) in the cost of the project upto the Scheduled COD of the project, the increase/decrease in non-escalable transmission charges shall be an amount equal to Zero point Three One Three percent (0.32%) of the non-escalable transmission charges.”

16.9. Undisputedly, the survey report prepared by the BPC was misleading and all the issues have arisen due to incorrect information provided therein. The bid of the Appellant was based on the disclosure made in the Survey Report that there was no forest land involved in the project which required forest clearance to be obtained. Presence of forests certainly affected the timely completion of the project in addition to additional cost incurred by the Appellant in getting the forest Clearance. The Central Commission has rightly acknowledged it and granted extension of time and compensation for the extra expenditure incurred by the



TSA. However, the Commission, without assigning reason, has rejected the claim made by the Appellant. The Commission observed that:

“However, we would like to make it clear that the extension of COD of the instant assets does not entail any financial benefit in the form of IDC and IEDC to the Petitioner.”

16.10 The Central Commission failed to understand that the IDC and IEDC is not a financial benefit to the Appellant but due to the financial liability to be borne by the Appellant. This Tribunal vide Judgment dated 20.10.2020 in Appeal No. 208 of 2019 in – **Bhopal Dhule Transmission Company Limited v Central Electricity Regulatory Commission & Ors. (“Bhopal Dhule Judgment”)** held that the Commission erred in denying Change in Law relief to the appellant for IDC which is a direct consequence of the Change in Law event. The relevant extract of the Judgement is reproduced herewith

“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.

1.15 *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.*

.....

1.16 *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.*

...

1.17 **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."

16.11 Therefore, we are of the opinion that the Appellant is entitled to be fully compensated for the IDC and IEDC incurred on account of Change in Law & Force Majeure Events"

- g) Thus, on the Issue No.1 regarding disallowance of IDC and IEDC, the APTEL held as under:

"Issue No.1:- As per the discussions held above, the Appellant is entitled to be fully compensated for the IDC and IEDC incurred on account of Change in Law & Force Majeure Events"

- h) As regards Issue No. 2 regarding disallowance of compensation on account of increase in length of the transmission lines due to change in the Gantry Coordinates, APTEL observed as follows:

"17.1 The Commission erred in passing the judgement as the claim of the Appellant in on account of change in length of the transmission line and not due to time overrun. It can well be understood that slackness has not resulted into increase of length of the Transmission lines. The Appellant is not claiming extension of time because of change in the Gantry Coordinates but seeking relief due to change in the length of the Transmission Line as a result of change in Gantry Coordinates.

17.2 Shri Pradeep Mishra, Learned Counsel for Respondent No. 2 submitted that the decision dated 20.11.2019 in Appeal No. 121 of 2015; Sasan Power Ltd. Vs. CERC &Ors. of this Tribunal is not applicable in the present case as the PGCIL vide its letter dated 04.07.2014 had informed the Petitioner as there may be change in north coordinate by few meters during detailed Engineering. Further, submitted that due to any fault on behalf of Appellant or PGCIL the replying Respondent cannot be penalized by making them to pay the higher tariff.

17.3 The submission is devoid of merit as any indication for change of coordinates which results into increased length after the submission of bids can't deny the Appellant with the additional cost incurred due to the erroneous Survey Report. However, we acknowledge that the contention of the Respondent that the Long Term Transmission Customers cannot be penalised by making them to pay the higher tariff for reason not accountable to them. We are inclined to pass directions to the Central Commission to develop a regulatory mechanism to deal with the matter so that such erroneous reports are dealt with firm hands.



17.4 Shri Alok Shankar, Learned Counsel for Respondent no. 19 submitted that the RFP issued by the Bid Process Coordinator, REC Transmission Project Company Limited (RECTPCL) is a standard form document. The RFP expressly instructs the bidders to undertake independent due diligence and disclaims completeness of any information. The learned Central Commission upon review of the provisions of the RFP and the conduct of the Appellant concluded that no relief could be granted.

17.5 The Commission has duly acknowledged the fact that the Survey Report is erroneous and misled the Appellant by granting extension of SCOD and cost incurred in obtaining the Forest Clearance. The change in Gantry Coordinates have also been acknowledged, however, compensation has not been granted for reasons as explained in the said judgement of the Commission which is unjustified. The point of challenge is compensation on account of unforeseen and uncontrollable events occurred due to the erroneous Survey Report and not the RFP document.

17.6 Therefore, we agree with the Appellant that full compensation has to be granted for the change in the length of the Transmission lines.”

- i) Thus, on the Issue No. 2 regarding disallowance of compensation on account of increase in length of the transmission lines due to change in the Gantry Coordinates, APTEL held as under:

“Issue No.2:- We hold that the Appellant should be compensated for the actual change in the length of the Transmission lines as against the length of the Transmission lines in case the Gantry Coordinates would have been same as indicated in the Survey Report.”

