IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)
Appeal No. 54 OF 2021

Dated: 12.08.2025

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

1. Bihar State Power Holding Company Limited
1st Floor, Vidyut Bhawan,
Jawahar Lal Nehru Marg,
Patna - 800 001

2. North Bihar Power Distribution Company Ltd.
Vidyut Bhawan,
Jawahar Lal Nehru Marg,
Patna - 800 001

3. South Bihar Power Distribution Company Ltd.
Vidyut Bhawan,
Jawahar Lal Nehru Marg,
Patna - 800 001 **…. Appellant (s)**

Versus

1. Central Electricity Regulatory Commission
Through its Secretary
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001

2. NTPC Limited,
(Erstwhile Kanti Bijlee Utpadan Nigam Limited)
Through its Chairman & Managing Director,
NTPC Bhawan, Core-7, Scope Complex,
7, Institutional Area, Lodhi Road,

New Delhi — 110 003

3. Jharkhand Bijlee Vitaran Nigam Ltd.
Through its Chairman
Engineering Building, HEC Township,
Dhurwa, Ranchi — 834 004

4. GRIDCO Ltd.
Through its Chairman
Janpath,
Bhubaneshwar — 751 022

5. West Bengal State Electricity Distribution Company Ltd.
Through its Chairman
Vidyut Bhawan, Bidhannagar, Block DJ,
Sector-II, Salt Lake City,
Kolkata — 700 091

6. Power Department, Govt. of Sikkim,
Through its PCE-cum-Secretary
Kazi Road, Gangtok, Sikkim — 737 101

7. Damodar Valley Corporation (DVC),
Through its Chairman
DVC Towers, VIP Road,
Kolkata, West Bengal — 700 054 **… Respondent(s)**

Counsel for the Appellant(s) : Mr. Aashish Gupta
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Ms. Ritu Apurva for Res.2

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The Appeal No. 54 of 2021 has been filed by the following Appellants:
   1) Bihar State Power (Holding) Company Limited;
   2) North Bihar Power Distribution Company Limited; and
   3) South Bihar Power Distribution Company Ltd.

2. The three Appellants are hereby collectively referred to as the *"**Appellant**".* The Appellants are hereby challenging the Order in Petition No. 74/GT/2017 (in short "Impugned Order") dated 29.04.2019 passed by the Central Electricity Regulatory Commission (in short "Central Commission" or "CERC" or "Respondent No. 1").

Description of the Parties

3. The Appellants are the distribution licensees in the State of Bihar.

4. Respondent No. 1 is the Central Electricity Regulatory Commission, established under section 76 of the Electricity Act, 2003, having been vested with

the powers under section 79 of the Electricity Act, 2003 (in short "Act") inter alia to resolve the dispute herein.

5. Respondent Nos. 2 to 7 are companies engaged in the generation, distribution, and transmission of electricity in various states of India.

Factual Matrix of the Case (as submitted by the Appellants)

6. The present appeal has been filed against the order dated 29.04.2019 passed by the CERC in Petition 74/GT/2017 wherein the CERC has condoned time overrun and cost overrun in Tariff approval for Muzaffarpur Thermal Power Station, Stage-II, Unit-I and Unit-II (in short "Plant"). It is pertinent to mention here that the CERC passed the impugned order erroneously, while, inter alia, overseeing Regulations 11 & 12 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (in short, "Tariff Regulations 2014").

7. The Scheduled Commercial Operation Date ("SCOD") was 12.10.2012 for Unit I and 12.01.2013 for Unit II (as per resolution of the Board of Directors of the Respondent KBUNL Company (now NTPC Limited) in the 18th meeting dated 06.03.2010, which granted 31 months for Unit I from the date of the Main Plant award and 3 months thereafter for Unit II of the generating station).

8. The actual Commercial Operation Date (COD) of the plant was 18.03.2017 for Unit-I and 01.07.2017 for Unit-II. Therefore, there is a huge delay of 1619 days

in the completion of Unit I and of 1632 days for Unit II. In other words, Unit I, which was supposed to be completed in approximately 2.5 years (31 months), took around 7 years to complete, and Unit II, which was supposed to be completed in approximately 2.8 years (34 months), took around 7.3 years to complete. This amount of time overrun is shocking and indeed unusual, and was required to be viewed with a strict lens and in accordance with the regulatory provisions by the CERC during the approval of the tariff.

9. On 14.03.2017, the 2nd Respondent/NTPC Ltd. filed a petition bearing no. 74/GT/2017 for approval of the tariff of the project based on the anticipated COD of Unit-I (25.03.2017) and Unit-II (31.03.2017) till 31.03.2019. Since Unit-I of the project achieved COD on 18.03.2017 and Unit-II on 01.07.2017, the generator vide affidavit 19.02.2018 filed an amended petition for approval of the tariff of the project from the actual COD of Unit-I (18.03.2017) and Unit-II (01.07.2017) till 31.03.2019, considering the actual expenditure incurred as on the actual COD of the said units.

10. In the said petition bearing no. 74/QT/2017, the CERC passed an order dated 29.04.2019 and has therein granted condonation of time overrun of 948 days (almost 3 years) to the Respondent KBUNL.

11. CERC has failed to take note of the various legal provisions and specifically Regulation 11 & 12 of the Tariff Regulations 2014 on the question related to condonation of time overrun. This has resulted in the CERC granting condonation of 948 days.

12. Thus, being aggrieved by the Impugned Order dated 29.04.2019 passed by the CERC in the Petition No. 74/GT/2017, the Appellant has preferred the present Appeal.

Written Submissions of the Appellants, dated 16.12.2024

13. The Appellant submitted that the appeal challenges the order dated 29.04.2019 passed by the Central Electricity Regulatory Commission in Petition No. 74/GT/2017, wherein time-overrun and cost-overrun were condoned in the tariff determination for Muzaffarpur Thermal Power Station, Stage-II (Units I and II).

14. Bihar's total allocated share from the Plant is 264 MW, constituting 67.7% of its capacity as per Ministry of Power notification dated 10.12.2010, with the actual share being 74.12% per ERCPC letter no. ERPC/Comm-I/share /2024-25/538 dated 28.06.2024. The investment approval for the Plant was granted by the board of Respondent No. 2, Kanti Bijlee Utpadan Nigam Ltd. (KBUNL), in a meeting held on 06.03.2010.

15. As per the resolution, the scheduled Commercial Operation Date (SCOD) for Unit I was 31 months from the date of the main plant award, and Unit II was to follow 3 months later. The main BTG contract was awarded to BHEL on 12.03.2010, designated as the Zero Date. However, the actual commercial operation was achieved only on 18.03.2017 (Unit I) and 01.07.2017 (Unit II),

resulting in a delay of 1618 days and 1632 days, respectively.

16. Thereafter, on 14.03.2017, KBUNL filed a petition bearing no. 74/GT/2017 for approval of tariff of the Plant based on the anticipated COD of Unit I (i.e., 25.03.2017) and Unit-II (i.e., 31.03.2017) till 31.03.2019. Since Unit I of the Plant had achieved COD on 18.03.2017 and Unit II on 01.07.2017, KBUNL filed an amended petition dated 19.02.2018 for approval of tariff based on the actual CODs of the units, considering the actual expenditure incurred as on the actual COD of the said units.

17. CERC has passed the Impugned Order in the said petition granting condonation of time overrun of 948 days to KBUNL for delays under the following heads:

(a) Ban on mining lease in Bihar (234 days);
(b) Heavy Rainfall (67 days);
(c) Dharna pradarshan and hunger strike by labourers (31 days – not considered separately for calculating the total number of days, as the same is subsumed in other factors);
(d) Change in law for land acquisition (648 days).

18. Accordingly, CERC reset the SCOD for computation of IDC and IEDC to 18.05.2015 for Unit-I and 31.08.2015 for Unit-II for computation of IDC and IEDC under Regulation 11 of the 2014 Tariff Regulations. The condonation of time overrun and revision of SCOD by the CERC is as follows:

Units	SCOD	Actual COD	Time overrun	Time overrun allowed	Time overrun disallowed
I	12.10.2012	18.03.2017	1618 days	948 days	670 days
II	12.01.2013	01.07.2017	1632 days	961 days	670 days

19. Accordingly, the CERC allowed IDC only up to the reset SCOD of Unit-I and Unit-II, amounting to INR 30143.12 lakh and INR 41020.31 lakh, respectively. Further, on account of the delay in the declaration of COD, the establishment expenses of the units had increased. Accordingly, the CERC has allowed establishment expenses till the reset SCODs of the units.

20. It is submitted that the CERC has erred in allowing the delay under the aforementioned heads for the reasons set out hereinbelow.

A.Ban on mining lease in Bihar

21. The Appellant submitted that KBUNL claimed that a Government of Bihar notification dated 26.02.2010 imposed a mining ban across the state, allegedly disrupting the supply of stone aggregates to the Plant and causing a delay of 234 days, further, stated that this amounted to a ‘change in law’ under the 2014 Tariff Regulations. The CERC, in the impugned order, observed that the 10-day interval between the date of the alleged notification (26.02.2010) and the date of investment approval (06.03.2010) was too short to assess its impact on stone

aggregate supply.

22. The Appellant submitted that this finding is erroneous in law and fact. The actual notification banning mining was issued on 04.02.2010 and took immediate effect. This is evident from the notification annexed to KBUNL's petition dated 19.02.2018 before the CERC. **No notification dated 26.02.2010 has been produced by KBUNL on record.**

23. Thus, the mining ban was already in force for 33 days prior to the investment approval granted on 06.03.2010. KBUNL was aware of the notification and should have factored its impact into the Plant's SCOD planning. CERC failed to consider this critical fact.

24. Furthermore, the 234-day delay was the result of the contractor's or supplier's failure to procure aggregates and is a matter internal to the generator's contractual arrangements. Such delay cannot be passed on to beneficiaries through condonation of time-overrun and does not warrant regulatory relief.

25. CERC has gravely erred in failing to consider that the delay in execution of the project on account of the contractor, supplier, or agency of the generator is a 'controllable factor' under Regulation 12(1)(c) of the 2014 Tariff Regulations. The relevant portion of the said regulation reads as below:

*"12. **Controllable and Uncontrollable factors.***

-The following shall be considered as controllable and uncontrollable factors leading to cost escalation impacting Contract Prices, IDC and IEDC of the project:

(1) The "controllable factors" shall include but shall not be limited to the following:

(a) Variations in capital expenditure on account of time and/or cost overruns on account of land acquisition issues;

(b) Efficiency in the implementation of the project not involving approved change in scope of such project, change in statutory levies or force majeure events; and

(c) Delay in execution of the project on account of contractor, supplier or agency of the generating company or transmission licensee."

26. Under Regulation 12 of the 2014 Tariff Regulations, delays caused by a contractor's failure, such as the inability to procure stone aggregates within stipulated timelines, are categorized as controllable factors. Consequently, any such delay cannot justify an increase in Interest During Construction (IDC) and Incidental Expenditure During Construction (IEDC).

