

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI  
(APPELLATE JURISDICTION)**

**APPEAL NO. 208 of 2019**

**Dated : 20<sup>th</sup> October, 2020**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson  
Hon'ble Mr. S.D. Dubey, Technical Member (Electricity)**

**IN THE MATTER OF:**

Bhopal Dhule Transmission Company Limited  
F-1, "The Mira Corporate Suites"  
1 & 2 Ishwar Nagar, Mathura Road,  
New Delhi-110065  
(Through Vice President – Corporate &  
Regulatory Affairs and Business Development  
(Power & Infrastructure)

**...Appellant**

**Versus**

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

**...Respondent No. 1**

2. Chhattisgarh State Power Trading Company Limited  
2nd Floor, "Vidyut Sewa Bhawan"  
Danganiya, Raipur – 492013  
(through its Managing Director)

**...Respondent No. 2**

3. Sterlite Energy Limited  
1st Floor, City Mart Complex  
Baramuda  
Bhubaneshwar – 751003

- (through its Chairman) **...Respondent No. 3**
4. GMR Kamalanga Energy Limited  
10th Floor, C&D Block  
IBC Knowledge Park  
Opposite Fire Station, Bannerughatta Road  
Bangalore – 560029  
(through its Chairman and Managing Director) **...Respondent No. 4**
5. Navbharat Power Private Limited  
Malaxmi House, 82583/3  
Road No. 2 Banjara Hills  
Hyderabad – 500034  
(through its Managing Director) **...Respondent No. 5**
6. Monnet Power Company Limited  
Monnet House, 11 Masjid Moth  
Greater Kailash Part II  
New Delhi – 110048  
(through its Chief Executive Officer) **...Respondent No. 6**
7. Jindal India Thermal Power Limited  
B-1, Local Shopping Complex  
Vasant Kunj  
New Delhi – 110070  
(through its Chief Executive Officer) **...Respondent No. 7**
8. LANCO Babandh Power Limited  
LANCO House, Plot No – 397, Udyog Vihar - III  
Gurgaon – 122016  
(through its Managing Director) **...Respondent No. 8**
9. Ind Barath Energy (Utkal) Limited  
Plot No 30A, Road No 1  
Film Nagar, Jubilee Hills  
Hyderabad – 500033  
(through its Chairman and Managing Director) **...Respondent No. 9**

10. MB Power (Madhya Pradesh) Limited  
235 Okhla Industrial Area, Phase III  
New Delhi – 110020  
(through its Chief Executive Officer) **...Respondent No. 10**
  
11. RKM Powergen Limited 147  
Gitanjali Avanti Vihar Sector 1  
Raipur – 492004  
(through its Managing Director) **...Respondent No. 11**
  
12. Athena Chhattisgarh Power Limited  
7-1-24 B Block, 5th Floor  
Roxana Towers  
Greenlands, Begumpet  
Hyderabad – 500016  
(through its Managing Director) **...Respondent No. 12**
  
13. Jindal Power Limited  
2nd Floor, DCM Building  
Plot No – 94 Sector 32  
Gurgaon – 122001  
(through its Chairman) **...Respondent No. 13**
  
14. SKS Power Generation (Chhattisgarh) Limited  
501 B, Elegant Business Park  
Andheri, Kurla Road  
J. B. Nagar, Andheri (East)  
Mumbai – 400059  
(through its Managing Director) **...Respondent No. 14**
  
15. Korba West Power Co. Limited  
6th and 7th Floor, Vatika City Point  
M. G. Road  
Gurgaon – 122002  
(through its Managing Director) **...Respondent No. 15**

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16. DB Power Limited  
813, Phase V  
Udyog Vihar  
Gurgaon – 122016  
(through its Managing Director) **...Respondent No. 16**
17. Visa Power Limited  
No.9, HLL Building  
Shakespeare Sarani  
Kolkata – 700071  
(through its Chairman) **...Respondent No. 17**
18. KSK Mahanadi Power Company Limited  
82/293/82/A/431/A, Road No 22  
Jubilee Hills  
Hyderabad – 500033  
(through its Chairman) **...Respondent No. 18**
19. Bharat Aluminum Company Limited  
C/o Administrative Building  
Balco Nagar  
Korba – 495684  
(through its Chief Executive Officer) **...Respondent No. 19**
20. Vandana Vidyut Limited  
Vandana Bhawan  
MG Road, Raipur  
Chhattisgarh – 492001  
(through its Managing Director) **...Respondent No. 20**
21. Lanco Amarkantak Power Limited  
Plot No 397  
Udyog Vihar, Phase-3  
Gurgaon – 122016  
(through its Chief Executive Officer) **...Respondent No. 21**
22. Chhattisgarh Steel & Power Limited

142, Saheed Smarak Complex  
G. E. Road, Raipur  
Chhattisgarh – 492001  
(through its Managing Director)

**...Respondent No. 22**

23. GMR Chhattisgarh Energy Pvt. Limited  
10th Floor, Tower D  
IBC Knowledge Park  
4/1 Bannerghatta Road, Near Dairy Circle  
Bangalore – 560029  
(through its Managing Director)

**...Respondent No. 23**

24. Power Grid Corporation of India Limited  
SAUDAMINI, Plot No.2, Sector 29,  
Near IFFCO Chowk,  
Gurgaon (Haryana) – 122001  
(through its Chairman and Managing Director)

**...Respondent No. 24**

Counsel on record for the Appellant(s) :

Mr. Sanjay Sen, Sr. Adv.  
Mr. Vishal Binod  
Mr. Deep Rao Palepu  
Mr. Divyanshu Bhatt  
Mr. Syed Jafar Alam  
Mr. Abhishek Kumar  
Mr. Arjun Agarwal

Mr. Tan Reddy  
Mr. Gaurav Kumar  
Ms. Anisha Chopra Batra (Rep)

Counsel on record for the Respondent(s):

Mr. Satender Kumar Rai for R-9

Mr. Hemant Sahai  
Mr. Nitish Gupta  
Mr. Shreshth Sharma  
Mr. Aditya K. Singh  
Ms. Puja Priyadarshini  
Ms. Molshree Bhatnagar  
Mr. Nived Veerapaneni  
Ms. Anukriti Jain

Ms. Jyotshna Khatri for R-10

Ms. Suparna Srivastava

Ms. Sanjana Dua for R-24

## J U D G M E N T

### PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed by M/s. Bhopal Dhule Transmission Company Limited under Section 111(1) of the Electricity Act, 2003 (“**the Act**”) against the Central Electricity Regulatory Commission’s (“**CERC**”) Order dated 24.04.2019 in Petition No. 297/MP/2018 (“**Impugned Order**”). The Appellant, Bhopal Dhule Transmission Company Limited (“**BDTCL**”/ “**Appellant**”), is an inter-state transmission licensee whose transmission elements interconnect with those of Power Grid Corporation of India Limited (“**PGCIL**” / “**Respondent No. 24**”).