- j) As regards issue No.3 regarding loss of first year tariff on account of ‘force majeure’ and ‘change in law’ events which delayed COD, the APTEL while disallowing the claim of the Petitioner held as under:

“Issue No.3:-We hold that the tariff can be levied only for the services provided and not on account of Force Majeure or Change in Law Events. In the present case the commissioning of the Transmission System of the Appellant has delayed and any Tariff can be billed only once the COD has been achieved. Any change at this stage will result into amendment to the TSA. Therefore, decline to grant any compensation on this account”

- k) As regards issue No.4 regarding tariff for the period of mismatch in COD of the transmission assets of DMTCL and PGCIL, APTEL observed as follows:

“20.1 Therefore, we agree with the submissions made by the Appellant seeking relief for the recovery of amounts paid by DMTCL to PGCIL along with interest



pursuant to its order dated 01.09.2017 passed in Petition No. 209/TT/2016. DMTCL was held liable to pay these amounts on account of delay in COD of the Project.”

- l) Thus, on the issue No.4 regarding tariff for the period of mismatch in COD of the transmission assets of DMTCL and PGCIL, APTEL held as under:

“Issue No.4:-We decide in favour of the Appeal and the amounts paid by DMTCL to PGCIL along with interest pursuant to order dated 01.09.2017 passed in Petition No. 209/TT/2016 be returned to DMTCL.”

- m) As regards Issue No. 5 regarding disallowing claims on account of increase in number of power line crossings, APTEL observed as follows:

“21.0 In regard to issue mentioned at Para 19(d) denying the Appellants claims with respect to the work affected on account of increase in number of power line crossings due to inaccuracies in the Survey Report prepared by the Bid Processing Coordinator (“BPC”) (i.e., PFC Consulting Ltd. (“PFCCL”)) as Force Majeure and Change in Law Event , we find that it is similar to the issue of erroneously indicating the gantry coordinates which we have discussed in detail in the preceding Paras. The existence of increased number of line crossings as against only two indicated in the Survey Report has resulted into additional expenses and time on the part of the Appellant due to unforeseen and uncontrollable event.

21.1 The Respondents raised the similar contention that the Survey Report is mere indicative only and the bidder should have ascertained all the facts given in the Survey Report through its own survey. The provisions of the RFP were also brought before us. We are not inclined to accept the arguments as the erroneous and misleading report has resulted into the present cause of these Appeals. We are of the firm opinion that in case a diligently and accurately prepared Survey Report cannot be provided by the BPC, it should be left to the bidder to carry out its Survey before participating in the bids. We agree with the Appellant’s submissions made on this issue and again advise the Central Commission to formulate and specify a suitable Regulatory mechanism to deal with such erroneous reports. The decision cannot be burdened with such misleading informations.”

- n) Thus, on the Issue No. 5 regarding disallowing claims on account of increase in number of power line crossings, APTEL held as under:

“Issue No.5:- We hold that any audited expenditure incurred due to the existence of increased number of line crossings as against only two indicated in the Survey Report is to be paid to the Appellant as compensation.”

- o) As regard to Issue No.6 regarding disallowance of additional cost incurred on account of ground improvement work at Motihari Sub-station land, APTEL observed as follows:



“

22.2 *It is submitted that the above hindrances could not have been anticipated at the time of submission of bid and thus, qualify as a Force Majeure event beyond the control of DMTCL. The abovementioned Force Majeure event of Geotechnical surprise at Motihari Sub-station is a rarest of rare event which resulted in stoppage of construction work at the Project site from 06.04.2015 to 21.02.2016. An additional expenditure of approximately Rs. 7.32 Crores was incurred towards sub-station ground improvement in addition to the IDC during this duration. It is submitted that CERC has in Order dated 28.04.2016 in Petition No. 409/TT/2014-PGCIL vs. MPPMCL & Ors. allowed relief on account of ground improvement works as beyond the control of PGCIL.*

22.3 *At this stage we opt not to decide on the merit of this issue but direct the matter to CERC to examine and pass an order in the light of its order dated 28.04.2016 in Petition No. 409/TT/2014PGCIL vs MPPMCL & Ors.”*

- p) Thus, on the Issue No.6 regarding disallowance of additional cost incurred on account of ground improvement work at Motihari Sub-station land, APTEL held as under:

“Issue No.6:- CERC to examine and pass an order in the light of its order dated 28.04.2016 in Petition No. 409/TT/2014-PGCIL vs MPPMCL & Ors.”