27. Therefore, the Impugned Order is contrary to law and violates the framework of the 2014 Tariff Regulations. This Tribunal has previously upheld decisions where CERC disallowed delays attributable to contractors, leaving such matters to be resolved contractually between generators and their contractors. Reliance is placed on the judgment in ***Power Grid Corporation of India Limited v. CERC,***

2015 SCC OnLine APTEL 131. Passing such contractual liabilities onto consumers by way of a tariff is legally unsustainable.

28. Moreover, KBUNL did manage to procure stone aggregates from Sheikhpura and Nawada initially, and from Pakhur subsequently, despite the mining restrictions being in effect since 04.02.2010. This proves that aggregate procurement was not impossible under the said notification. KBUNL failed to disclose: (i) the remaining quantity of aggregates needed after the initial procurement; and (ii) whether such quantity could have been sourced from outside Bihar.

29. In the absence of any concrete pleadings or evidence of mitigation efforts, the CERC erred in treating the entire delay as an uncontrollable factor. The burden of proving that a delay was due to uncontrollable factors lies on the party seeking relief. This Tribunal, in ***Maharashtra State Power Generation Co. Ltd. v. MERC, 2011 SCC OnLine APTEL 65,*** held that the generating company must clearly establish that no imprudence was involved in the project execution. In the context of force majeure, the onus remains on the affected party to show that it acted diligently and took all reasonable steps to mitigate the impact of such an event.

30. Even assuming the delay caused by the 04.02.2010 notification was beyond KBUNL's control, KBUNL has not demonstrated that it undertook all reasonable efforts to procure aggregates from alternative sources or acted prudently in project execution.

31. Under Clause 8 of the Power Purchase Agreement dated 27.12.2010, a party invoking force majeure must reasonably satisfy the other party of its existence and provide a timely written notice. KBUNL has failed to furnish evidence regarding the exact duration of the force majeure event, date of intimation to the Appellants, and steps taken to mitigate its impact. The absence of such documentation undermines its claim and renders the Impugned Order unsustainable.

32. Moreover, since the 04.02.2010 notification was issued prior to project commencement, it cannot be considered a 'change in law' or 'force majeure' under the 2014 Tariff Regulations, as KBUNL had the opportunity to account for its impact at the investment approval stage.

33. Accordingly, the CERC's allowance of a 234-day delay based on this notification is erroneous, and the Impugned Order is liable to be set aside. The CERC also failed to recognize that the 04.02.2010 notification merely regulated, and did not completely ban, stone mining. Though the Appellants had argued that mining under existing leases and for certain purposes remained permissible, the CERC delivered no findings on this point.

34. KBUNL's reliance on CERC orders dated 06.12.2019 and 08.01.2017 in Petitions 197/GT/2017 and 199/GT/2017 is misplaced. Those orders concerned a total ban on sand mining, unlike the present case, which involves a regulatory measure. Therefore, the factual distinction renders those precedents inapplicable. In light of these submissions, the Impugned Order warrants reversal.

B.Heavy Rainfall in September 2011

35. KBUNL sought condonation of a 67-day delay, attributing it to heavy rainfall in September 2011, which allegedly disrupted boiler erection due to site submersion during and after the rains. The CERC accepted this explanation, holding that the rainfall of 424.6 mm, double the long-period average of 202.20 mm, qualified as a force majeure event under Regulation 3(5) of the 2014 Tariff Regulations. It also found that water accumulation at the site persisted until November 2011.

36. However, the CERC overlooked the requirement under Regulation 3(25), which defines force majeure due to weather as conditions exceeding statistical averages for the last 100 years. Instead of such data, KBUNL had submitted rainfall figures for only four subsequent years, and no centennial analysis was undertaken by the CERC.

37. It is a settled principle that CERC cannot disregard or reinterpret its own binding regulations. This is supported by this Tribunal's ruling in ***GRIDCO Ltd. v. Bhushan Power & Steel Ltd.,*** judgment dated 01.07.2014 in Appeal No. 169 of 2013, which affirms that no authority may amend or dilute existing regulations in the guise of interpretation.

38. Therefore, condoning the 67-day delay based on deficient data and contrary to Regulation 3(25) constitutes a grave legal error. The Impugned Order was thus

passed in disregard of governing regulations and is liable to be set aside.

C. <u>Dharna pradarshan and hunger strike by labourers (31 days – not considered separately for calculating the total number of days, as the same is subsumed in other factors)</u>

39. Furthermore, the 67-day period subsumed delays claimed under two other heads:

(i) 30 days due to local agitation in October-November 2011; and
(ii) 31 days due to a labour dharna and hunger strike.

40. Regarding the 30-day unrest, the CERC rightly refused to condone it. In any case, the unrest related to demands for uninterrupted electricity from MTPS Stage-I, not the Stage-II unit under dispute in this appeal. As such, this delay cannot be used to justify time overrun in the present case.

41. Given that the construction of a generating station is generally localized, KBUNL failed to show that it had implemented adequate mitigation measures, such as deploying sufficient security to address the alleged local unrest. In the absence of such precautionary steps, it cannot seek condonation of delay under this ground.

42. Moreover, KBUNL has not refuted the Appellants' submissions in this regard. Therefore, no relief can be granted for the delay attributed to local unrest.

The claim of time overrun due to the labour dharna and hunger strike is addressed separately below.

43. KBUNL claimed a 31-day delay due to a strike by labourers of its boiler erection contractor, M/s DCPL, which began on 18.07.2014 following the expulsion of certain workers and demands for additional allowances. Despite mediation efforts, the strike escalated into a hunger strike from 08.08.2014 to 18.08.2014, halting boiler erection activities.

44. **Although CERC, in paragraph 38 of the Impugned Order, rejected this delay claim, the final summary table (paragraph 46) incorrectly shows the 31-day delay as condoned. This internal contradiction renders the condonation unsupported by any reasoning and inconsistent with CERC's own findings.**

45. Furthermore, since the labourers were under a contractor (M/s DCPL), the issue falls within the domain of the generator-contractor relationship and is a 'controllable factor' under Regulation 12(1)(c) of the 2014 Tariff Regulations. KBUNL cannot seek relief for issues attributable to its contractor. In any case, no documentary evidence has been provided to support this delay claim. Accordingly, no relief can be granted for the claimed 31-day delay.

D. Change in law for land acquisition

46. KBUNL attributed a delay of 648 days in acquiring land for the make-up

water corridor to the coming into force of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ("2013 Act") on 01.01.2014, stating that landowners insisted on acquisition under the new law. CERC accepted this explanation, treating the delay as beyond KBUNL's control.

47. This finding is legally flawed and warrants setting aside the Impugned Order for the following reasons:

i. First, CERC ignored Regulation 12(1)(a) of the 2014 Tariff Regulations, which explicitly classifies 'land acquisition issues' as controllable factors. The Impugned Order does not reflect any application of this provision, rendering the decision contrary to the regulatory framework and passed without due consideration. Second, KBUNL's claim that the 2013 Act constituted a 'change in law' is misplaced. The delay was actually caused by disputes between KBUNL and landowners, not directly due to the enactment itself. This is evident from KBUNL's own submissions in paragraph 22 of its revised petition dated 19.02.2018.

48. In view of the above, KBUNL cannot claim time overrun under the rubric of 'change in law' in view of the settled law, i.e., what cannot be done directly cannot be done indirectly. In this regard, reliance may be placed on the judgment of the Hon'ble Supreme Court in ***Sant Lal Gupta v. Modern Coop. Group Housing Society Ltd. (2010) 13 SCC 336,*** which has held as below:

> "*21. It is a settled proposition of law that what cannot be done directly, is not permissible to be done obliquely, meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of "quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud". An authority cannot be permitted to evade a law by "shift or contrivance".*"

49. In view of the above, the Impugned Order may be set aside in as much as it suffers from non-application of mind and is contrary to settled legal principles.

50. CERC failed to consider that the 2013 Land Acquisition Act came into effect on 01.01.2014, which was after the Scheduled Commercial Operation Date (SCOD) of both units is 12.01.2013. Therefore, if KBUNL had commissioned the project within its own declared SCOD, the 2013 Act would not have had any bearing. The delay is thus solely attributable to KBUNL's failure to complete the project on time, and CERC's order wrongly allows KBUNL to benefit from its own default.

51. Further, even if the land acquisition issues were assumed to be beyond KBUNL's control, CERC failed to independently assess and record how much of the 648-day delay was actually supported by evidence. CERC also overlooked the requirement that for any time-overrun due to uncontrollable events, the generator must prove beyond doubt that it acted prudently throughout project execution. This omission renders the Impugned Order unsustainable.

52. CERC also ignored that the Plant was an extension project of KBUNL, and both units were declared under commercial operation using contingency arrangements for make-up water drawn from Stage I of MTPS. This is acknowledged in the Impugned Order itself. Hence, KBUNL could have continued operations through alternative sources without needing the delayed land. Accordingly, the time-overrun claim based on land acquisition lacks merit, and the Impugned Order should be set aside on this ground as well.

53. It is also pertinent to note that KBUNL eventually paid the landowners the demanded compensation of INR 20 lakhs per Kattha. It is submitted that had KBUNL disbursed the compensation for land in terms of the above, the purported delay of 648 days would not have occurred. It is therefore evident that the entire delay of 648 days is entirely attributable to KBUNL, and their condonation ought to have been rejected by the CERC. Since the CERC has failed to appreciate the above, the Impugned Order clearly suffers from non-application of mind and is liable to be set aside on that ground itself.

54. Moreover, it is submitted that the time frame for completion of any project is entirely within the domain of the generating company. In the instant case, the board of directors of KBUNL had in their meeting dated 06.03.2010 specifically determined the SCODs for both the units, and it was based on such time frame that the Appellants had entered into Power Purchase Agreements (PPAs) with KBUNL and planned their Annual Revenue Requirement in accordance with the PPAs.

55. Evidently, the Appellants and consequently the consumers of the State of Bihar cannot be made to suffer on account of KBUNL's failure to appropriately plan the project and ensure performance of contractual obligations by its contractors/suppliers (be it for the supply of stone aggregates or the employment of workers). In this regard, this Tribunal in ***Power Grid Corporation of India Ltd. v. Central Electricity Regulatory Commission*** in Appeal No. 281 of 2014 dated 13.08.2015 held as follows:

> "*9.3 .....It appears to be a case of improper planning and improper management and timely progress at different stages of the Assets on the part of the Appellant/petitioner. The said notes filed by the Appellant before the Central Commission are internal matters of the Appellant with Judgment in Appeal No. 281 of 2014 Page 16 of 17 regard to its contractor or sub-contractors, etc. They could not take a place of any kind of evidence to help the Appellant. It was for the Appellant to select a contractor or sub-contractor, who could complete the stage-wise part of each Asset within the time frame allowed**. If the 48 months period for completion or commissioning of the assets/project was not sufficient, it could have been considered at the time of granting investment approval**.*"

56. In view of the above, KBUNL ought to have considered all relevant factors at the time of granting investment approval for the Plant on 06.03.2010 and ought to have ensured timely compliance by its contractors. Since the CERC has failed to consider the above, the Impugned Order is liable to be set aside on this ground

itself.