### **2. Facts of the case:**

2.1 The Appellant was incorporated as a special purpose vehicle by PFC Consulting Limited (“**PFCCL**”) as part of a Tariff Based Competitive Bidding process under Section 63 of the Act to develop and implement the following transmission elements on Build, Own, Operate and Maintain basis for system strengthening of Western Region:

(a) Transmission Lines:

- (i) Jabalpur-Bhopal 765 kV S/C Transmission line (“**BJ Line**”);
- (ii) Bhopal-Indore 765 kV S/C Transmission line (“**BI Line**”);
- (iii) Bhopal-Bhopal 400 kV D/C Transmission Line (“**BB Line**”);
- (iv) Aurangabad-Dhule 765 kV S/C Transmission Line (“**DA Line**”);
- (v) Dhule-Vadodara 765 kV S/C Transmission Line (“**DV Line**”); and
- (vi) Dhule-Dhule 400 kV D/C Transmission Line (“**DD Line**”).

(b) Substations:

(i) 765/400 kV 2x1500 MVA substation at Bhopal (“Bhopal Substation”)

(ii) 765/400 kV 2x1500 MVA substation at Dhule (“Dhule Substation”)

(Together, the aforesaid transmission lines and substations are referred to as the “**Project**”).

2.2 Sterlite Grid Limited (“**SGL**”) participated in the competitive bidding process conducted by PFCCL and on emerging as the successful bidder, a Letter of Intent (“**LOI**”) was issued by PFCCL to SGL on 31.01.2011. In accordance with the bidding documents, SGL acquired 100% of the shareholding in the Appellant company by executing a Share Purchase Agreement with PFCCL on 31.03.2011. Thereafter, the Appellant entered into the TSA with the LTTCs (being Respondent Nos. 2-23 herein) on 07.12.2010.

2.3 Subsequently, the CERC, vide its Order dated 12.10.2011 in Petition No. 110 of 2011, granted an inter-state transmission license to the Appellant for inter-state transmission of electricity and, vide its Order dated 28.10.2011 in Petition No.108 of 2011, adopted the transmission charges for the Project.

2.4 In terms of Schedule 3 of the TSA, the Project was scheduled to be commissioned by the Appellant within 36 months from the Effective date. The term “Effective date” has been defined under Article 2.1 of the TSA to be the later of the dates of: (i) the execution of the TSA; (ii) acquisition of the Special Purpose Vehicle by the selected bidder; and (iii) submission of Contract Performance Guarantee on behalf of the Transmission Services Provider (“**TSP**”). Accordingly, the Effective date is the date of signing of the Share Purchase Agreement, i.e., 31.03.2011 and consequently, the



originally envisaged date of Scheduled Date Of Commercial Operation (“**SCOD**”) for the Project was 31.03.2014.

- 2.5 The Appellant developed the Project in right earnest to the best of its ability in accordance of its various contractual obligations under the TSA. The Appellant regularly reported the detailed construction progress on a monthly basis to the Central Electricity Authority (“**CEA**”) in terms of Article 4.1(g) of the TSA. However, due to various unforeseen and uncontrollable events that qualify as Force Majeure and Change in Law, that took place subsequent to the award of the Project, the Appellant was not able to complete the Project as per the SCOD envisaged under the TSA.
- 2.6 Meanwhile, PGCIL filed Petition No. 227/TT/2014 before the CERC seeking determination of transmission tariff of the Transmission Assets for the 2014-2019 tariff block in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (“**2014 Tariff Regulations**”).
- 2.7 During the pendency of the aforementioned Petition No. 227/TT/2014, the Appellant filed Petition No. 216/MP/2016 before the CERC on 15.10.2016 seeking declaratory and compensatory reliefs on account of various Force Majeure and Change in Law events which adversely impacted the Project. It is stated and submitted that as a result of various unforeseen and uncontrollable events that took place subsequent to the award of the Project, the Appellant was prevented from completing the Project on time. It is submitted that the various events, which adversely affected and delayed the commissioning of the Project, include the following:

**Force Majeure and Change in Law events:**

- (a) Delay in grant of Forest clearance;

- i. Change in the Ministry of Environment and Forests' Guidelines for Diversion of Forest Land for non-forest purposes under the Forest Conservation Act, 1980 read with the Forest Conservation Rules, 2003;
- ii. Change in the applicable Format for obtaining clearances under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forests Rights) Act, 2006

**Force Majeure events:**

- (b) Delay in Grant of Authorization under Section 164 of the Electricity Act, 2003;
- (c) Delay due to finalization of coordinates of the gantry of PGCIL's substation;
- (d) Delay in allotment of land for the Bhopal Substation and delay in transportation of equipment; and

**Change in Law event:**

- (e) Change in Taxes.

2.8 The actual dates of commissioning of the constituent elements of the Project are set out in the table below:

<b>Element</b>	<b>Commercial Operation Date</b>
DA Line	05.12.2014
DV Line	9.2.2015
DD Line	06.12.2014
BJ Line	09.06.2015
BI Line	19.11.2014
BB Line	30.06.2014 and 12.08.2014
Bhopal Substation	5.7.2014 and 30.09.2014
Dhule Substation	06.12.2014

Vide its Order dated 25.06.2018 in Petition No. 216/MP/2016, CERC found that the Appellant's Project was indeed impacted by Force Majeure events

and *inter alia* extended the SCOD of all the aforesaid elements to their Actual Date of Commercial Operation (“**ACOD**”).