4. Subsequently, DMTCL filed Interlocutory Application No. 2099 of 2021 before APTEL seeking clarification of judgment dated 3.12.2021. APTEL vide order dated 21.1.2022 observed that DMTCL is entitled to be fully compensated for IDC and IEDC for the period from SCOD to actual COD on account of “*change in law*” and *force majeure* events and also to receive compensation on account of change in gantry coordinates and increase in number of power lines crossing and the consequential carrying cost. The relevant portion of the order dated 21.1.2022 is extracted hereunder:

“The Appellants have moved these applications seeking clarification. Having heard the learned counsel for the parties, we are clear in our minds that the Judgment dated 03.12.2021 leaves no scope for doubt that the Appellants have been held entitled to be fully compensated for IDC and IEDC incurred on account of Change in Law and Force Majeure Events and also to receive compensation on account of change in Gantry Coordinates and increase in number of power lines crossing. It is inherent in the findings returned and the directions given that while passing a consequential order in terms of the remit, the Commission will be obliged to grant the reliefs in above nature and also to consider the consequential carrying cost.”



Proceedings before the Commission

5. Accordingly, the instant petition is reopened as per the APTEL's direction in judgment dated 3.12.2021 for consideration of two aspects, i.e. the additional cost incurred on account of ground improvement work at Motihari Sub-station and the consequent carrying cost. The petition was heard on 8.2.2022.

6. During the course of hearing on 8.2.2022, the learned senior counsel for the Petitioner submitted that the four of the six issues have been decided in favour of the Petitioners. Issue No.3, pertaining to compensation towards loss of first year tariff was declined by APTEL. He further submitted that APTEL directed the Commission to examine Issue No. 6 regarding additional cost due to ground improvement work at Motihari Sub-station in the light of the Commission's order dated 28.4.2016 in Petition No. 409/TT/2014 (PGCIL vs MPPMCL & Ors.) and pass an order. He also submitted that the Petitioner filed IA No. 2099 of 2021 seeking clarification of order dated 3.12.2021 in Appeal No. 276 of 2021 before the APTEL on the aspect of carrying cost and APTEL vide order dated 21.1.2022 directed the Commission to consider the consequential carrying cost also.

7. The Commission vide RoP dated 8.2.2022 directed the Petitioner to submit details of IDC and IEDC from SCOD to actual COD along with the basis for arriving at the same, additional cost on account of change in the gantry coordinates and to further submit the additional cost on account of increase in number of power line crossings and ground improvement work at Motihari Sub-station along with documentary proof and Auditor Certificate. The Commission further directed DMTCL to submit the chronology of events from the date of bidding to COD of the Motihari Sub-station.



Submissions of the Petitioner DMTCL

8. Pursuant to the directions of the Commission, the DMTCL vide affidavit dated 25.2.2022 has made the following submissions:

a) As regards the details of IDC and IEDC from SCOD to actual COD along with the basis for arriving at the same, DMTCL has submitted that DMTCL has incurred ₹69.60 crore towards IDC and IEDC from SCOD to actual COD. The basis for arriving at the same are the interest payments made by DMTCL to its lenders between SCOD to COD i.e.10.6.2016 to 9.8.2017 respectively. DMTCL has to be compensated for the same along with consequential carrying cost. The Auditor Certificate dated 26.10.2017 has been placed on record and is also a part of petition. IDC amount would be recovered in terms of Article 12.2 of the TSA in the form of an increase in tariff from the COD of the project along with carrying cost for past arrears. APTEL has held that DMTCL is entitled to IDC and IEDC on account of the unexpected requirement of obtaining forest clearance due to inaccuracies in the survey report. Further, APTEL has held that IDC and IEDC is a financial liability borne by the Petitioner. APTEL vide clarification order dated 21.1.2022 has further clarified that DMTCL shall be entitled to consequential carrying cost on IDC and IEDC.

b) As regards additional cost on account of change in the gantry coordinates, DMTCL has submitted that APTEL has held that DMTCL is entitled to be fully compensated for change in length of transmission lines. Accordingly, DMTCL has submitted that it is entitled to claim compensation of ₹3.15 crore along with consequential carrying cost towards change in length of transmission lines. The Auditor Certificate dated 23.12.2017 indicating the additional cost incurred by DMTCL has been placed on record and is also a part of petition. The route of 400 kV D/C Muzaffarpur-Darbhanga Transmission



Line provided by BPC Survey Report and actual route due to change in Gantry Coordinates (also confirmed by PGCIL) are plotted on Toposheets with terminating point at PGCIL Muzaffarpur Sub-station and has also been annexed in the instant petition.

c) Regarding additional cost on account of increase in number of power line crossings, DMTCL has submitted that the APTEL has held that DMTCL is entitled to claim audited expenditure incurred on account of increase in number of power line crossings as against the two which were indicated in the survey report. Accordingly, DMTCL is entitled to claim ₹1.84 crore towards compensation along with consequential carrying cost on account of increase in the number of power line crossings. It is pertinent to note that the Auditor Certificate dated 23.12.2017 has been placed on record and is also a part of petition. A copy of the Auditor Certificate dated 23.12.2017 indicating the additional cost incurred by DMTCL due to increase in the number of EHV Powerline crossings is also annexed in the instant petition.

d) As regards the ground improvement work at Motihari Sub-station, DMTCL has submitted as under:

(i) The APTEL directed Commission to examine the issue of geotechnical surprise at the Motihari Sub-station in terms of its order dated 28.4.2016 in Petition No. 409/TT/2014 titled PGCIL Vs. MPPMCL & Ors. Between the period from May 2014 to February 2015, DMTCL purchased land for the Project and conducted soil investigations at the Motihari Sub-station. DMTCL has further submitted that in terms of the soil investigation, it was discovered that the strata were prone to liquefaction. The consequences of liquefaction include bearing failure, lateral spreading, and settlement. Accordingly, DMTCL engaged industry experts and as per their opinion,



ground improvement measures were required to be undertaken before commencing foundation work. Thus, in line with good engineering practices and for the safety of sub-station foundations, DMTCL undertook ground improvement measures. Pursuant to the recommendations, by May 2015, the best methodology for Motihari Sub-station ground improvement was assessed and finalized by DMTCL. DMTCL has submitted that it had been diligently sending updates to Long-Term Transmission Customers (“LTTC”) and Central Electricity Authority (CEA) with respect to the ground improvement works.

(ii) The report from its engineering consultant (i.e Feedback Infra) recommended methods to overcome soil liquefaction. The findings of the engineering consultant's Report were also supported by the report submitted by Takalkar Power Engineers & Consultants Pvt. Ltd. dated 15.6.2015 and the same has been annexed and placed on record. Accordingly, the abovementioned ‘*force majeure*’ event of Geotechnical surprise at Motihari Sub-station is a rare event which resulted in stoppage of construction work at the Project site from 6.4.2015 to 21.2.2016. Since the ground improvement works arising out of natural calamities were beyond the control of DMTCL, the same is covered under Article 11 of the TSA. As regards the direction of APTEL to examine the issue of geotechnical surprise at the Motihari Sub-station in terms of its order dated 28.4.2016 in Petition No. 409/TT/2014 titled PGCIL Vs. MPPMCL & Ors, it is submitted that the Commission in its order dated 28.4.2016 in Petition 409/TT/2014 allowed time over-run of 2 months on account of damage to the tower foundation in the monsoon season due to erosion of slopy land and the same was held to be beyond the control of PGCIL. In



this regard, reliance was placed on the report of geotechnical experts of IIT Mumbai.

(iii) The geotechnical surprise at the Motihari Sub-station is a '*force majeure*' event in terms of the TSA as the Survey Report provided by the BPC set out details of potential sub-station lands, keeping in mind the cost of the land and its approachability. Accordingly, the Petitioner shortlisted the land for its Motihari Sub-station based on the information provided in the Survey Report. After acquiring the sub-station land, DMTCL conducted a soil investigation which revealed that the Motihari Sub-station land was prone to liquefaction. DMTCL could not have carried out soil investigations prior to the acquisition of the land. Therefore, anticipating a geotechnical surprise at the Motihari Sub-station which would lead to stoppage of work was beyond the control of DMTCL. Hence, the same constitutes as a *force majeure* event in terms of the TSA. DMTCL has incurred an additional expenditure of approximately ₹7.32 crore. Further, in terms of the APTEL's clarification order, DMTCL is also entitled to consequential carrying cost. A copy of the Auditor Certificate dated 23.12.2017 indicating the additional cost incurred by DMTCL on account of ground improvement at Motihari Sub-station due to geotechnical surprise is also annexed in the instant petition.

(e) Amounts paid to PGCIL pursuant to order dated 1.9.2017 in Petition 209/TT/2016 ought to be returned to DMTCL with interest forthwith. Pursuant to order dated 1.9.2017 in Petition No. 209/TT/2016, PGCIL raised a demand Note of ₹55,34,000. On 9.11.2017, DMTCL made the said payment vide NEFT Ref. No. IDFBH17313697833. APTEL directed return of the said



amount with interest to DMTCL by PGCIL. Accordingly, the Commission ought to direct PGCIL to release ₹55,34,000/- forthwith with interest.

Analysis and Decision

9. We have perused the APTEL's judgement dated 3.12.2021 in Appeal No.129 of 2020 and Appeal No. 276 of 2021 and the submissions made by DMTCL after remand. Six issues were framed by APTEL in the Appeal and in five issues, clear findings have been recorded and the Commission has been directed to examine and pass order in one issue. In the IA No. 2099 of 2021 in Appeal No. 276 of 2021 filed by DMTCL, APTEL has directed the Commission to consider the consequential carrying cost.