57. In any event, the CERC has clearly failed to appreciate the settled law that in case of a force majeure event, the onus is on the party claiming the benefit of the force majeure event to demonstrate that it promptly and effectively undertook all possible measures to mitigate the effect of the force majeure event, ***Halliburton Offshore Services v. Vedanta Ltd., 2020 SCC OnLine Del 2068*** [Paras 69-70].

58. Additionally, Clause 8 of the Power Purchase Agreement dated 27.12.2010 between KBUNL and the distribution licensees also provides that any party claiming the benefit of the force majeure clause, "*shall reasonably satisfy the other party of the existence of such an event and give written notice within a reasonable time to the other party to this effect*." However, KBUNL has failed to *inter alia* demonstrate (with supporting documentation) the exact dates of advent and removal of the force majeure event, the date of intimation of the same to the Appellants, and prompt and effective steps taken by KBUNL for mitigation of harm on account of the force majeure event. In view of the above, the Impugned Order is liable to be set aside.

Supplementary Written Submissions of the Appellants

59. CERC in Petition 74/GT/2017 has condoned the time overrun (of 948 days) by Respondent No. 2 in commissioning of Muzaffarpur Thermal Power Station, Stage-II (Units – I and II) in the manner set out below:

	Reasons for delay		No. of days delay		
		Period of delay	Claimed period (days)	Not condoned	Condoned
a	Ban on mining lease in Bihar	Mar-10 to Nov-10 (234 days)	234	0.00	234
b	Policy change in specification of Wagon tippler by Railways (RDSO)	Dec-10 to Dec-12 (737 days)	670	670	0.00
c	Power crisis in Tamil Nadu delaying BHEL works	Dec-11 to Dec-12 (396 days)	396*	396*	0.00
d	Heavy rainfall	Aug-11 to Nov-11 (97 days)	67	0.00	67
e	Agitation and local unrest	Oct-11 to Oct-11 (30)	30*	30*	0.00
f	Dharna Pradarshan and hunger strike by labourers	Jul-14 to Aug-14 (31days)	31*	0.00	31*
g	Change in law for land acquisition in Bihar	June-15 to Mar-17 (648 days)	648	0.00	648
	Total		**1619**	**670**	**949**
	Finally accepted position to account for actual time overrun of 1618 days in place of 1619 days as claimed by the petitioner		**1618**	**670**	**948**

*Not considered separately for the calculation of total claimed/ condoned/ not condoned delay as the delay is subsumed in other factors as discussed in the preceding paragraphs.

I. Delay of 648 days cannot be condoned as a result of change in law pertaining to land acquisition

60. Respondent No. 2 has contended that the enactment of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 which came into effect from 01.01.2014 constituted a change in law which caused a delay of 648 days in the acquisition of land for make-up water corridor as the landowners demanded acquisition of land under the 2013 Act. It is submitted that the said contention has been wrongly accepted by the CERC for the reasons set out below:

Re: R2 was already in delay prior to the change in law dated 01.01.2014 and therefore cannot benefit from its own delay

(a) Respondent No. 2 cannot claim the benefit of a change in law on 01.01.2014, when it was already in delay prior to the said date. The CERC has failed to appreciate the conduct of Respondent No. 2 prior to the alleged uncontrollable factor (i.e., change in law of land acquisition). It is well settled that a party cannot take advantage of its own prior delay and seek benefit of a change in law. This is for the reason that the said party would not have been impacted by the change in law event if it had not itself delayed the project prior to the change in law. In this regard, reliance may be placed on the following judgments:

i. Halliburton Offshore Services v. Vedanta Ltd., 2020 SCC OnLine Del 2068 (Para 69):

> "*The Court would have to assess **the conduct of the parties prior to the outbre**ak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the epidemic/pandemic.*"

ii. MSEDCL v. MERC, (2022) 4 SCC 657 (Para 186-187):

> "***86.** In Halliburton Offshore Services Inc. v. Vedanta Ltd. ……. the Delhi High Court rightly observed that the Court, while considering the plea of non-performance of the condition due to*

outbreak of the Covid-19 Pandemic, ought to examine factors ***such as the conduct of the parties prior to the outbreak****."*

iii. The logic supporting this principle is also evident from the judgment dated 23.07.2024 of this Tribunal in Sasan Power Limited v. CERC [Appeal no. 116 of 2017], wherein it was held as below:

"*42. …. It would be totally unjustified to pass on the extra financial burden caused to the Appellant due to the said new two conditions in the revised EC,* ***on to the procurers and ultimately to the consumers when the revised EC is the outcome of the actions of the Appellant itself****…."*

(b) Even assuming (without accepting) all periods of delay prior to 01.01.2014 are condoned by the Commission in favour of Respondent No. 2 in the Impugned Order, it is evident that Respondent No. 2 was still in delay prior to 01.01.2014 (i.e., date of change in law of land acquisition). As such Respondent No. 2 cannot be granted condonation of delay of 648 days on account of change in law of land acquisition. The same is evident from the table below which demonstrates that Respondent No. 2 should have achieved COD much prior to 01.01.2014, even if the delays condoned by the CERC prior to 01.01.2014 are accepted.

Date	**Unit-I**	**Unit-II**
SCOD	12.10.2012	12.01.2013
Revised SCOD after accounting for Delay of 301 days as allowed by the	09.08.2013	09.11.2013

Commission (i.e., 234 days on account of ban on mining lease in Bihar and 67 days on account of heavy rainfall)		
2013 Act came into effect	01.01.2014	

(c) It is evident that even accepting the CERC's findings in respect of all delays condoned by it prior to 01.01.2014 (the date of change in law)- Respondent No. 2 was still already in delay as on 09.08.2013 (for Unit-1), and 09.11.2013 (for Unit-2). In view of the above, Respondent No. 2 cannot claim the benefit of change in law resulting from its own undisputed delay as on 09.08.2013 and 09.11.2013 for the 2 units respectively. Pertinently, no cross appeal has been filed by Respondent No. 2 against the impugned order. Therefore, Respondent No. 2 has accepted the findings in the Impugned Order – which clearly demonstrates that, even after condonation of certain periods of delay, R2 was already in delay several months prior to 01.01.2014

Re: R2 has not demonstrated any impact of alleged delay in land acquisition (for makeup water corridor) on the commissioning of Units 1 and 2

(d) Undisputedly, Respondent No. 2 had eventually declared COD of the units without even waiting for land acquisition and using makeup water

system from MTPS Stage-I system. In fact, the Impugned Order categorically notes that KBUNL had synchronised the units of the Plant, with help of Stage-I water even though the acquisition of land was not completed. Therefore, the land acquisition issues (if any) did not impact the commissioning of the project.

(e) Pertinently, the CERC in the Impugned Order has itself held that prior to 01.01.2014 (change in law of land acquisition) and until 31.03.2015, Respondent No. 2 was not impacted by any delay on account of any (alleged) land acquisition issues. The relevant extract of the Impugned Order is reproduced hereinbelow:

"*time overrun due to "Policy change in specification of wagon tippler by railways (RDSO) was the prime reason of delay in synchronization of Unit-I which finally occurred on 31.3.2015...* ***Thus non-acquisition of land has not played any role in delay of synchronization of Unit-I on 31.3.2015 as the water of stage-I was used for synchronization***".

(f) In any event, it is submitted that under the 2014 Tariff Regulations, 'land acquisition issues' have been classified as 'controllable factors' under Regulation 12(1)(a) of 2014 Tariff Regulations and not a change in law as contended by Respondent No. 2.

61. As a result, the condonation of delay of 648 days on account of change of law of land acquisition is not sustainable since: (i) Respondent No. 2 was already

in delay (even accepting other delays condoned by the Commission in the Impugned Order) prior to the alleged change in law (i.e. on 01.01.2014); and (ii) Respondent No. 2 has, in any event, been unable to demonstrate how its activities were impacted by the alleged land acquisition issues, since it was admittedly able to commission both units without waiting for completion of land acquisition (i.e. by using the makeup water corridor of Phase 1).

II. Delay on account of ban on mining lease in Bihar

62. Respondent No. 2 has contended that the notification dated 26.02.2010 issued by the Government of Bihar ("Notification") banned mining in all parts of Bihar thereby adversely affecting supply of stone aggregates to the project site which caused a delay of 234 days. In this regard, CERC has *inter alia* failed to consider the following:

(a) The Notification does not impose a complete ban on the mining or quarrying of stone aggregates but simply regulates the same. While CERC has recorded the submission of the Appellants that the said notification allowed for mining under existing leases and for certain uses, it has failed to deliver any finding with respect to the same.

(b) The impact of the notification regulating mining lease could have been taken into consideration at the time of granting investment approval for the project on 06.03.2010 (which was subsequent to the Notification coming into effect) wherein the SCOD of both units of the Plant was

specifically determined by the board of directors of Respondent No. 2. It is trite that the time frame for completion of any project is entirely within the domain of the generating company. In this regard, this Tribunal has in PGCIL v. CERC, 2015 SCC OnLine APTEL 5 (Para 9.3) held as below:

> "*9.3 .....It appears to be a case of improper planning and improper management and timely progress at different stages of the Assets on the part of the Appellant/petitioner… If the 48 months period for completion or commissioning of the assets/project was not sufficient**, it could have been considered at the time of granting investment approval**.*"

(c) Further, the Notification does not amount to either a 'change in law' or 'force majeure' event as it came into effect prior to commencement of the project.

(d) In any event, Respondent No. 2 was admittedly able to procure stone aggregates from Sheikhpura and Nawada for the initial period of the project, and from Pakhur thereafter despite the aforesaid notification on regulation on stone quarrying being in force since 04.02.2010. This in itself shows that it was not impossible for Respondent No. 2 to obtain the aggregates from alternate sources and the delay was solely on account of improper planning.

(e) Additionally, no reliance can be placed on the judgment of this tribunal in Appeal No. 61 of 2020 relied on by Respondent No. 2 as the investment approval in the said case was granted prior to the notification of the ban.

63. In view of the above, the Appellants (and consequently the consumers of the State of Bihar) cannot be made to suffer for Respondent No. 2's failure to appropriately plan the project.

Re: Heavy Rainfall

Re: Dharna pradarshan

64. In relation to the aforesaid heads, the submissions made in the Written Submissions dated 16.12.2024 filed by the Appellants are reiterated and not repeated herein for the sake of brevity.

65. In view of the above, it is humbly submitted that the Impugned Order is erroneous in law and in fact and is accordingly liable to be set aside.