- 2.9 The Appellant preferred a parallel appeal against CERC’s Order dated 20.09.2017 in Petition No. 227/TT/2014, being Appeal No. 272 of 2018. Appeal No. 272 of 2018 is presently pending before this Tribunal. In the said Appeal, an interim stay vide Order dated 10.10.2018 continues to operate in favour of the Appellant. It is stated and submitted that the subject matter and cause of action under Appeal No. 272 of 2018 is distinct from and unrelated to the subject matter and cause of action relevant to the present Appeal.
- 2.10 In its Order dated 25.06.2018 in Petition No. 216/MP/2016, the CERC under Para 38 *inter alia* granted certain liberty to the Appellant to approach the Commission with all the relevant documents for consideration in this regard:
- 2.11 Pursuant to the allowance of Change in Law events and the aforesaid liberty granted by the CERC vide Order dated 25.06.2018 in Petition No. 216/MP/2016, the Appellant filed a consequential petition before the CERC being Petition No. 297/MP/2018 providing all the documents required to establish the merit and *bona fides* of its Change in Law claim.
- 2.12 Having considered the extensive documentation submitted by the Appellant, the CERC framed the following three issues and answered them in detail:

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

***Issue No. 2: Whether the claims of the Petitioner under change in law in respect of the project are admissible?***

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

- 2.13 As is evident, while the CERC has rightly held in the Impugned Order that the Appellant complied with all necessary pre-requisites for claiming Change in Law relief under the TSA and that the Change in Law events actually adversely affected the Appellant's Project, CERC went on to erroneously deny Change in Law relief to the Appellant.
- 2.14 The aforesaid Change in Law events *viz.* delay in grant of Forest Clearance and change in formats of no-objection certificates from the concerned district collectors under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 ("**FRA Clearance**") has burdened the Appellant with *inter alia* an additional IDC liability. The total IDC on original project cost is Rs. 84,01,63,867/-, which is tabulated hereunder:

Particulars	From Actual Drawal to SCOD	From SCOD to ACOD
Gross Interest	97,69,89,675.00	1,42,10,83,955.00
Less: Interest Earned	2,42,56,792.00	34,41,524.00
Less: Interest Charged to Profit & Loss Account	-	74,64,20,055.00
Net Interest Capitalized	95,27,32,883.00	67,12,22,277.00
Finance Charges	21,94,51,212.00	16,89,41,491.00
Total IDC	1,17,21,84,095.00	84,01,63,867.00

- 2.15 Being aggrieved by the aforementioned findings of the CERC, the Appellant has filed the captioned Appeal. The Appellant craves this Tribunal's leave to add, alter or make additional submissions, if required. The Appellant also craves leave to place any other record/ document as may be required for the appropriate adjudication of the present Appeal.
- 2.16 It is stated that the Appellant herein received a letter dated 13.12.2018 from Mr. Naveen Gupta, the Insolvency Resolution Professional ("**IRP**") of Monnet Power Company Limited, which is arrayed as Respondent No. 6 in the captioned Appeal. By the said letter, the Appellant was informed that

vide an Order dated 23.02.2018, the National Company Law Tribunal (“NCLT”), Mumbai Bench admitted Company Petition No. 1696 of 2017 against Monnet Power Company Limited and appointed Mr. Naveen Gupta as the IRP. The said letter, which annexes a copy of the said NCLT Order, further states that in terms of Section 14 of the Insolvency and Bankruptcy Code, 2016 (“IBC”) the moratorium period had begun from the date of the said Order, i.e., 23.02.2018. Another similar letter dated 03.01.2019 was received from the IRP of Monnet Power Company Limited.

- 2.17 Similarly, it is stated that the Appellant herein received a letter dated 03.11.2018 from VISA Power Limited, which is arrayed as Respondent No. 17 in the captioned Appeal. By the said letter, the Appellant was *inter alia* intimated that vide an Order dated 11.10.2018 (“Liquidation Order”), the NCLT, Kolkata Bench ordered the liquidation of VISA Power Limited. A perusal of the said Liquidation Order evidences that vide an earlier Order dated 22.12.2017, the NCLT, Kolkata Bench had appointed Mr. Anil Goel as the IRP of VISA Power Limited, and accordingly, the moratorium under Section 14 of the IBC was initiated with effect from 22.12.2017. Upon the pronouncement of the Liquidation Order, a separate moratorium under Section 33(5) of the IBC came into force.

The aforesaid facts are relevant in light of Sections 14 and 33 of the IBC which prohibit *inter alia* the continuation of any suit or proceedings in any court of law/ tribunal during the subsistence of the moratorium period. In view of the foregoing, the Appellant is not pressing claims against Respondent Nos. 6 and 17. Even though the tariff and recovery of Change in Law and Force Majeure reliefs is to be collected in accordance with the Central Electricity Regulatory Commission (Sharing of inter-State Transmission Charges and Losses) Regulations, 2010, this submission ought not to be construed as a waiver or relinquishment of the Appellant’s

claims as against Monnet Power Company Limited or VISA Power Limited, and the Appellant reserves all rights and contentions to be raised at an appropriate stage.

### **3. Questions of law:**

The following questions of Law arise in the present Appeal:

- 3.1 Whether the CERC could have denied Change in Law relief to the Appellant after having arrived at unequivocal findings of fact and law that Change in Law events adversely affected the Appellant's Project in accordance with the TSA?
- 3.2 Whether the CERC arbitrarily and illegally altered the basis of allowing Change in Law relief under the TSA thereby overriding the express provisions of the TSA?
- 3.3 Whether the CERC erroneously overlooked the unqualified nature of Article 12.2 of the TSA to read in illegal exceptions to the grant of Change in Law relief under the TSA when in fact there exist none?
- 3.4 Whether IDC and Incidental Expenses During Construction ("**IEDC**") constitute appropriate Change in Law relief under the TSA in cases where the COD of the Project has been delayed due to admitted Change in Law events?
- 3.5 Whether the CERC could have completely ignored its own previous Order in Petition No. 310/MP/2015 dated 08.05.2017 and Order in Petition No. 174/MP/2016 dated 13.09.2017 where Change in Law relief, identical to that claimed by the Appellant in Petition No. 297/MP/2018, was granted in materially similar facts to altogether deny the Appellant the very same relief?