10. The five issues in which APTEL has given clear findings are as under:

- (a) Issue No.1:- As per the discussions held above, the Appellant is entitled to be fully compensated for the IDC and IEDC incurred on account of Change in Law & Force Majeure Events.
- (b) Issue No.2:- We hold that the Appellant should be compensated for the actual change in the length of the Transmission lines as against the length of the Transmission lines in case the Gantry Coordinates would have been same as indicated in the Survey Report.
- (c) Issue No.3:- We hold that the tariff can be levied only for the services provided and not on account of Force Majeure or Change in Law Events. In the present case the commissioning of the Transmission System of the Appellant has delayed and any Tariff can be billed only once the COD has been achieved. Any change at this stage will result into amendment to the TSA. Therefore, decline to grant any compensation on this account.
- (d) Issue No.4:- We decide in favour of the Appeal and the amounts paid by DMTCL to PGCIL along with interest pursuant to order dated 01.09.2017 passed in Petition No. 209/TT/2016 be returned to DMTCL.
- (e) Issue No.5:- We hold that any audited expenditure incurred due to the existence of increased number of line crossings as against only two indicated in the Survey Report is to be paid to the Appellant as compensation.

11. In respect of Issue No.1, Issue No.2 and Issue No.5, DMTCL is entitled to commute the compensation in terms of the judgement of the APTEL and raise the



claims against its long term transmission customers in terms of Article 12.2 of the TSA.

12. As regards Issue No. 4, we notice that PGCIL approached APTEL by filing IA No. 245 of 2022 in Appeal No. 276 of 2021 seeking clarification with regard to the direction in paragraph 20.1 and decision on Issue No. 4 in its judgment dated 3.12.2021 in Appeal No. 276 of 2021 and Appeal No. 129 of 2020. APTEL in its judgment dated 1.4.2022 has disposed of the said application as follows:

“Having heard the learned senior counsel for the Applicant/PGCIL and the learned counsel for the non-applicant/Appellant- Darbhanga Motihari Transmission Company Limited, we see no occasion for clarification or ambiguity in the observations or directions in the judgment passed on 3.12.2021, particularly in the context of Para 20.1 and the decision on Issue No. 4. If the applicant/PGCIL is entitled in law to claim any relief pursuant to the directions issued in the wake of the said conclusion, nothing said in the judgment passed by this Tribunal inhibits it from pursuit of such remedy in accordance with law. With these observations, we dispose of both the applications.”

13. In the light of the finding of APTEL in the judgment dated 3.12.2021 in Appeal No. 276 of 2021 and the order dated 1.4.2022 in IA No. 245 of 2022, PGCIL is directed to comply with the decision of the APTEL, without prejudice to its right to pursue any remedy available under law.

14. Issue No. 6 pertains to the claim of DMTCL for additional cost incurred on account of ground improvement work at Motihari Sub-station land due to geotechnical surprise as a force majeure event. The Commission vide order dated 29.3.2019 in Petition No. 238/MP/2017 had decided the claim of DMTCL for additional expenditure incurred towards the ground improvement work at Motihari Sub-station as under:

“67. The Petitioner has claimed additional expenditure of ₹64 lakh and ₹7.32 crore due to raising the level of sub-station land at Motihari level upto FGL + 800 mm in line with the recommendation of Petitioner’s Engineering Consultant and towards ground improvement at Motihari Sub-station land due to geo-technical surprise. We are of the considered view that the said events cannot be considered as Force



Majeure events as provided under Article 11.7 of the TSA. Accordingly, the Petitioner's claim is rejected."

15. In the Appeal before the APTEL, DMTCL has submitted that at the time of geotechnical investigation in Motihari Sub-station land, it discovered that the strata Was prone to liquefaction with very low safe bearing capacity of the soil which required ground improvement measures to be undertaken before start of any construction work. DMTCL after consulting the experts incurred on expenditure of ₹7.32 crore towards sub-station ground improvement, including the IDC incurred on account of stoppage of construction work at the project site from 6.4.2015 to 21.2.2016. DMTCL has relied on the order of the Commission dated 28.4.2016 in Petition No. 409/TT/2014 (PGCIL vs. MPPMCL & Ors.) in which the Commission had allowed relief on account of ground improvement works holding the same as beyond the control of PGCIL. APTEL in the judgment dated 3.12.2021 has directed the Commission as under:

"22.3 At this stage we opt not to decide on the merit of this issue but direct the matter to CERC to examine and pass an order in the light of its order dated 28.04.2016 in Petition No. 409/TT/2014PGCIL vs MPPMCL & Ors."

16. DMTCL has submitted that the geotechnical surprise at Motihari Sub-station is a 'force majeure' and a rare event and it is covered under Article 11 of the TSA. DMTCL has submitted that it incurred an additional expenditure of approximately ₹7.32 crore and has submitted a copy of the Auditor Certificate dated 23.12.2017 in support of the same.