Revised Written Submissions of the Respondent No. 2, Kanti Bijlee Utpadan Nigam Limited (Now NTPC Limited), dated 18.03.2025

66. The present appeal, filed by Bihar State Power Holding Company Limited, challenges the Central Electricity Regulatory Commission's order dated 29.04.2019 in Petition No. 74/GT/2017. The matter concerns tariff determination for the Muzaffarpur Thermal Power Station, Stage-II. The project was

implemented by Kanti Bijlee Utpadan Nigam Limited (KBUNL), which was subsequently merged into NTPC Limited on 26.08.2022.

67. The appeal primarily contests the CERC's condonation of 948 days of time overrun and the resultant cost overrun permitted in favor of KBUNL. The Appellant has challenged the Central Commission's findings on three specific grounds for time overrun:

(a) a ban on mining lease in Bihar (234 days),
(b) heavy rainfall (67 days), and
(c) issues arising from the change in land acquisition law (648 days).

68. However, during the oral hearing, arguments were restricted to the mining lease ban and the change in land acquisition law. The Appellant also cited new judgments and made further submissions, prompting these updated written submissions. The 31-day delay due to a labour strike was considered separately by the CERC and treated as subsumed under other delay factors.

69. Overall, while considering the time overrun, the Central Commission has followed the principles laid down by this Tribunal in its Judgement dated 27.04.2011 in Appeal No. 72 of 2010, ***Maharashtra State Power Generation Co. Ltd. v. Maharashtra Electricity Regulatory Commission & Ors***. at para 7.4 of the Judgement, this Tribunal has enunciated the various principles to be considered for condonation of time overrun which is as follows:

"7.4. The delay in execution of a generating project could occur due to following reasons:

i) due to factors entirely attributable to the generating company, e.g., imprudence in selecting the contractors/suppliers and in executing contractual agreements including terms and conditions of the contracts, delay in award of contracts, delay in providing inputs like making land available to the contractors, delay in payments to contractors/suppliers as per the terms of contract, mismanagement of finances, slackness in project management like improper co-ordination between the various contractors, etc.

ii) due to factors beyond the control of the generating company e.g. delay caused due to force majeure like natural calamity or any other reasons which clearly establish, beyond any doubt, that there has been no imprudence on the part of the generating company in executing the project.

iii) situation not covered by (i) & (ii) above.

In our opinion in the first case the entire cost due to time over run has to be borne by the generating company. However, the Liquidated Damages (LDs) and insurance proceeds on account of delay, if any, received by the generating company could be retained by the generating company. In the second case the generating company

could be given benefit of the additional cost incurred due to time over-run. However, the consumers should get full benefit of the LDs recovered from the contractors/suppliers of the generating company and the insurance proceeds, if any, to reduce the capital cost. In the third case the additional cost due to time overrun including the LDs and insurance proceeds could be shared between the generating company and the consumer. It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions of the contract between the generating company and its contractors/suppliers. If the time schedule is taken as per the terms of the contract, this may result in imprudent time schedule not in accordance with good industry practices."

70. Prudence check of capital cost is the prerogative of the Central Commission. In this regard, Regulation 9 (2) of the Tariff Regulations, 2014 is as follows:

*"**9. Capital Cost:***

(1) The Capital cost as determined by the Commission after prudence check in accordance with this regulation shall form the basis of determination of tariff for existing and new projects.

(2) The Capital Cost of a new project shall include the following:

(a) the expenditure incurred or projected to be incurred up to the date of commercial operation of the project;

(b) Interest during construction and financing charges, on the loans (i) being equal to 70% of the funds deployed, in the event of the

actual equity in excess of 30% of the funds deployed, by treating the excess equity as normative loan, or (ii) being equal to the actual amount of loan in the event of the actual equity less than 30% of the funds deployed;

["(bi) Any gain or loss on account of foreign exchange risk variation pertaining to the loan amount availed during the construction period shall form part of the capital cost."]5

(c) Increase in cost in contract packages as approved by the Commission;

(d) Interest during construction and incidental expenditure during construction as computed in accordance with Regulation 11 of these regulations;

(e) capitalised Initial spares subject to the ceiling rates specified in Regulation 13 of these regulations;

(f) expenditure on account of additional capitalization and de-capitalisation determined in accordance with Regulation 14 of these regulations;

(g) adjustment of revenue due to sale of infirm power in excess of fuel cost prior to the COD as specified under Regulation 18 of these regulations; and

(h) adjustment of any revenue earned by the transmission licensee by using the assets before COD."

71. With regard to the principles of time and cost overrun, the Appellant is heavily relying on Regulation 11 of the Tariff Regulations, 2014. However,

Regulation 11 and 12 have to be read together to disclose the mind of the Central Commission when it comes to consideration of time overrun. The said Regulations are as follows:

> *"**11. Interest during construction (IDC), Incidental Expenditure during Construction (IEDC)***
>
> ***(A) Interest during Construction (IDC):***
>
> *(1) Interest during construction shall be computed corresponding to the loan from the date of infusion of debt fund, and after taking into account the prudent phasing of funds up to SCOD.*
>
> *(2) In case of additional costs on account of IDC due to delay in achieving the SCOD, the generating company or the transmission licensee as the case may be, shall be required to furnish detailed justifications with supporting documents for such delay including prudent phasing of funds:*
>
> *Provided that if the delay is not attributable to the generating company or the transmission licensee as the case may be, and is due to uncontrollable factors as specified in Regulation 12 of these regulations, IDC may be allowed after due prudence check:*

Provided further that only IDC on actual loan may be allowed beyond the SCOD to the extent, the delay is found beyond the control of generating company or the transmission licensee, as the case may be, after due prudence and taking into account prudent phasing of funds.

(B) Incidental Expenditure during Construction (IEDC):

(1) Incidental expenditure during construction shall be computed from the zero date and after taking into account pre-operative expenses up to SCOD: Provided that any revenue earned during construction period up to SCOD on account of interest on deposits or advances, or any other receipts may be taken into account for reduction in incidental expenditure during construction.

(2) In case of additional costs on account of IEDC due to delay in achieving the SCOD, the generating company or the transmission licensee as the case may be, shall be required to furnish detailed justification with supporting documents for such delay including the details of incidental expenditure during the period of delay and liquidated damages recovered or recoverable corresponding to the delay:

Provided that if the delay is not attributable to the generating company or the transmission licensee, as the case may be, and is due to

uncontrollable factors as specified in regulation 12, IEDC may be allowed after due prudence check: Provided further that where the delay is attributable to an agency or contractor or supplier engaged by the generating company or the transmission licensee, the liquidated damages recovered from such agency or contractor or supplier shall be taken into account for computation of capital cost.

(3) In case the time over-run beyond SCOD is not admissible after due prudence, the increase of capital cost on account of cost variation corresponding to the period of time over run may be excluded from capitalization irrespective of price variation provisions in the contracts with supplier or contractor of the generating company or the transmission licensee.

12. Controllable and Uncontrollable factors:

The following shall be considered as controllable and uncontrollable factors leading to cost escalation impacting Contract Prices, IDC and IEDC of the project :

(1) The "controllable factors" shall include but shall not be limited to the following:

(a) Variations in capital expenditure on account of time and/or cost over-runs on account of land acquisition issues;

(b) Efficiency in the implementation of the project not involving approved change in scope of such project, change in statutory levies or force majeure events; and

(c) Delay in execution of the project on account of contractor, supplier or agency of the generating company or transmission licensee.

(2) The "uncontrollable factors" shall include but shall not be limited to the following:

(i) Force Majeure events; and

(ii) Change in law.

Provided that no additional impact of time overrun or cost over-run shall be allowed on account of non-commissioning of the generating station or associated transmission system by SCOD, as the same should be recovered through Implementation Agreement between the generating company and the transmission licensee:

Provided further that if the generating station is not commissioned on the SCOD of the associated transmission system, the generating company shall bear the IDC [and IEDC] 6 or transmission charges if the transmission system is declared under commercial operation by the Commission in accordance with second proviso of Clause 3 of

Regulation 4 of these regulations till the generating station is commissioned: Provided also that if the transmission system is not commissioned on SCOD of the generating station, the transmission licensee shall arrange the evacuation from the generating station at its own arrangement and cost till the associated transmission system is commissioned."

72. Even though the Appellant did not argue this issue, it has based its appeal on this incorrect premise i.e., under Regulation 12, the factors of land acquisition etc., are to be considered as controllable and ought to be considered as an absolute rule and irrespective of the factual situation and evidence produced by the project proponent is erroneous.

73. However, it is submitted that Regulation 12(1) which deals with controllable factors has to be read along with Regulation 12 (2) which defines uncontrollable factors to include *Force Majeure* events and *change in law* events. The Statement of Reasons ('SOR') annexed clearly lead to the position that delays in land acquisition that arise out of uncontrollable factors can be considered on a case-to-case basis by the Central Commission while conducting prudence check for either a generating company or a transmission licensee. Hence viewed from either the lens of the Judgement dated 27.04.2011 or the provisions of the Tariff Regulations, 2014 or the SoR, the Central Commission has correctly appreciated and dealt with the time overrun on account of the factors pleaded and substantiated by KBUNL.

74. The issue specific submissions on the three issues raised by the Appellant

are as under:

RE: BAN ON MINING LEASE IN BIHAR

75. Before dealing with the contentions of the Appellant, it is submitted that a similar issue with regard to delay in project execution had come up before this Tribunal in the context of the Unchahar Stage-IV generating station of NTPC. This Tribunal by judgement dated 22.09.2022 in Appeal No. 61 of 2020 not only held that the non-availability of sand and moorum which are nothing but aggregates used in civil construction is a reason beyond the control of the Generator but also awarded the condonation of time which occurred due to the cascading effect of the above.

> *"……..…..*
>
> *10. We agree with the appellant that the Commission has failed to appreciate the prevalent circumstances in proper light. The moratorium or embargo imposed against mining of sand etc., as indeed excessive rainfall seen by the region have been treated as force majeure events but it cannot be said that the effect thereof would have impaired the development activities only to the extent for the period for which time overrun has been allowed. The cascading effect of such events cannot be ignored. As was explained before the Commission on the basis of documents and photographs in support, the rainfall and flooding had rendered the overall movement of heavy vehicles virtually impossible. The safety, security and*

reliability standards obliged the developer not to rush into achieving the COD as that would have put human life and public property to undue risk. In these circumstances, the reasoning given by the Central Commission for denial of the condonation of time overrun to the extent of 157 days does not appeal to us.

……."

76. The Central Commission has only allowed a period of 234 days for which period there was a moratorium, or an embargo imposed against mining of sand. In the present case, it is not the question of an impossibility which had to be proved on a per day basis by KBUNL. The Bihar Minor Mineral Concession (Amendment) Rules, 2010 had held that no mining lease for stones would be granted and only the existing leases granted would subsist for the period of grant without being renewed. So irrespective of the agency mining, it was not possible to conduct the mining itself.