**4. Learned Counsel for the Appellant (Bhopal Dhule Transmission Company Ltd.) has submitted the following Written Submissions for our consideration:**

- 4.1 The present Appeal has been filed against the Order dated 24.04.2019 passed in Petition No. 297/MP/2018 by the Central Electricity Regulatory Commission whereby the Central Commission has allowed the Change in Law event and denied the Interest During Construction and corresponding Carrying Cost arising out of the said Change in Law event.
- 4.2 The CERC while adjudicating consequential claims of the Appellant in Petition No. 297/MP/2018, pursuant to liberty granted by the CERC vide Order dated 25.06.2018 in Petition No. 216/MP/2016, rightly accepted vide the Impugned Order that the Appellant had been impacted by the Change in Law Events claimed by the Appellant in accordance with the Transmission Services Agreement dated 07.12.2010 executed with Respondent Nos. 2-23 ("TSA"), but erroneously and surprisingly denied the Appellant any Change in Law relief whatsoever. The Appellant's key grievance is that Change in Law relief, i.e. the monetary relief claimed by the Appellant by way of Interest During Construction ("IDC") and corresponding Carrying Costs have been denied by the CERC despite its own categorical finding that the Appellant was impacted by the Change in Law events.
- 4.3 In terms of Schedule 3 of the TSA, the Project was scheduled to be commissioned by the Appellant within 36 months from the Effective date. The Effective date in the present case is 31.03.2011 and consequently, the Scheduled Date of Commercial Operation ("SCOD") for the Project was 31.03.2014.
- 4.4 The Appellant developed the Project in right earnest to the best of its ability in accordance of its various contractual obligations under the TSA. The Appellant regularly reported the detailed construction progress on a monthly basis to the Central Electricity Authority ("CEA") in terms of Article 4.1 (g) of

the TSA. However, due to various unforeseen and uncontrollable events that qualify as Force Majeure and Change in Law, that took place subsequent to the award of the Project, the Appellant was not able to complete the Project as per the SCOD envisaged under the TSA.

- 4.5 Accordingly, the Appellant filed Petition No. 216/MP/2016 before the CERC on 15.10.2016 seeking declaratory and compensatory reliefs on account of various Force Majeure and Change in Law events which adversely impacted the Project. In the said Petition, the Appellant stated that as a result of various unforeseen and uncontrollable events that took place subsequent to the award of the Project, the Appellant was prevented from completing the Project on time.
- 4.6 The Appellant further submitted that as a result of the aforesaid Force Majeure and Change in Law events, various elements of the Project were commissioned on a date which is later than their Scheduled Commissioning Date. The actual dates of commissioning of the constituent elements of the Project are set out in the table below:

Element	Actual Commercial Operation Date
DA Line	05.12.2014
DV Line	9.2.2015
DD Line	06.12.2014
BJ Line	09.06.2015
BI Line	19.11.2014
BB Line	30.06.2014 and 12.08.2014
Bhopal Substation	5.7.2014 and 30.09.2014
Dhule Substation	06.12.2014

- 4.7 The CERC vide its Order dated 25.06.2018 in Petition No. 216/MP/2016, acknowledged that the Appellant's Project was indeed impacted by the Force Majeure events and inter alia extended the SCOD of all the aforesaid



elements to their Actual Date of Commercial Operation (“ACOD”). Further, the CERC was inter alia pleased to grant the following liberty to the Appellant (emphasis supplied):

*“38. In our view, the letter dated 13.2.2012 issued by MoEF disentitling the persons to utilize degraded forest land on the basis of certificate from the Chief Secretary regarding non-availability of nonforest land for the purpose of compensatory afforestation where the forest cover in the State is less than 50% is covered under “a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such consents, clearances and Permits” and is therefore covered under Change in Law. However, from the documents placed on record, it cannot be conclusively proved that the Petitioner’s case falls under the change in law. In particular the following need clarification and supporting documents:*

*(a) Whether the Petitioner had applied for certificate from the Chief (Secretary) and the outcome thereof;*

*(b) The efforts made by the Petitioner to acquire the non-forest land for compulsory afforestation;*

*(c) Whether the guidelines dated 13.2.2012 of MoEF were issued during the pendency of its application before the Chief (Secretary);*

*(d) Whether the Petitioner acquired the degraded forest land after the issue of MoEF letter dated 11.7.2014;*

*(e) Whether the forest clearance was granted after the petitioner made available the degraded forest land in accordance with the MoEF letter dated 11.7.2014.*

*Therefore, the claims of the Petitioner needs to be examined in the light of the explanation/ documents as noted above. We therefore grant liberty to the Petitioner to approach the Commission with all the relevant documents for consideration in this regard.*

*(emphasis supplied)*

4.8 Pursuant to the allowance of Change in Law events and the aforesaid liberty granted by the CERC vide Order dated 25.06.2018 in Petition No. 216/MP/2016, the Appellant filed a consequential petition before the CERC being Petition No. 297/MP/2018 providing all the documents required to establish the merit and bona fides of its Change in Law claim.

4.9 The extensive documentation submitted by the Appellant, the CERC framed the following issues and answered them in the following manner, as excerpted hereunder in relevant parts (emphasis supplied):

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

...

In our view, the Petitioner has complied with the requirement of TSA regarding prior notice to the L TTCs regarding occurrence of change in law and force majeure before approaching the Commission.

**Issue No. 2: Whether the claims of the Petitioner under change in law in respect of the project are admissible?**

...

38. We have considered the submissions of the Petitioner and examined the documents on record. We are of the view that the Petitioner has taken all possible steps for early resolution of issues pertaining to forest clearance. We are also of the view that in case of forest clearance for all the transmission lines the Petitioner has pursued the matter with relevant authorities and the time consumed was on account of delay in grant of forest clearance owing to change in Moe-F guidelines dated 13.2.2012.

39. The letter dated 13.2.2012 issued by MoEF disallowing the persons to utilize degraded forest land on the basis of certificate from the Chief Secretary regarding non-availability of non-forest land for the purpose of compensatory afforestation where the forest cover in the State is less than 50% is covered under Change in Law in terms of Article 12 of the TSA. In our view, the time consumed for getting the final forest clearances from MOEF in the States of Maharashtra, Madhya Pradesh and Gujarat was beyond the control of the petitioner and was due to a change in law on account of MOEF Notification dated 13.2.2012.

.....

4. Thus MoEF vide its letter dated 5.7.2013 mandated that the no objection certificates in respect of FRA Clearances should be issued by all District Collectors as per the revised formats. As a consequence of which, the Petitioner was constrained to re-apply for the no-objection certificates from all the relevant District Collectors and re-submit the same for the purpose of obtaining its FRA Clearances. The same is also covered under the clause of TSA “a change in the terms and conditions prescribed for obtaining any Consents Clearances and Permits or the inclusion of new terms or conditions for obtaining such consents, clearances and Permits” and is, therefore, a Change in Law.