17. We have considered the submission of DMTCL in the light of the observation of APTEL, the decision of the Commission in order dated 28.4.2016 in Petition No. 409/TT/2014 and the facts of the present case. DMTCL does not attribute the selection of location of the Motihari Sub-station to the survey report prepared by BPC. It is noted that the BPC in its survey report indicates the coordinates of the



place where the sub-station is to be located. It is for the bidder to carry out diligent survey on the basis of the coordinates provided in the survey report of the BPC and decide the location of the sub-station and submit the bid accordingly. DMTCL in its affidavit dated 25.2.2022 has submitted that it purchased the land for the sub-station between the period from May, 2014 to February, 2015 and during soil investigation, it turned out that the strata was prone to liquefaction which required ground improvement measures. It is undisputed that the said land was existing in the same condition even prior to the site selection and purchase of land by DMTCL. It was the bidder's responsibility to carry out diligent survey and purchase the land it finds best suited. After having done the survey and only thereafter having bought the land, the Petitioner cannot claim that the discovery of soil liquefaction at the selected site at the time of construction be termed as a geotechnical surprise resulting in *force majeure* event. If the Petitioner has failed to carry out proper survey, the cost of its lapse cannot be fastened on to its long term transmission customers. Therefore, we do not agree with DMTCL that the stoppage of work due to soil liquefaction and the consequent expenditure incurred by DMTCL for ground improvement measures are covered under *force majeure* in terms of the TSA.

18. DMTCL has also submitted before APTEL that Commission in order dated 28.4.2016 in Petition No.409/TT/2014 allowed relief on account of ground improvement work holding the same as beyond the control of PGCIL and in the light of the said decision it is entitled to reimbursement of expenditure towards ground improvement work. The Commission in order dated 28.4.2016 in Petition No. 409/TT/2014 had observed as under:

"18. As regards the time over-run beyond 31.12.2011 in case of Assets-I and II, the petitioner has submitted that Jabalpur Pooling Sub-station is located in the vicinity of Narmada River. During the execution of works, in some of the area of the sub-station land, there was damage of tower foundation in monsoon season in 2013 and 2014 due to erosion of slopy land and settlement of ground towards river and gorge. In this



regard, the petitioner has submitted the Report of Geotechnical experts of IIT, Mumbai as a supporting document. This resulted in delay in erection and commissioning of reactors of Asset-I and Asset-II. We are of the view that the time over-run of 2 months in case of Assets I and II on account of monsoon during the years 2013 and 2014 was beyond the control of the petitioner. Hence, the time overrun of only 2 months on account of heavy monsoons in years 2013 and 2014 is condoned for Assets-I & II.”

“22. The Hon’ble Appellate Tribunal for Electricity in its Judgment dated 27.4.2011 in Appeal No.72/2010 has held that the additional cost due to time over-run due to the factors beyond the control of project developer shall be capitalized. As discussed in above paras, for Assets-I and II, the time over-run of 7 months on account of land acquisition and 2 months on account of heavy monsoons is beyond the control of the petitioner and it cannot be attributed to the petitioner. As per the judgement of Hon’ble Tribunal, the additional cost due to time over-run not attributable to the petitioner shall be capitalized. Accordingly, the time over-run in case of the Asset-I and II is condoned and accordingly IDC and IEDC for the delay are allowed to be capitalized...”

19. In Petition No. 409/TT/2014, PGCIL had submitted that part of the time over-run in case of Asset-I: 400 kV 125 MVAR (3 Ph) Bus Reactor-2 with associated bays at Jabalpur 765/400 kV Pooling Sub-station, Asset-II: 765 kV, 240 MVAR bus reactor-1 along with one spare unit of 80 MVAR at 765 kV Jabalpur Pooling Sub-station with associated bays respectively under “Transmission System for Phase-I Generation Projects in Orissa (Part-B)” was due to the time taken for executing works related to the damaged tower foundation near Jabalpur Pooling Sub-station which are located in the vicinity of Narmada River and were damaged in monsoon season in 2013 and 2014 due to erosion of slopy land and settlement of ground towards river and gorge. The Commission considered the damage to the tower foundation near Jabalpur Sub-station due to rains in the monsoon season as a geo-technical surprise and decided that the time over-run was not attributable to PGCIL and accordingly condoned the associated time over-run. As regards the additional expenditure, PGCIL in Petition No. 409/TT/2014 had not made any specific claim on account of the expenditure incurred towards damaged tower foundation works near Jabalpur Pooling Sub-station. PGCIL vide affidavit dated 25.4.2016 in Petition No. 409/TT/2014 gave the reasons for variation in the cost of structure for switchyard in



case of Asset-I and Asset-II as difference in the FR cost and the actual award cost received in the competitive bidding. In other words, PGCIL neither claimed nor was granted any expenditure on account of the damaged tower foundation works near Jabalpur Sub-station.

20. In the present petition, since, we have come to the conclusion that the soil liquefaction at Motihari Sub-station is not an event of *force majeure* and considering the fact that PGCIL was not granted any monetary compensation on account of damage to the tower foundation near Jabalpur Sub-station, we are of the view that DMTCL is not entitled for reimbursement of the cost of ₹7.32 crore on account of ground improvement work at Motihari Sub-station. As regards the stoppage of work on account of the time consumed for ground improvement work at Motihari Sub-station, it is pertinent to note that the said period ran concurrent to the period of 'change in law' and *force majeure* on account of time taken for obtaining clearance and accordingly the SCOD has been extended and DMTCL is entitled for the IDC and IEDC for the said period in terms of the decision of APTEL on Issue No.1.