77. It is also incorrect on the part of the Appellant to state that every notification or amendment to the Bihar Minor Mineral Concession Rules, 1972 ought to have been known and factored in while the Investment Approval for the project was obtained. The close proximity of the investment approval and the date of notification of Rules cannot be used to impute any motive to delay the project on KBUNL. KBUNL was not interested in delaying the project even by one day.

78. This issue has been dealt with in Para 19 of the Impugned Order as under:

"19. The above rules were notified by the Govt. of Bihar on 26.2.2010. The Investment Approval for the project was obtained by the petitioner on 6.3.2010, that is, after a gap of only 10 days. As such, we agree with the contention of the petitioner that it was difficult to pre-judge the actual impact of amendment on stone aggregate availability. Further considering the fact that there was a huge demand of aggregates on alternate source of supply i.e. Pakur district due to massive infrastructure works such as construction of National Highway and the fact that the alternate source of aggregate was further away by 244 Kms. as compared to original source i.e. Sheikpura and Nawada, we are of the considered view that the said factors leading to the delay of around 8 months (234 days) were beyond the control of the petitioner for which Petitioner cannot be made responsible. Accordingly, the prayer of the petitioner to condone the time overrun of 234 days in the COD of the project on this count is allowed"

79. The decision of this Tribunal in Power Grid Corporation of India Limited v. Central Electricity Regulatory Commission, 2015 SCC OnLine APTEL 131 has no application since the delay in the case of PGCIL was on account of nonfulfillment of contractual obligations by the supplier / contractor of PGCIL.

80. On the issue of not giving notice in terms of Article 8 of the PPA, it is submitted that while executing the project, several challenges are faced by a generating company. It is not that each time a force majeure notice is issued by it

to the beneficiaries. *Force Majeure* under the PPA is provided for in the following terms:

> ***"8. FORCE MAJEURE***
>
> *either party shall be liable for any chains for any loss or damage arising that out of failure to carry and be terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out,, forces of nature, accident, açt of God or any other such reasons as beyond the control of concerned parts. Any party claiming the benefit of this clause shall reasonably satisfy the other party of the existence of such an event and give written notice within a reasonable time to the other party to this effect. (Generation/drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceases to exist."*

81. The invocation of a force majeure clause, as argued by the Appellants, pertains to excusal from power supply obligations, whereas the tariff determination process under CERC Regulations involves an assessment of project execution prudence, including capital cost, time and cost overrun, SCOD, and COD.

82. KBUNL completed the project despite difficulties and is seeking relief under the regulatory framework, not under contractual supply obligations. The notification dated 26.02.2010 imposed a near-complete mining ban across Bihar, with limited exceptions for existing leases and specific uses. It applied uniformly

to all entities sourcing stone aggregates.

83. Contrary to the Bihar Discoms' contention that the notification was merely regulatory, it constituted a blanket ban as per Section 2 of the Bihar Minor Mineral Concession (Amendment) Rules, 2010, as referenced in KBUNL's reply. The CERC correctly noted that KBUNL's investment approval was granted on 06.03.2010, only 10 days after the mining ban notification, making it impractical for KBUNL to fully assess its implications at that stage. The mining ban compelled KBUNL to shift its aggregate procurement from local sources like Sheikhpura (172 km) and Nawada (190 km) to Pakur in Jharkhand (434 km), significantly increasing transportation time.

84. Moreover, supply from Pakur was constrained due to concurrent demand from major infrastructure projects. The Appellant's attempt to distinguish CERC's earlier decisions in Petitions No. 197/GT/2017 and 192/GT/2017 is unconvincing, especially since this Tribunal, in the Unchahar case, has already recognized a similar mining ban as a valid ground for condonation of time overrun. Thus, the matter is no longer res integra.

RE: HEAVY RAINFALL (By way of abundant caution though it was not argued by the Appellant)

85. The Appellant has challenged a period of 67 days which has been condoned by the Central Commission on account of high rainfall as being contrary to Regulation 3 (25) of the Tariff Regulations, 2014:

*"(25) **'Force Majeure'** for the purpose of these regulations means the event or circumstance or combination of events or circumstances including those stated below which partly or fully prevents the generating company or transmission licensee to complete the project within the time specified in the Investment Approval, and only if such events or circumstances are not within the control the generating company or transmission licensee and could not have been avoided, had the generating company or transmission licensee taken reasonable care or complied with prudent utility practices:*

a) Act of God including lightning, drought, fire and explosion, earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, geological surprises, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred years; or

(b) Any act of war, invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

(c) Industry wide strikes and labour disturbances having a nationwide impact in India;"

86. The Appellant's contention that delay due to rainfall must be justified only through 100-year statistical data is incorrect. KBUNL had highlighted that Muzaffarpur District experienced 424.6 mm of rainfall in September 2011 more than double the average of 202.20 mm resulting in site flooding and waterlogging.

Since the issue raised was actual site flooding and not just a contractual force majeure event, it was sufficient to show that the situation was beyond KBUNL's control.

87. Long-term rainfall data was adequate to substantiate this. KBUNL submitted rainfall deviation data over 50 years showing a 110% increase above the long-term average. The 100-year benchmark cited in the Tariff Regulations applies specifically to "adverse weather conditions," not to flooding. Flooding and submergence of equipment, by themselves, constitute force majeure. Insisting on a 100-year rainfall history for each flood event would lead to absurd results, contrary to settled principles of statutory interpretation.

88. Heavy rainfall as a justifiable ground for time overrun has been upheld by this Tribunal in Appeal No. 61 of 2020 (Unchahar Case). There too, only two years of rainfall data (from 01.06.2016 to 31.10.2018) was considered sufficient, further supporting KBUNL's claim.

CHANGE IN LAW LEADING TO DELAY IN LAND ACQUISITION

89. The Appellant's claim that Regulation 12(1)(a) of the 2014 Tariff Regulations absolutely bars the Central Commission from considering any land acquisition-related delays is incorrect. Regulation 12(1) must be read alongside Sub-Regulation (2) and the Statement of Reasons (SoR), which clarify that land acquisition delays arising from force majeure or change in law can be assessed by the Commission on a case-by-case basis. The Commission rightly interpreted

Regulations 12(1) and 12(2) together, consistent with the intent of the SoR, which acknowledged that delays caused by uncontrollable land acquisition issues were within the Commission's adjudicatory scope.

90. Thus, it is incorrect to allege that the Commission exceeded its mandate. The fact that the 2013 Land Acquisition Act came into effect after the SCOD of Unit-I (12.01.2013) is not determinative. The delay in achieving SCOD was caused by multiple overlapping factors, not land acquisition alone, and the Commission was right in examining the cumulative effect.

91. It is preposterous to contend that the state legislation dealing with land acquisition in 2013 is not a change in law. The Appellant is breaking up each and every event ignoring that land acquisition is not simply paying whatever is demanded by the landowners and getting possession immediately. If such an approach is adopted by the generating companies the very same beneficiaries will blame the generating company of being imprudent in incurring additional expenditure of project cost. KBUNL had clearly demonstrated each of the steps taken by it on account of land acquisition before the Central Commission in the following table:

DATE	PARTICULARS	PAGE NO
2011	Initially it was envisaged that Land for make-up water corridor to be acquired through The Bihar Underground Pipelines (Acquisition of Right of	@ 197

	User in Land) Act, 2011. Accordingly, proposal was submitted to district authorities for Land acquisition.	
September 2012 to February-2013	Thereafter, Govt. of Bihar completed Land Notification and its declaration.	
February 2013 and March 2013	Subsequently, camps were organized for disbursement of compensation in February 2013 and March 2013. However, a few tenants received the payment and most of them boycotted the payment and raised demands of acquiring land under new Land Acquisition Act 2013, which had to come into effect from 01.01.2014 and also demanded payment at residential rate @ Rs. 20 Lakh per Kattha etc.	
28.10.2013	Meeting was held under the Chairmanship of Additional Collector (Muzaffarpur) and in presence of District Land Acquisition Officer (DLAO), to sort out the issues and for early acquisition of the land. In the meeting, villagers reiterated that they will not give consent for acquisition of land under ROU Act and insisted	@ Page 209

	that land must be acquired under the LA Act and rate should be residential @ Rs. 20 Lakh per Kattha.	
12.07.2014	In the meeting, KBUNL placed its apprehensions that if mode of land acquisition changed then it will halt project completion and that the scheduled target will not be achieved. The meeting remained inconclusive and Additional Collector requested KBUNL representative to discuss the matter with its higher authorities and to decide accordingly. First meeting of the task force was held and it was decided by the task force that: As the new Land Acquisition Act 2013 has come into effect from 01-01-2014 and in view of non-availability of Land Acquisition Policy by Bihar Govt. for acquisition of land under new Land Acquisition Act 2013, the acquisition of land may take longer time hence land acquisition will not be done through Land Acquisition Act 2013. It was also decided that as the rate of land notified under ROU Act has already been decided hence 100% payment (whereas ROU Act provide for 20% compensation) at the decided rate shall be made and land shall be directly purchased from respective landowners.	@ Page 211

08.08.2014	During the meeting with the landowners, the above view were put forth by the task force that Land Notified and Declared under ROU Act shall be directly purchased from the landowners. It was also decided, on insistence of landowners that rate of land to be decided as per New Notification and shall be conveyed to landowners in the next meeting. During the meeting held on 25-08-2014 with the landowners, landowners demanded that if KBUNL wants to purchase land then minimum rate should be Rs. 20 Lakh per Kattha. Whereas DAO mentioned that rate of land shall be paid as per BHUGTAN BHEETH and as per new Notification the rate of land is Rs. 4.5 Lakh per Kattha.	@ Page 213
	On this, landowners insisted that they will not sell the land at the above rate and insisted for purchase of land at Rs. 20 Lakh per Kattha. Subsequently a meeting of task force was held on 30-08-2014 and it was decided that the exorbitant rate being demanded by land owners is not justified and that in view of non-agreement on the rate of land it may be acquired under the new Land Acquisition Act. KBUNL consistently and sincerely followed up with District	

	Administration and higher authorities of BSPGCL/BSPHCL for early decision on the modalities of the land acquisition.	
11.12.2015	DLAO Muzaffarpur, vide its letter, intimated that there are two policy existing for acquisition of Land (i) Perpetual Lease Pólicy, 2014 and Right to Fair Compensation and (il) Bihar Transparency in Land Acquisition, Rehabilitation and Resettlement Manual, 2014. It was also requested by DLAO to opt one policy, out of two mentioned above, under which KBUNL would like to acquire the land.	@ Page 219
21.03.2016	KBUNL vide its letter intimated its concurrence for acquisition of land under Perpetual Lease Policy, 2014. Further, proposal for this were submitted to District Magistrate (Muzaffarpur) on 01-04-2016. Under the Perpetual Lease Policy, 2014, the District Administration/ Govt. shall first provide details of landowners, consent of the landowners and type/rate of land to KBUNL.	@ Page 221
	Thereafter, KBUNL acquired the land by disbursing payments to willing landowners. As the land could not be acquired in time and make-up water pipeline could not be laid, the declaration of COD was delayed	

92. The Appellant's reliance on the judgment in Appeal No. 281 of 2014 (PGCIL case) is misplaced, as that case involved a delay due to the Appellant's failure to select a competent contractor, which is not relevant here. The Appellant's argument that the delay from the new land acquisition law cannot be considered since the project was already delayed is flawed. Delays in large infrastructure projects often result from multiple overlapping factors, not sequential or isolated causes.