...

In view of the reasons submitted by the Petitioner, the delay is attributable to the delay in grant of forest clearance.

...

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

...

50. The Petitioner has submitted that Change in Law relief for the very same issue, i.e. delay in grant of Forest Clearance on account of the said MoEF Notification was granted to Jabalpur Transmission Company Limited (“JTCL”) by

the Commission in terms of its order dated 16.10.2015 in Petition No. 73/MP/2014 read with its order dated 8.5.2017 in Petition No. 310/MP/2015. The Commission in its above orders allowed JTCL 's claims regarding additional expenditure towards IDC on loans during the extended construction period: increase in afforestation rates as prescribed by MoEF; and increase in taxes and duties. Similar lvt in its order dated 13.9.2017 in Petition No. 174/MP/2016, the Commission held that since the delay in getting forest clearance was beyond the control of the Petitioner. East North Interconnection Company Limited (ENICL), and ENICL should be allowed IDC for the extended period in order to put the ENICL in same economic position as if the Change in Law had not occurred. The Petitioner has prayed to compensate the Petitioner for the adverse economic impact of the aforesaid Change in Law event and restore the Petitioner to the same economic position as if such Change in Law event had not occurred.

51. The relevant provision of the TSA (Article 12.2) as regards relief on account of change in law is as under:

**“12.2 Relief for Change in Law**

**12.2.1 During Construction Period:** During the Construction Period, the impact of increase/decrease in the cost of the Project in the Transmission Charges shall be governed by the formula given below:

For every cumulative increase/decrease of each Rupees Nine Crores (Rs. 9,00,00,000/=) in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in non-escalable Transmission Charges shall be an amount equal to 0.32 percent (0.32%) of the Non-Escalable Transmission Charges.

**12.2.2 During the Operation Period.**

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

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

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

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

From the above provision of TSA, we note that “during the construction period, the impact of increase/decrease in the cost of the Project in the Transmission Charges shall be governed by the formula given”.

52. The Commission has in its order dated 29.3.2019 in Petition No. 195/MP/2017, held as under:

*“95. In our view, the Petitioner was prevented from discharging its obligations under the TSA on account of unexpected requirement and delay in grant of forest clearance which was not there in the RFP documents and as such delay beyond one year in grant of forest clearance is covered under Force Majeure. Accordingly, the SCOD shall stand extended till the actual CODs of Kurukshetra- Malerkotla and Malerkotla- Kurukshetra Transmission Lines which are 18.1.2017 and 27.3.2017 respectively. However, we would like to make it clear that the extension of COD of the instant assets does not entail any financial benefit in the form of IDC and IEDC to the Petitioner.*

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*113. The Petitioner has submitted that on account of events of Force Majeure and unexpected requirement of forest clearance, there was delay as a result of which there was time over-run of 128 days in case of Kurukshetra-Malerkotla Line and 196 days in case of Malerkotla Amritsar Line. The Petitioner has submitted that it had incurred IDC during the period beyond SCOD till the respective dates of commercial operation of the Kurukshetra-Malerkotla and Malerkotla Amritsar Transmission Lines. We have already extended the scheduled COD of the Kurukshetra-Malerkotla and Malerkotla Amritsar Transmission Lines upto the actual CODs without the benefit of consequential IDC. Accordingly, the Petitioners prayer for grant of IDC for the period beyond the scheduled COD is rejected. However, the Petitioner is allowed to recover the amount paid by the Petitioner to the forest authorities for obtaining the forest clearance and other legitimate expenditure made for obtaining the forest clearance, service tax, excise duty, Swachh Bharat Cess and Krishi Kalyan Cess from the L TTCs. The Petitioner is directed to submit the documentary evidence in support of the amount paid to the forest departments for obtaining the forest clearance and payment of taxes along with the Auditor Certificate to the LTTCs while claiming the relief under Change in Law. “*

53. Similarly, the Commission in its order dated 29.3.2019 in Petition No. 238/MP/2017, held as under:

*“82. The Petitioner has submitted that on account of events of Force Majeure and unexpected requirement of forest clearance, there was delay as a result of which there was time over-run of 295 days in case of Darbhanga line and 366 days in case of Motihari Line. The Petitioner has submitted that it incurred IDC during the period beyond SCOD till the respective dates of commercial operation of the*

*Darbhangha and Motihari Transmission Lines. We have already extended the scheduled COD of the Darbhanga and Motihari Transmission Lines upto the actual CODs without the benefit of consequential IDC and IEDC. Accordingly, the Petitioners prayer for grant of IDC for the period beyond the scheduled COD and the IEDC for the said period is rejected. However, the Petitioner is allowed to recover the amount paid by the Petitioner to the forest authorities for obtaining the forest clearance and other legitimate expenditure made for obtaining the forest clearance, service tax, excise duty, Swachh Bharat Cess and Krishi Kalyan Cess from the L TTCs. The Petitioner is directed to submit the documentary evidence in support of the amount paid to the forest departments for obtaining the forest*

clearance and payment of taxes alongwith the Auditor Certificate to the LTTCs while claiming the relief under Change in Law. “

54. The TSAs in the above two Petitions are similarly worded as in the instant case as regards relief from events of change in law. Therefore, the above orders are applicable in the present case also. We are not in agreement with the prayer of the Petitioner to allow IDC or IEDC during the construction period. In our view. Only that impact of change in law can be governed by the given formula that is a direct consequence of change in law. In the instant caser these events are change in norms of forest clearance and change in formats of FRA Clearance. These change in law events have a bearing on schedule of commissioning but the Petitioner cannot claim IDC or IEDC due to such delay. This being a competitively bid project, these parameters are neither disclosed nor evaluated while bids are submitted.

55. The Petitioner has requested to allow carrying cost of the Change in Law compensation awarded under Article 12 of the TSA in Petition No. 216/MP/2016 as well as under the instant Petition. Since the claim of the Petitioner for allowing IDC and IEDC has been rejected. The prayer for allowing carrying cost no more survives.