21. The other issue which arises for our consideration is the claim of carrying cost for the relief granted to DMTCL by APTEL as clarified by the APTEL IN ITS order dated 21.1.2022. The relevant portion of the APTEL's order dated 21.1.2022 is extracted as under:

"The Appellants have moved these applications seeking clarification. Having heard the learned counsel for the parties, we are clear in our minds that the Judgment dated 03.12.2021 leaves no scope for doubt that the Appellants have been held entitled to be fully compensated for IDC and IEDC incurred on account of Change in Law and Force Majeure Events and also to receive compensation on account of change in Gantry Coordinates and increase in number of power lines crossing. It is inherent in the findings returned and the directions given that while passing a consequential order in terms of the remit, the Commission will be obliged to grant the reliefs in above nature and also to consider the consequential carrying cost."

22. APTEL in order dated 21.1.2022 has clarified that the Commission is obliged to compensate DMTCL with the IDC and IEDC incurred on account of 'change in



law' and compensation on account of change in gantry coordinates and to consider the consequential carrying cost. DMTCL has contended that APTEL on its clarification application has held that DMTCL is eligible for carrying cost on the reliefs granted vide judgement dated 3.12.2021. However, it is observed that APTEL in order dated 21.2.2022 has directed the Commission "*to consider the consequential carrying cost*". It appears that DMTCL has misunderstood the APTEL's direction to Commission "*to consider the consequential carrying cost*" as a direction to allow carrying cost to DMTCL. In this regard we would like to refer to Hon'ble Supreme Court's judgement dated 24.2.2006 in Civil Appeal No.3424 of 2000 in *APSRTC & Others. Vs G. Srinivas Reddy & Others. ((2006) 3SCC 674)*. In the said judgement, Hon'ble Supreme Court while examining the significance and meaning of a direction given by the court to "consider" a case observed that as when a court directs an authority to "consider" the matter, the authority has to consider the matter in accordance with law, facts and circumstances of the case without being circumscribed by any observations of the court. The relevant portions of the judgement are extracted hereunder:

"14. We may, in this context, examine the significance and meaning of a direction given by the court to "consider" a case. When a court directs an authority to "consider", it requires the authority to apply its mind to the facts and circumstance of the case and then take a decision thereon in accordance with law. There is a reason for a large number of writ petitions filed in the High Courts being deposed of with a direction to "consider" the claim/case/representation of the petitioner(s) in the writ petitions."

"17. Where the High Court finds the decision-making process erroneous and records its findings as to the manner in which the decision should be made, and then directs the authority to "consider" the matter, the authority will have to consider and decide the matter in the light of its findings or observations of the court. But where the High Court without recording any findings, or without expressing any view, merely directs the authority to "consider" the matter, the authority will have to consider the matter in accordance with law, with reference to the facts and circumstances of the case, its power not being circumscribed by any observations or findings of the court."

23. Accordingly, we consider DMTCL's entitlement for "carrying cost" as per the APTEL's directions "*to consider the consequential carrying cost*" in the light of the judicial pronouncements of APTEL and Hon'ble Supreme Court.



24. The aspect of “carrying cost” was considered by APTEL in its judgement dated 13.4.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission & Ors.* The Adani Power Limited (APL) filed an appeal before the APTEL against the Commission’s order dated 4.5.2017 in Petition No. 235/MP/2015 disallowing its claims regarding ‘change in law’, carrying cost and actual SHR. APL had entered into three Power Purchase Agreements (PPA’s) for supply of power with Haryana Discoms dated 7.8.2008 (‘Haryana PPA’) and with Gujrat Urja Vikas Nigam Ltd. (GUVNL) dated 2.2.2007 (Gujarat Bid-02 PPA) and 6.2.2007 (“Gujarat Bid-01 PPA”). APTEL in its judgment dated 13.4.2018 held that APL will be eligible for recovering “carrying cost” from Haryana Discoms in accordance with the Haryana PPA and GUVNL in accordance with Gujarat Bid-02 PPA, which provide for principle of “restitution”. However, “carrying cost” on the claim under ‘change in law’ in case of the Gujarat Bid-01 PPA with GUVNL was disallowed as the PPA did not provide for the principle of “restitution”. The relevant portion of the APTEL’s judgement dated 13.4.2018 is extracted hereunder:

“ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:

13.4 Tariff Adjustment Payment on account of Change in Law



13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from

- (a) the date of adoption, promulgation, amendment, reenactment or repeal of the Law or Change in Law; or
- (b) the date of order/ judgement of the Competent Court or tribunal or Indian Government instrumentality, if the Change in Law is on account of a change in interpretation of Law.
- (c) the date of impact resulting from the occurrence of Article 13.1.1.