93. Hence, the Commission was right in considering the land acquisition law as an additional valid factor contributing to the delay. The Appellant also cited Halliburton Offshore Services v. Vedanta Ltd., where parties claiming force majeure under COVID-19 had to prove its effect on performance.

94. However, that standard does not apply here. KBUNL is not seeking a contractual exemption, but rather demonstrating that certain delays were beyond its control, which is sufficient under tariff determination proceedings. There is no substance in the Appeal.

95. The CERC has consistently allowed time overruns on similar grounds during the 2014-19 tariff period. The Appellant has accepted similar decisions in other cases, making its challenge in this case selective and untenable.

Analysis and Conclusion

96. After hearing the Learned Counsel for the Appellant and the Learned Counsel for the Respondents at length and carefully considering their respective submissions, we have also examined the written pleadings and relevant material on record. Upon due consideration of the arguments advanced and the documents placed before us, the following three issues arise for determination in this Appeal, based on the pleadings of the parties during oral arguments and Written Submissions:

1. ***Whether the CERC was justified in condoning a delay of 234 days on account of the ban on mining lease in Bihar, treating it as a force majeure event/change in law?***

2. ***Whether the CERC rightly condoned 67 days of delay due to heavy rainfall, treating it as a force majeure event under the 2014 Tariff Regulations?***

3. ***Whether the CERC erred in condoning 648 days of delay on account of land acquisition difficulties, treating the enactment of the 2013 Land Acquisition Act and resulting resistance from landowners as a change in law/uncontrollable factor?***

97. The Appellant herein has prayed for the following:

"(i) Set aside impugned order dated 29.04.2019 passed by the Ld. CERC in 74/GT/2017 and the corrigendum dated 11.06.2019 to the extent as prayed for in the present Appeal; and

(ii) Pass such other and any further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case."

Issue No. 1: Whether the CERC was justified in condoning a delay of 234 days on account of the ban on mining lease in Bihar, treating it as a force majeure event/change in law?

98. The Appellant has strongly contended that the delay of 234 days, condoned by the Central Electricity Regulatory Commission on the ground of a "ban on mining lease in Bihar," is fundamentally erroneous, misconceived, and contrary to the regulatory framework as well as the factual record.

99. The Appellant points out that the notification relied upon by the Respondent No. 2 (KBUNL) to substantiate its plea of force majeure or change in law was a notification dated 04.02.2010 and not 26.02.2010, as wrongly recorded by the CERC in the Impugned Order. The Appellant highlights that the Investment Approval for the project was granted on 06.03.2010, which is subsequent to the issuance of the said notification.

100. Accordingly, the Appellant asserts that the risks and consequences arising from the said regulatory measure were well within the knowledge of the generating

company at the time of finalizing the project timelines and SCODs. Therefore, such a delay could not be later characterized as an uncontrollable factor or force majeure.

101. It was further submitted that the notification in question did not impose a blanket ban on mining activities but was merely a regulatory measure concerning the issuance of new mining leases in the State of Bihar. Existing leases, subject to conditions and clearances, were permitted to continue operations.

102. The Appellant also points out that the Respondent No. 2 was able to procure stone aggregates from Sheikhpura and Nawada, both within Bihar, and subsequently from Pakur (Jharkhand), indicating that alternate procurement options were available and utilized. This, according to the Appellant, is a clear indicator that there was no total impossibility or external compulsion that obstructed project progress.

103. The Appellant further argues that the burden to prove that a delay was caused due to an uncontrollable factor, or that it qualified as force majeure under Regulation 12(2), lies squarely upon the generating company. However, the Respondent No. 2 has failed to demonstrate:

(i) the efforts made to mitigate the impact of the alleged restriction,
(ii) any contractual constraints that rendered alternate sourcing impossible, or
(iii) why it could not rework its schedule, knowing that the regulation was already in force prior to investment approval.

104. It is the Appellant's case that imprudent planning, avoidable delays, or incorrect project assumptions cannot be passed on to the beneficiaries.

105. The Respondent No. 2, Kanti Bijlee Utpadan Nigam Limited (KBUNL), in its defence of the Commission's condonation of the 234-day delay, contends that the project suffered due to an external and unforeseeable regulatory development, namely, a ban imposed by the Government of Bihar on mining activities through amendments to the Bihar Minor Mineral Concession Rules.

106. KBUNL argues that this development severely affected the availability of stone aggregates, which are a critical construction material for thermal power projects, thereby disrupting the overall construction schedule.

107. KBUNL asserts that this delay was clearly beyond its control, as the procurement of minor minerals, such as aggregates, was not within its exclusive power once the State Government prohibited mining and the issuance of new leases.

108. It further submits that though it eventually managed to procure the required materials from other locations such as Pakur (Jharkhand), this resulted in logistical challenges, cost increases, and delays, including issues with transportation, handling, and sequencing of construction activity. KBUNL argues that the mere fact that an alternative procurement was eventually arranged does not nullify the occurrence of a force majeure event; it only demonstrates that mitigation efforts

were indeed made. The delay caused by the shifting of sourcing operations and resulting disruption, according to KBUNL, is part of the larger effect of the ban.

109. KBUNL also relies on the decision of this Tribunal in the Unchahar case (Appeal No. 61 of 2020), where it was held that state-level bans or embargoes on materials essential to project construction may qualify as uncontrollable events. According to the Respondent, the circumstances in the present case are on stronger footing since the restrictions on mining in Bihar had a far-reaching impact on material procurement across the region. It asserts that the Commission has considered all the evidence carefully and has rightly exercised its jurisdiction under Regulation 12(2) in condoning the delay of 234 days.

110. It is important to note the relevant paragraphs from the Impugned Order, wherein the Central Commission condoned the delay of 234 days, as under:

> *"19. The above rules were notified by the Govt. of Bihar on 26.2.2010. The Investment Approval for the project was obtained by the petitioner on 6.3.2010, that is, after a gap of only 10 days. As such, we agree with the contention of the petitioner that it was difficult to pre-judge the actual impact of amendment on stone aggregate availability. Further considering the fact that there was a huge demand of aggregates on alternate source of supply i.e. Pakur district due to massive infrastructure works such as construction of National Highway and the fact that the alternate source of aggregate was further away by 244 Kms. as compared to original source i.e.*

Sheikpura and Nawada, we are of the considered view that the said factors leading to the delay of around 8 months (234 days) were beyond the control of the petitioner for which Petitioner cannot be made responsible. Accordingly, the prayer of the petitioner to condone the time overrun of 234 days in the COD of the project on this count is allowed."

111. At the outset, we note that the central basis for condoning the delay of 234 days in the Impugned Order is the reliance placed by the Commission on a notification dated 26.02.2010, which, according to the Appellant and borne out by the documents placed on record, was published in the Extraordinary Gazette on 26.02.2010, making it effective with "immediate effect".

112. However, such a factual position was not considered by the Central Commission. This factual inaccuracy in the Impugned Order assumes critical significance because the Investment Approval for the project was granted only on 06.03.2010, subsequent to the issuance of the said notification. Consequently, KBUNL was aware or ought to have been aware of the regulatory landscape and potential consequences while finalizing its construction timeline and SCOD.

113. We also note that the Central Commission declared the gap of 10 days as insufficient for ascertaining the difficulty faced by the KBUNL.

114. We decline to accept such a decision as the Central Commission has, after observing that the gap of 10 days is insufficient, has condoned a delay of 234 days

without carrying out any prudent check of why it is 234 days because of the said notification.

115. The Central Commission declared such notification as affecting the availability of stone aggregate beyond the control of the KBUNL.

116. However, it is brought to our notice that the said notification was issued on 04.02.2010. However, from the records, it is seen that the same was published in the official Extraordinary Gazette on 26.02.2010, making it effective from the date of notification only.

117. From the submissions of both parties, it is evident that the notification did not impose a complete and universal prohibition on mining activities in the State of Bihar. Rather, it regulated the issuance of fresh mining leases and did not terminate operations under valid existing leases. There is no assertion by KBUNL that procurement from existing sources within Bihar was legally impossible. In fact, as acknowledged in its own submissions, KBUNL was able to source materials from Sheikhpura and Nawada within the State of Bihar, and later from Pakur in the State of Jharkhand. These facts indicate that alternate procurement routes were available and were eventually utilized.

118. In this context, the Tribunal finds considerable force in the Appellant's submission that the delay cannot be characterized as arising from a force majeure event. The existence of alternate sources of procurement and the absence of absolute regulatory prohibition on aggregate procurement contradict the assertion

of external compulsion or impossibility. Further, KBUNL has not placed on record any evidence of formal communication with the authorities, attempts to secure supply under old leases, or any contractual or legal constraint that made such procurement untenable.

119. Importantly, the standard set out in Regulation 12(2) of the 2014 Tariff Regulations is not mere difficulty or commercial inconvenience, but rather a demonstrable impossibility or absolute external bar that prevents timely execution.

120. It is not sufficient to show that delays occurred. The generator must show that such delays could not have been avoided with reasonable foresight and planning. In the present case, since the regulation was already in force at the time of investment approval, KBUNL was in a position to factor such delays into its SCOD projections. Its failure to do so reflects imprudent planning, which cannot be converted into a pass-through to beneficiaries.

121. We also note that KBUNL has heavily relied on the decision in the Unchahar case to justify the CERC's condonation. However, a careful perusal of the cited precedent shows that it involved a blanket ban on sand mining imposed through judicial orders and statutory interventions after the investment approval, thereby constituting a supervening event. In contrast, the present case involves a notification that pre-dated the project approval, and thus fails the test of supervening force majeure.

122. On the aspect of mitigation, we find that KBUNL's submissions are

generalized and lack documentary substantiation. While it has stated that alternative sourcing was done from Pakur and that there were logistical challenges, it has not provided project-specific records, contractual constraints, or correspondence that demonstrate a consistent and urgent attempt to resolve or mitigate the impact of the alleged disruption. Such evidentiary gaps make it difficult to accept the condonation of 234 days purely on the basis of a generalized claim of difficulty or externality.

123. In sum, the Tribunal finds that the delay of 234 days attributed to the mining lease restrictions did not meet the threshold required under Regulation 12(2). The notification was already in force prior to investment approval, alternate procurement was not barred, and no compelling evidence has been produced to show that the delay was unavoidable despite prudent planning and diligent mitigation.