56. The Petition No. 297/MP/2018 is disposed of in terms of the above.”

- 4.10 As is evident, while the CERC has rightly held that the Appellant complied with all necessary pre-requisites for claiming Change in Law relief under the TSA and that the Change in Law events actually adversely affected the Appellant's Project, the CERC went on to erroneously deny the Change in Law relief sought by the Appellant.

The aforesaid Change in Law events viz. Change in relevant guidelines that resulted in delay in grant of Forest Clearance and change in formats of no objection certificates from the concerned district collectors under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (“FRA Clearance”) has burdened the Appellant with inter alia an additional IDC liability. The Appellant submits that the gross interest paid by the Appellant from SCOD, i.e., 12.08.2014 till ACOD, i.e., 09.06.2015 is Rs. 1,42,10,83,955/-, the cash interest earned from the temporary parking of funds from SCOD to ACOD is Rs. 34,41,524/-, the interest charged to profit and loss account is Rs. 74,64,20,055/-, the net interest capitalized paid by the Appellant from SCOD to ACOD is

Rs. 67,12,22,376/-the finance charges from SCOD to ACOD is Rs.16,89,41,491/-. Therefore, the total IDC on original project cost is Rs.84,01,63,867/-. This computation is tabulated hereunder:

Particulars	From Actual Drawal to SCOD	From SCOD to ACOD
Gross Interest	97,69,89,675.00	1,42,10,83,955.00
Less : Interest Earned	2,42,56,792.00	34,41,524.00
Less : Interest Charged to Profit & Loss Account	-	74,64,20,055.00
Net Interest Capitalized	95,27,32,883.00	67,12,22,277.00
Finance Charges	21,94,51,212.00	16,89,41,491.00
Total IDC	1,17,21,84,095.00	84,01,63,867.00

4.11 In view of the above, the Appellant has filed the captioned Appeal before this Tribunal seeking setting aside of the Impugned Order to the extent it denies Change in Law relief to the Appellant by way of IDC and corresponding Carrying Costs.

**5. Learned Counsel for the Respondent No. 10 (M/s. MB Power (Madhya Pradesh) Limited) has submitted the following Reply/Submissions for our consideration :**

5.1 The Appellant has entered into a Transmission Service Agreement dated 07.12.2010 with 21 IPPs including the Respondent No. 10 – M/s MB Power Madhya Pradesh Limited. The Answering Respondent being one of the Long-Term Transmission Customers with whom the Appellant herein has executed the TSA, is an affected party in the present proceedings and accordingly seeks the leave of this Tribunal to submit its limited response on the present Appeal.

5.2 The Answering Respondent is filing the present reply to address the limited issue of liability of payment of IDC and carrying cost, if any, that may arise in case the present Appeal is allowed on merits. Accordingly, the Answering Respondent seeks the leave of this Tribunal to put on record its submissions

without contesting the entire Appeal and filing para-wise reply.

5.3 The TSA executed between the Appellant and the 21 IPPs including the Answering Respondent has been executed in terms of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010. As per agreed terms of the TSA, the Answering Respondent is liable to pay to the Appellant the transmission charges as prescribed under Schedule 5 of the TSA. The relevant provisions are set out herein under for the ease of convenience of this Tribunal-

***“Article 1 - Definitions***

***“Transmission Charges”*** shall mean the charges payable to the TSP by the Long Term Transmission Customers pursuant to the TSA, as adopted by the Appropriate Commission;

***“Monthly Transmission Charges”*** for any Element of the Project, after COD of the Element till COD of the Project, and for the Project after COD of the Project, shall mean the amount of Transmission Charges for the relevant Contract Year as specified in Schedule 5 of this Agreement;

***Article 10: Billing and Payment of Transmission Charges***

***10.1 Subject to the provisions of this Article 10, the Long Term Transmission Customers shall pay to the TSP, in Indian Rupees, on monthly basis, the Monthly Transmission Charges from the date on which an Element(s) has achieved COD until the expiry date of this Agreement, unless terminated earlier, in line with the provisions of Schedule 5 of this Agreement.”***

5.4 The invoices for the monthly transmission charges are being issued by the Central Transmission Utility Sharing Regulations. The Sharing Regulations introduce Point of Connection based transmission pricing methodology in India. This is a socialized system for the collection and disbursement of transmission charges with respect to the transmission system servicing a particular region. The relevant provisions from the TSA are set out below for the ease and convenience of this Tribunal:

***‘RECITAL F:***

***The Long Term Transmission Customers agree, on the terms and subject to the conditions of this Agreement, to use the available transmission capacity of the Project and pay TSP the Transmission Charges as determined in accordance with***

*the terms of this Agreement.*

**Schedule 2: Project Description and Scope of Project**

*..... Sharing of transmission charges for the various elements of the transmission works listed above would be as per orders of CERC from time to time*

**Schedule 5: Computation of Transmission Charges**

*(c) ..... The Transmission Charges to be paid to the TSP shall comprise of the Escalable Transmission Charges and Non Escalable Transmission. Charges, payable by each Long Term Transmission Customer, in proportion to their Allocated Project Capacity for the Contract Year, as determined by the CERC. In the event of change by CERC in the methodology for the allocation of Transmission Charges between the Long Term Transmission Customers, such revised methodology shall apply.”*

- 5.5 After coming into force on 01.07.2011, the Sharing Regulations govern the manner in which the transmission charges as approved by the Ld. Central Commission and the losses shall be shared amongst the Designated ISTS Customers who use the Inter – State Transmission System. Therefore, by virtue of the notification of the Sharing Regulations, the 21 IPPs with whom the Appellant has executed the TSA shall be governed by the said Regulations. These Point of Connection charges and losses are computed as per Allocation Factor for all DICs.
- 5.6 The Answering Respondent has been paying the appropriated Transmission Charges for the subject Transmission Assets as per the PoC Mechanism computed in accordance with the Sharing Regulations.
- 5.7 In case of any additional recurring or non-recurring expenditure which has resulted due to Change in Law event during construction period, the impact of such increase / decrease in the cost of the Transmission Assets in the Transmission Charges shall be governed by the following formula:

**“Article 12: Change in Law**

*For every cumulative increase / decrease of each Rupees Nine Crores (Rs 90,000,000/-) in the cost of the Project upto the Scheduled COD of the Project, the increase / decrease in non-escalable Transmission Charges shall be an amount equal to 0.32 per cent (0.32%) of the Non- Escalable Transmission Charges.<sup>33</sup>*

- 5.8 Under the TSA that in case for any claim made under Article 12.2.1 and



12.2.2 of the TSA, the Appellant shall provide to the LTTCs and the Appropriate Commission documentary proof of such increase / decrease in cost of the Project / revenue for establishing the impact of such Change in Law.