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff.

To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.

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

xi. Accordingly, this issue is decided in favour of the Appellant in respect of above mentioned PPAs other than Gujarat Bid – 01 PPA.”

25. Aggrieved with the aforesaid judgment of the APTEL, Haryana Discom and GUVNL filed Civil Appeal No. 5865 of 2018 and Civil Appeal No. 6190 of 2018 respectively before the Hon'ble Supreme Court. Hon'ble Supreme Court vide its judgment dated 25.2.2019 (*Uttar Haryana Bijili Vitran Nigam Limited & Anr. v. Adani Power Ltd. & Ors.*) while upholding the directions of APTEL on payment of “carrying cost” to APL on the principles of restitution held as under:

“10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case,



the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.”

Xxx

16. Lastly, the judgment of this Court in Energy Watchdog v. Central Electricity Regulatory Commission and Ors., (2017) 14 SCC 80 was also relied upon. In this judgment, three issues were set out and decided, one of which was concerned with a change in law provision of a PPA. In holding that change in Indonesian law would not qualify as a change in law under the guidelines read with the PPAs, this Court referred to Clause 13.2 as follows:

“57. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 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 monthly tariff payments, the affected party to the economic position as if such change in law has not occurred.....”

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

26. The Gujarat Bid-02 PPA dated 2.2.2007 and Haryana PPA dated 7.8.2008 provides for principle of “restitution” as observed by APTEL and Hon’ble Supreme Court. The relevant portion of the PPA, which is similar in both the cases, is as follows:

“13.2 Application and Principles for computing impact of Change in law

While determining the consequence Change in Law under this Article 13, the 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 Monthly Tariffs Payments, to the extent contemplated in this Article 13, the affected party to the same economic position as if such Change in Law has not occurred.”

27. Considering the provisions of restitutionary principles contained Gujarat Bid-02 PPA and Haryana PPA, it was held that carrying cost was admissible for Change in Law claims from the date of occurrence of change in law and determination of



change in law by the Commission. However, carrying cost was specifically denied in case of Gujarat Bid-01 PPA on account of absence of a restitutionary clause on the pattern of Article 13.2 in Bid-02 PPA.

28. In the light of above judgment of APTEL and Hon'ble Supreme Court, we consider whether DMTCL is entitled to "carrying cost" in terms of the provisions of TSA dated 6.8.2013. Article 12.2, which provides for "Relief for Change in Law", of the TSA dated 6.8.2013 between DMTCL and its LTTCs provides as follows:

"12.2 Relief for Change in Law

12.2.1 During Construction Period:

During the construction Period, the impact of increase/decrease in the cost of the Project in the transmission Charges shall be governed by the formula given below:

- For every cumulative increase/decrease of each rupees One Crore Seventy Five Lakhs (Rs. 1.75,00,000/-) in the cost of the Project upto the Schedule COD of the Project, the increase/decrease in Non-Escalable Transmission Charges shall be an amount equal to 0.32 Percent (0.32%) of the Non-Escalable Transmission Charges.

12.2.2 During the Operation Period:

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

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

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

29. Thus, the above referred Article 12.2 of the TSA that deals with the "Relief for Change in Law" does not provide for the principle of "restitution" based on which APTEL and Hon'ble Supreme Court have held that the entity affected by 'change in law' will be eligible for "carrying cost" for the compensation allowed due to 'change in law' events. Accordingly, we are of the view that DMTCL is not entitled for the



“carrying cost” for the IDC and IEDC for the extended period of SCOD and the additional cost incurred due to change in gantry coordinates on account of absence of restitutionary principle in the Change in Law provisions in the TSA.

30. Accordingly, DMTCL shall recover the IDC and IEDC for the extended period of SCOD, additional cost incurred due to the actual change in the length of the Transmission lines as against the length of the Transmission lines in case the Gantry Coordinates would have been same as indicated in the Survey Report and additional expenditure incurred due to the existence of increased number of line crossings as against only two indicated in the Survey Report of the BPC as provided under Article 12 of the TSA between DMTCL and its beneficiaries.

31. APTEL in paragraph No. 21.1 of the judgement dated 3.12.2021 has advised the Commission to devise a suitable mechanism to deal with erroneous Survey Reports of the BPC. The relevant portion of the APTEL’s judgement 3.12.2021 is as follows:

“21.1We agree with the Appellant’s submissions made on this issue and again advise the Central Commission to formulate and specify a suitable Regulatory mechanism to deal with such erroneous reports.....”

32. Accordingly, the staff of the Commission is directed to take suitable action to devise a mechanism to deal with such erroneous Survey Reports of the BPC.

33. This order disposes of Petition No. 238/MP/2017 (on remand) in terms of above discussions and findings.

sd/-
(P. K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(P. K. Pujari)
Chairperson