124. Accordingly, this Tribunal holds that the delay of 234 days on account of the alleged ban on mining lease in Bihar was not justified for condonation under the 2014 Tariff Regulations. The finding of the Central Commission on this issue is accordingly set aside, and the said delay is held to be a controllable factor not eligible for pass-through.

<u>Issue No. 2:</u> Whether the CERC rightly condoned 67 days of delay due to heavy rainfall, treating it as a force majeure event under the 2014 Tariff Regulations?

125. The Appellant has contended that the condonation of 67 days of delay on account of heavy rainfall in the year 2011 by the Central Commission is contrary to the specific criteria laid down in the Tariff Regulations, 2014, and unsupported by adequate material. It is submitted that the definition of “force majeure” under Regulation 3(25) of the 2014 Regulations clearly includes “exceptionally adverse weather conditions” only when such conditions exceed the statistical measures over the last 100 years. The Appellant emphasizes that KBUNL, the Respondent No. 2, has failed to produce any data establishing that the rainfall in question met this threshold.

126. In particular, the Appellant submits that the rainfall figures relied upon by KBUNL pertain only to the year 2011 and a few subsequent years. Even the 50-year average rainfall data submitted is wholly insufficient to qualify as “exceptionally adverse weather.” The Appellant argues that even double or triple rainfall does not ipso facto constitute force majeure unless it satisfies the prescribed test. In other words, the law requires not a mere deviation but an exceptional deviation, evidenced over a sufficiently long statistical record, namely, 100 years, which is conspicuously absent in the present case.

127. Moreover, the Appellant points out that CERC has mechanically accepted the plea of the Respondent No. 2 without assessing whether the actual rainfall resulted in flooding or disruption to such an extent that it caused material delay to the project timeline. The reliance on rainfall being “higher than average” is legally untenable unless it is supported by concrete evidence of causality and compliance with the regulatory standard. It is the Appellant’s case that the interpretation

adopted by CERC is tantamount to substituting its own discretion in place of an objective statutory standard, and such an approach is impermissible in tariff adjudication.

128. In response, KBUNL has submitted that the rainfall experienced at the project site in September 2011 was not only unusually high, but also resulted in actual flooding, causing serious hindrance to construction works. The Respondent states that during that month, rainfall of 424.6 mm was recorded against a monthly average of 202.2 mm, amounting to an excess of over 110%. The rainfall persisted over several days, resulting in the submergence of key areas of the project site and impeding both movement and execution of civil works.

129. It is further submitted that even though the rainfall data relied upon spans only the last four to five years, the severity and consequences of the rain were such that it caused actual disruption of project activities, which in itself suffices for invoking Regulation 12(2). KBUNL argues that the definition under Regulation 3(25) includes not only “exceptionally adverse weather” based on statistical deviation, but also “flooding” as a separate ground. Therefore, the reference to “statistical measures over 100 years” is only applicable to “exceptionally adverse weather,” whereas actual flooding, even if based on proximate data, would independently qualify as force majeure.

130. KBUNL also draws support from the decision of this Tribunal in the case of Unchahar TPS (Appeal No. 61 of 2020), where the Tribunal accepted the impact of flooding on the basis of just two years’ rainfall data and actual site disruption.

The finding of the CERC, therefore, is not arbitrary or in violation of the Tariff Regulations and deserves to be upheld.

131. The Tribunal has carefully examined the rival submissions and the relevant provisions of the 2014 Tariff Regulations. In doing so, it has also considered the material referred to by both parties in their written submissions.

132. Regulation 3(25) of the 2014 Regulations defines “force majeure” to include, among other things, “flooding” and “exceptionally adverse weather conditions beyond the control of the generating company.” In this regard, it is essential to distinguish between the two expressions. While “exceptionally adverse weather” is subject to a strict evidentiary threshold, namely, statistical deviation exceeding the 100-year norm, the occurrence of “flooding” is treated as a separate and independent category under the same definition. Regulation 3(25) is quoted as under:

> *“ 'Force Majeure' for the purpose of these regulations means the event or circumstance or combination of events or circumstances including those stated below which partly or fully prevents the generating company or transmission licensee to complete the project within the time specified in the Investment Approval, and only if such events or circumstances are not within the control the generating company or transmission licensee and could not have been avoided, had the generating company or transmission licensee taken reasonable care or complied with prudent utility practices:*

(a)Act of God including lightning, drought, fire and explosion, earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, geological surprises, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred years; or

(b)Any act of war, invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

(c)Industry wide strikes and labour disturbances having a nationwide impact in India;

133. The Appellant has correctly pointed out that the rainfall data provided by the Respondent does not include a 100-year statistical series, which is the prescribed benchmark for establishing "exceptionally adverse weather." However, this criticism would be valid only if KBUNL were seeking to invoke that limb of the definition. Upon examining the submissions of the Respondent, it becomes clear that the condonation sought was on account of flooding caused by excessive rainfall, not merely the deviation from average precipitation. Therefore, the 100-year benchmark is not a mandatory prerequisite in the context of the claim advanced.

134. KBUNL has provided rainfall data showing that in September 2011, the project site experienced 424.6 mm of rainfall as against a monthly average of 202.2 mm, thus recording more than 110% excess rainfall. This quantum of rainfall, coupled with continued precipitation, led to waterlogging and site

inaccessibility until November 2011. These facts are undisputed and have been taken note of by the Commission in its Impugned Order.

135. The Tribunal finds that the actual occurrence of flooding, as distinct from general inconvenience due to rainfall, has been affirmatively demonstrated by the Respondent. There is no material brought on record by the Appellant to contradict the specific finding that the construction site was submerged and inaccessible for an extended duration. Moreover, KBUNL has indicated that the civil works and transport operations were temporarily suspended during this period due to site conditions.

136. The Appellant's reliance on the statistical threshold is understandable from a regulatory perspective. However, as clarified above, that criterion applies only to "exceptionally adverse weather" and not to "flooding," which is separately listed in the definition. The Tribunal is of the view that the regulatory text must be read disjunctively, allowing for distinct categories of force majeure to operate based on their own evidentiary standards. Requiring a 100-year statistical deviation for all weather-related disruptions would render the inclusion of "flooding" redundant, which cannot be the intent of the regulation.

137. As regards the precedent cited by the Respondent, i.e., the Unchahar TPS case, the Tribunal notes that it had indeed held that evidence of actual flooding, supported by short-term rainfall data, was sufficient to establish force majeure. The present case is qualitatively similar. The delay was not on account of a minor inconvenience or general weather fluctuation, but due to a disabling natural

occurrence that impaired the physical progress of the project.

138. Lastly, the Tribunal also notes that there is no allegation of imprudent scheduling or lack of mitigation in this specific context. The rainfall was sudden and excessive; the site became waterlogged, and construction activities had to be deferred. No evidence has been placed on record by the Appellant to demonstrate that the delay could have been avoided or minimized through alternative methods or advance planning.

139. In light of the above analysis, the Tribunal finds that the condonation of 67 days of delay on account of rainfall-induced flooding is justified under the applicable regulations. The findings of the Commission are neither perverse nor contrary to law, and hence, require no interference.

***Issue No. 3:* Whether the CERC erred in condoning 648 days of delay on account of land acquisition difficulties, treating the enactment of the 2013 Land Acquisition Act and resulting resistance from landowners as a change in law/uncontrollable factor?**

140. The Appellant has strongly opposed the condonation of 648 days of delay by the Central Commission on the ground of land acquisition difficulties allegedly triggered by the enactment of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. It is submitted that the said delay is clearly attributable to poor planning and execution by the Respondent No. 2, Kanti Bijlee Utpadan Nigam Limited (KBUNL), and does not

qualify for treatment as an uncontrollable factor under Regulation 12 of the Tariff Regulations, 2014.

141. The Appellant contends that Regulation 12(1)(a) of the 2014 Tariff Regulations clearly treats “land acquisition issues” as controllable factors, and hence any delay arising therefrom must be borne by the generating company. It is argued that KBUNL was well aware of the land requirements for the project, and the Scheduled COD (SCOD) had already been fixed at July 2013 (for Unit I) and September 2013 (for Unit II). Therefore, it was incumbent upon the Respondent to plan and secure land availability well in advance.

142. Importantly, the Appellant highlights that the 2013 Act came into force only on 01.01.2014, which was subsequent to the SCOD, and hence had no causal bearing on the delay, unless the Respondent had already defaulted on the original schedule. The Appellant asserts that the entire justification based on “change in law” collapses, since the new law became applicable only after KBUNL had already failed to complete land acquisition within the scheduled period. Accordingly, the delay is due to prior inaction, not a subsequent change in law.

143. Additionally, the Appellant points out that KBUNL was ultimately able to achieve COD of Unit I and Unit II even without complete land acquisition. In particular, despite the unavailability of land for the make-up water pipeline corridor, KBUNL proceeded by arranging alternate routes or temporary arrangements, thereby contradicting its own submission that such land was essential for commissioning. This, according to the Appellant, clearly proves that the delay was

not directly linked to the 2013 Act or the unavailability of land.

144. The Appellant also states that no credible evidence or documentation has been placed on record by KBUNL to demonstrate that any formal acquisition process was initiated and frustrated solely due to the enactment of the new legislation. There is no explanation as to why acquisition proceedings under the earlier legal framework were not completed on time, nor is there any record of negotiations, correspondence, or resistance by landowners that could be attributed exclusively to the change in law.

145. KBUNL has defended the CERC's condonation of 648 days of delay as being a justified and lawful exercise of regulatory discretion under Regulation 12(2). It is submitted that the land acquisition required for setting up essential project infrastructure, particularly the make-up water pipeline corridor, became untenably delayed due to socio-political resistance and withdrawal of consent by landowners, following the enactment of the 2013 Act.

146. The Respondent asserts that prior to the enactment of the new legislation, landowners had agreed to the voluntary sale of land, but once the 2013 Act came into force, they began insisting on compensation and benefits as per the newly prescribed framework. This led to a complete halt in the land acquisition process, as the earlier negotiated terms were rendered ineffective. KBUNL submits that this regime shift amounted to a "change in law" within the meaning of Regulation 12(2), and thus qualified as an uncontrollable factor justifying condonation of the resultant delay.

147. We disagree with the submissions of the Appellant regarding the failure of the KBUNL to place on record any credible evidence or documentation to demonstrate that any formal acquisition process was initiated, as a detailed chronology of events has been placed before us and not disputed by the Appellant, as under:

DATE	PARTICULARS
2011	Initially it was envisaged that Land for make-up water corridor to be acquired through The Bihar Underground Pipelines (Acquisition of Right of User in Land) Act, 2011. Accordingly, proposal was submitted to district authorities for Land acquisition.
September 2012 to February-2013	Thereafter, Govt. of Bihar completed Land Notification and its declaration.
February 2013 and March 2013	Subsequently, camps were organized for disbursement of compensation in February 2013 and March 2013.