- 5.9 Since the purported IDC and Carrying Cost payable to the Appellant (if any) shall form part of the capex of the Transmission Assets, the same shall be recoverable through the PoC Mechanism under the Sharing Regulations. The same cannot be levied and recovered from the Answering Respondent neither under the contractual nor under regulatory regime.
- 5.10 Any claim towards the Monthly Transmission Charges paid by the LTTCs in terms of the invoices being issued by the CTU are being maintained by the CTU in the POC pool. It may be noted at this point that even the TSA that has been entered into between the Appellant and the LTTCs is pursuant to the Sharing Regulations. Therefore, any additional liability (if any) arising on account of the purported IDC and Carrying Cost is liable to be levied under the POC mechanism in terms of the Sharing Regulations and the same in no way can be recovered from the LTTCs including the Answering Respondent neither under the contractual nor under regulatory regime.
- 5.11 The liability to pay Transmission Charges pursuant to the TSA only commences on actual evacuation of power i.e. when the 'transmission service' is actually provided under the TSA and not otherwise. The purported IDC / Carrying Cost if allowed by this Tribunal will be added to the capex of the Transmission Asset and therefore, has to be necessarily recovered as per the PoC Mechanism under the Sharing Regulations.
- 5.12 The commissioning of the Appellant's Transmission Assets has been delayed for reasons not attributable to the Answering Respondent and the other LTTCs and therefore they cannot be burdened upon with the same but for in terms of the applicable law. The Central Commission in the Impugned

Order has also expressed that the delay caused in the commissioning of the Appellant's transmission system is on account of Change in Law events. Therefore, the Answering Respondent ought to bear the brunt of any additional liability' on account of such Change in Law events. It is reiterated that the purported IDC / Carrying Cost if allowed by this Tribunal is to be recovered under the PoC Mechanism as per the Sharing Regulations.

**6. The Learned Counsel for the Respondent No.24 (Power Grid Corporation of India Limited) has submitted the following reply for our consideration:**

- 6.1 In the present Appeal, inter-se disputes have been agitated as between the Appellant and Respondent Nos.2-23 who are the beneficiaries/long-term transmission customers (LTTCs) of the transmission system being implemented by the Appellant under the tariff based competitive bidding (TBCB) route. The said inter- se disputes are not related to and are of no consequence to Respondent No.24 who is an inter-State transmission licensee as defined under Section 2(73) of the Electricity Act, 2003 and has implemented transmission elements upstream of the transmission system of the Appellant. As such, the answering Respondent is filing a short Reply to the above Appeal, seeking liberty to file such further Reply as may be directed by this Tribunal or should an occasion so arise.
- 6.2 A perusal of the impugned Order would reveal that neither any direction was issued by Respondent No.1 Commission qua Respondent No.24 nor the Appellant has any grievance qua Respondent No.24, as is also evident from the pleadings in the present Appeal. As such, no response on merits is presently required from Respondent No.24 to the above Appeal as well. However, in the event that this Tribunal at any given stage of hearing in the present Appeal specifically directs Respondent No.24 to submit any

information in connection with subject matter, then Respondent No.24 would provide/file the same as directed by this Tribunal. As stated above, Respondent No.24 also craves leave of this Tribunal to file an additional Reply, if the occasion so arises, during the course of proceedings in the present Appeal.

**6.3 The Appellant vide its written submissions has submitted as under:**

- 6.4 The CERC's finding that the Appellant is not entitled to the Change in Law relief (i.e. IDC and the Carrying Costs) is erroneous as it contradicts its own finding in the very same Impugned Order that Change in Law events had in fact adversely affected the Appellant's Project. Thus, the CERC has approved the arbitrary and illegal proposition that there can be legitimate Change in Law events for which no compensation at all shall be recoverable by a transmission service provider. Once the CERC had unequivocally accepted the Appellant's contentions on every count that Change in Law events had occurred, and have adversely affected the Appellant's Project, the CERC could not have denied the corresponding relief (in the form of IDC and the Carrying Costs) claimed by the Appellant. It is pertinent to mention that a declaration of events as Change in Law without allowing the concomitant relief contemplated under the TSA renders Article 12 of the TSA, the Change in Law clause, a nullity.
- 6.5 The CERC erred in holding that the Appellant is not entitled to Change in Law relief during the construction period of the Project since expenditure on IDC is not a direct consequence of such Change in Law events. Further, the CERC appears to have grounded its reasoning in the fact that IDC and IEDC are not disclosed or evaluated in competitively bid out transmission projects. It is submitted that the CERC has in the same breath held that uncontrollable events in the form of Changes in Law have impacted the Project, but that the Appellant deserves no compensation for the same. It is settled law that the purpose of including a Change in Law clause in long term infrastructure

contracts is to protect the parties from unforeseeable legal developments that commercially impact the cost of the project. The Appellant has no other means of recovering the IDC and Carrying Costs it was constrained to incur for no fault of its own and is suffering grave prejudice as a consequence of the Impugned Order.

- 6.6 Article 12.1.1 of the TSA, which is the Change in Law clause is unqualified and does not build in any exclusions with respect to IDC, IEDC or any other related expenditures which are incurred by a TSP due to Change in Law events. It is undisputed that the Change in Law events approved by the CERC in the Impugned Order took place during the construction period of the Project, i.e., before all the elements of the project declared commercial operation. Hence, the Appellant is squarely covered by Article 12.2.1 of the TSA which provides for a formula in accordance with which the Non-Escalable Transmission Charges of the Appellant is to be increased.
- 6.7 A perusal of the above clauses clearly shows that there are no exceptions to the grant of Change in Law relief once it has been determined that a Change in Law event has affected the Project and resulted in additional non-recurring expenditure in the form of IDC. The CERC has denied relief to the Appellant on an erroneous basis that change in law relief can be claimed for only the direct consequences of Change in Law events and the fact that IDC is not evaluated at the time of bidding. Pertinently, none of these factors find mention in Article 12 of the TSA and run contrary to the very purpose of the Change in Law clause, which is to put the affected party in the same economic position as if such event had not occurred. Thus, it is submitted that the CERC erred in mis-interpreting Article 12 of the TSA to deny the Appellant Change in Law relief.
- 6.8 Such a denial of the IDC by the CERC is in contravention of the provisions of Article 12.1.1 of the TSA in the facts and circumstances of the present case. It is stated and submitted that by adopting such an erroneous and illegal

approach, the CERC has rendered the Change in Law clause in the TSA completely nugatory and redundant. Such an interpretation by the CERC is causing the Appellant grave financial prejudice as it has no other means of recovering the IDC it was constrained to incur for no fault of its own.