	However, a few tenants received the payment and most of them boycotted the payment and raised demands of acquiring land under new Land Acquisition Act 2013, which had to come into effect from 01.01.2014 and also demanded payment at residential rate @ Rs. 20 Lakh per Kattha etc.
28.10.2013	Meeting was held under the Chairmanship of Additional Collector (Muzaffarpur) and in presence of District Land Acquisition Officer (DLAO), to sort out the issues and for early acquisition of the land. In the meeting, villagers reiterated that they will not give consent for acquisition of land under ROU Act and insisted that land must be acquired under the LA Act and rate should be residential @ Rs. 20 Lakh per Kattha.
12.07.2014	In the meeting, KBUNL placed its apprehensions that if mode of land acquisition changed then it will halt project completion and that the scheduled target will not be achieved. The meeting remained inconclusive and Additional Collector requested KBUNL representative to discuss the matter with its higher authorities and to decide accordingly. First meeting of the task

	force was held and it was decided by the task force that: As the new Land Acquisition Act 2013 has come into effect from 01-01-2014 and in view of non-availability of Land Acquisition Policy by Bihar Govt. for acquisition of land under new Land Acquisition Act 2013, the acquisition of land may take longer time hence land acquisition will not be done through Land Acquisition Act 2013. It was also decided that as the rate of land notified under ROU Act has already been decided hence 100% payment (whereas ROU Act provide for 20% compensation) at the decided rate shall be made and land shall be directly purchased from respective landowners.
08.08.2014	During the meeting with the landowners, the above view were put forth by the task force that Land Notified and Declared under ROU Act shall be directly purchased from the landowners. It was also decided, on insistence of landowners that rate of land to be decided as per New Notification and shall be conveyed to landowners in the next meeting. During the meeting held on 25-08-2014 with the landowners, landowners demanded that if KBUNL wants to purchase land then minimum rate should be Rs. 20 Lakh per

	Kattha. Whereas DAO mentioned that rate of land shall be paid as per BHUGTAN BHEETH and as per new Notification the rate of land is Rs. 4.5 Lakh per Kattha.
	On this, landowners insisted that they will not sell the land at the above rate and insisted for purchase of land at Rs. 20 Lakh per Kattha. Subsequently a meeting of task force was held on 30-08-2014 and it was decided that the exorbitant rate being demanded by land owners is not justified and that in view of non-agreement on the rate of land it may be acquired under the new Land Acquisition Act. KBUNL consistently and sincerely followed up with District Administration and higher authorities of BSPGCL/BSPHCL for early decision on the modalities of the land acquisition.
11.12.2015	DLAO Muzaffarpur, vide its letter, intimated that there are two policy existing for acquisition of Land (i) Perpetual Lease Pólicy, 2014 and Right to Fair Compensation and (il) Bihar Transparency in Land Acquisition, Rehabilitation and Resettlement Manual, 2014. It was also requested by DLAO to opt one policy, out of two

	mentioned above, under which KBUNL would like to acquire the land.
21.03.2016	KBUNL vide its letter intimated its concurrence for acquisition of land under Perpetual Lease Policy, 2014. Further, proposal for this were submitted to District Magistrate (Muzaffarpur) on 01-04-2016. Under the Perpetual Lease Policy, 2014, the District Administration/ Govt. shall first provide details of landowners, consent of the landowners and type/rate of land to KBUNL.
	Thereafter, KBUNL acquired the land by disbursing payments to willing landowners. As the land could not be acquired in time and make-up water pipeline could not be laid, the declaration of COD was delayed

148. It cannot be argued that the Land Acquisition Act, 2013, which took effect from 01.01.2014 (after the Scheduled Commercial Operation Date (SCOD) of Unit-I on 12.01.2013), is only one of several factors that caused project delays and not the sole one. Project completion was hindered by multiple concurrent issues, and all these factors should be considered by the regulator, rather than focusing entirely on land acquisition.

149. We agree with the submission of KBUNL that it is unreasonable to claim that

the state law on land acquisition, enacted in 2013, does not constitute a change in law. The Appellant seems to ignore that land acquisition is a complex process, not just a transaction of paying landowners and obtaining land instantly. Rushing the process could lead to accusations of financial imprudence by the power company.

150. KBUNL provided clear evidence to the Central Commission outlining the steps it took regarding land acquisition. The process began as early as 2011, with attempts to use the Bihar Underground Pipelines (Acquisition of Right of User in Land) Act. The district authorities initiated the land notification and declaration by early 2013. Attempts to pay compensation were largely unsuccessful as most landowners refused and instead demanded acquisition under the new 2013 Act and at much higher rates.

151. Subsequent meetings failed to resolve these issues, with landowners insisting on the application of the new law and higher compensation. With no progress, it was ultimately decided that the land would need to be purchased directly where possible at approved rates or otherwise acquired under the new Act, further prolonging the process. Multiple meetings and negotiations continued over several years, with the relevant authorities seeking clarity on which policy to apply. KBUNL finally opted for acquisition under the Perpetual Lease Policy, 2014, and proceeded accordingly.

152. Due to these complications, the critical pipeline work was delayed, pushing back the Commercial Operation Date.

153. The judgment dated 13.08.2015 in Appeal No. 281 of 2014 is inapplicable to the present case, as it was rendered in the context of PGCIL's failure to appoint a suitable contractor, which led to project delays.

154. The Appellant argued that the delay in project execution had already occurred before the enactment of the new land acquisition legislation and, therefore, the change in law cannot be cited as a force majeure event by KBUNL. However, it is submitted that project delays typically arise due to multiple overlapping causes, rather than sequential or isolated events. The occurrence of the land acquisition law change during an ongoing delay caused by other factors does not preclude the Central Commission from considering it as a valid and concurrent reason for the delay, provided it is otherwise legitimate.

155. KBUNL also relies on the Statement of Reasons (SOR) to the 2014 Tariff Regulations, wherein it is clarified that land acquisition issues will be considered on a case-to-case basis, especially in the context of changes in legislation. The Respondent argues that the Commission has examined the specific facts of the present case, the timeline of events, and the sequence of legal developments before deciding to condone the delay. Therefore, the Commission's order is neither arbitrary nor contrary to the regulatory framework.

156. Regulation 12 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 is as follows:

"12. ***Controllable and Uncontrollable factors:*** *The following shall be considered as controllable and uncontrollable factors leading to cost escalation impacting Contract Prices, IDC and IEDC of the project :*

(1) The "controllable factors" shall include but shall not be limited to the following:

b) *Efficiency in the implementation of the project not involving approved change in scope of such project, change in statutory levies or force majeure events; and*

c) *Delay in execution of the project on account of contractor, supplier or agency of the generating company or transmission licensee.*

(2) The "uncontrollable factors" shall include but shall not be limited to the following:

i. Force Majeure events.; and

ii. Change in law.

Provided that no additional impact of time overrun or cost over-run shall be allowed on account of non-commissioning of the generating station or associated transmission system by SCOD, as the same should be recovered through Implementation Agreement between the generating company and the transmission licensee:

Provided further that if the generating station is not commissioned on the SCOD of the associated transmission system, the generating company shall bear the IDC or transmission charges if the transmission system is declared under commercial operation by the Commission in accordance with second proviso of Clause 3 of

Regulation 4 of these regulations till the generating station is commissioned:

Provided also that if the transmission system is not commissioned on SCOD of the generating station, the transmission licensee shall arrange the evacuation from the generating station at its own arrangement and cost till the associated transmission system is commissioned."

157. This issue calls for careful consideration of the interplay between Regulation 12(1)(a), which treats land acquisition issues as controllable, and Regulation 12(2)(ii), which provides for an exception in case of a change in law. The Tribunal must determine whether the enactment of the 2013 Land Acquisition Act materially altered the legal landscape in such a way that the delay in acquiring land for project infrastructure, including the make-up water pipeline, was rendered uncontrollable.

158. Regulation 12(1)(a) provides that "***a)*** *Variations in capital expenditure on account of time and/or cost overruns on account of land acquisition issues;",* it is thus clear that the controllable factor is limited to variation in capital cost, however, as pleaded by KBUNL before us, it is not mere variation in cost but withdrawl of consent by the land orders, which is distinct from Regulation 12(1)(a).

159. At the outset, it is important to recognize that land acquisition is, by its very nature, a process involving advance planning, stakeholder engagement, governmental liaison, and legal formalities. A prudent project developer is expected to identify critical parcels of land, secure possession well in advance,

and anticipate delays arising from local resistance or procedural bottlenecks. This is precisely why Regulation 12(1)(a) categorically includes “land acquisition issues” as a controllable factor.

160. However, in this case, it is not the failure on the part of the KBUNL but the withdrawl of consent as given earlier by the land owners vis-à-vis delay in acquisition process involving the Government authorities as seen from the table above.

161. KBUNL has claimed that landowners withdrew consent for voluntary sale after the 2013 Act came into force, and began demanding compensation under the new law. This assertion, if true, does indicate a material change in the factual and legal environment, which may have impeded progress. However, such a claim requires substantiation.

162. Further, the Tribunal notes that KBUNL was eventually able to achieve COD of both units without the acquisition of the disputed land.

163. However, the facts remain that the commissioning was completed by utilising the infrastructure of the existing units, which certainly may affect the operation of the entire plant in the long run.

164. The reliance placed by KBUNL on the Statement of Reasons (SOR) to the 2014 Regulations is noted. The SOR does allow for a case-by-case approach to

land acquisition delays, particularly where legal changes intervene. However, the principle underlying such discretion is that the change in law must have a direct causal nexus with the delay.

165. However, non-acquisition is due to the governmental process, which is certainly beyond the control of the KBUNL.

166. Nevertheless, the Tribunal recognizes that some degree of disruption due to the enactment of the 2013 Act may have occurred, especially in terms of renegotiation of compensation, public resistance, and procedural re-alignment. These consequences are not implausible, and to that extent, the Commission's finding that the change in law had some impact is not wholly unreasoned.

167. In view of the above discussion, the Tribunal holds that the principle of condonation of delay due to change in law may be invoked in this case.

168. Accordingly, the matter is remanded to pass consequential orders strictly adhering to the conclusion made herein above.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the Appeal No. 54 of 2021 has merit and is partly allowed.

The followings directions are passed:

(i) The delay of 234 days condoned by the CERC on account of the ban on mining lease in Bihar is hereby set aside.

(ii) The delay of 67 days condoned by the CERC due to flooding arising from excessive rainfall in September 2011 is found to be legally tenable.

(iii) The delay of 648 days condoned by the CERC on account of land acquisition is affirmed.

The Central Commission is directed to pass consequential orders strictly adhering to the conclusion made herein above.

The Captioned Appeal and pending IAs, if any, are disposed of in the above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 12th DAY OF AUGUST, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

pr/mkj/kks