6.9 The CERC's reasoning in the Impugned Order reads in two exceptions to the grant of Change in Law relief under Article 12.1.2 of the TSA namely: (a) that IDC is not a direct consequence of the Change in Law events and therefore must be denied; and (b) that no relief can be allowed for additional IDC incurred since IDC is not a component that is disclosed or evaluated at the bidding. Neither of these find any mention in the text of Article 12 of the TSA. Further, since the spirit of Article 12 of the TSA is to ensure monetary restitution of a party to the extent of the consequences of Change in Law events, such exceptions cannot be read into Article 12 of the TSA. It is submitted that a crucial factor for the Appellant whilst bidding for the Project was that uncontrollable Change in Law events would be duly accounted for in accordance with Article 12 of the TSA. By the Impugned Order, it is submitted that the CERC has illegally altered the meaning of the Change in Law clause of the TSA long after award of the bid and commissioning of the Project. Such an interpretation of the TSA has a catastrophic effect on the viability of the Appellant's Project since it modifies a critical parameter of the entire bid process (the Change in Law clause), which cannot be countenanced.

6.10 The import of Article 12 of the TSA is that a party affected by Change in Law must be put in the same economic position as if such Change in Law has not occurred, i.e., the party (being the Appellant herein) must be given the benefit of restitution as understood in civil law. In the present case, the CERC has itself accepted that Change in Law has adversely affected the Appellant's Project but illegally refused to give due regard to the restitutionary mechanism envisaged under Article 12 of the TSA.

- 6.11 The erroneous denial of Change in Law relief to the Appellant has resulted in a very real risk of the Appellant's Project becoming unviable. The Appellant's Project was envisaged as part of comprehensive transmission system evolved for evacuation from Independent Power Producer ("IPP") generation projects in the States of Odisha, Chhattisgarh, Madhya Pradesh, Jharkhand and West Bengal and as an alternative for delivering power to Gujarat and Maharashtra.
- 6.12 The Impugned Order puts the Appellant's Project at a risk of becoming unviable while also being a threat to the grid's stability. BJ and DV Lines traverse through forest, thereby making the cost of maintenance high on account of vegetation management. If the trees are not deforested and the corresponding forest clearances not maintained, transmission lines are likely to trip, which will cause loss of availability and revenue as well as negatively affect the grid's stability. Similarly, there are challenging Right of Way issues (in operation phase) and if payments in this regard are not made regularly (as Operation & Maintenance expenses), transmission lines are more likely to trip.
- 6.13 The CERC erred in passing the Impugned Order without fairly considering its own Orders in cases of Jabalpur Transmission Company Limited ("JTCL") and East North Interconnection Company Limited ("ENICL"). It is stated and submitted that Change in Law relief has previously been granted by the CERC in analogous factual circumstances and for the very same Change in Law event, i.e., delay in grant of Forest Clearance on account of the Ministry of Environment and Forests, Government of India ("MoEF") Notification F. No. 11-423/201 1-FC dated 13.02.2012 ("MoEF Notification"). For instance, Change in Law relief was granted to JTCL by the CERC in terms of its Order dated 16.10.2015 in Petition No. 73/MP/2014 read with its Order dated 08.05.2017 in Petition No. 310/MP/2015. Vide the said Orders, the CERC allowed JTCL's claims regarding additional expenditure towards IDC on

loans taken during the extended construction period, which is precisely the same relief that was sought by the Appellant in Petition No. 297/MP/2018. Despite its own orders allowing the very same Change in Law relief in the past, the CERC inexplicably denied the same to the Appellant vide the Impugned Order.

6.14 Similarly, in its Order dated 13.09.2017 in Petition No. 174/MP/2016, the CERC held that the delay in getting forest clearance was beyond the control of the Petitioner therein, ENICL, and that ENICL should be allowed IDC for the extended period in order to put ENICL in the same economic position as if the Change in Law had not occurred.

6.15 Despite the CERC's attention being specifically invited to its JTCL and ENICL Orders, the CERC deviated from its own precedents and disallowed the Change in Law relief sought by the Appellant. Such inconsistency in dispensation of justice is bad in law, shows clear non-application of mind and is violative of the parity in treatment guaranteed by Article 14 of the Constitution of India.

6.16 Article 12 of the TSA covers any and all additional expenditure incurred by an affected party as a result of a Change in Law. There are no exceptions or qualifications attached with the nature of expenditure or the purpose of such expenditure. It is submitted that the Appellant had no option but to incur additional IDC for the periods when the Project commissioning was delayed. Such additional IDC is an additional 'expenditure' as it is an outflow from the Appellant to its lenders. Such IDC has been certified by the Appellant's Chartered Accountant, which has not been disputed by any of the respondents or the CERC in any manner. This is a direct consequence of the Change in Law events unequivocally approved by the CERC itself.

6.17 In a tariff-based competitive bidding ("TBCB") project such as the Appellant's Project, the only relief that a TBCB licensee is entitled to claim for delays because of Change in Law events is the monetary compensation in the form

of IDC and IEDC. It is submitted that when the commissioning of a transmission project such as that of the Appellant is uncontrollably delayed, it has no revenue stream for the period of such delay. Thus, during the period of delay, the Appellant had no option but to incur additional expenditure by paying additional interest. This additional interest is an inevitable consequence of the delay caused by the Change in Law events. By denying the only appropriate relief available to the Appellant in the present case, the CERC has rendered Article 12 of the TSA completely meaningless vide its Impugned Order. As a result, the Project is now at a risk of becoming economically unviable.

6.18 The CERC's own tariff regulations that govern transmission projects whose tariff is determined under Section 62 of the Act expressly recognise that the appropriate relief for Change in Law events is in the form of IDC and IEDC. In this regard, the definition of "Change in Law", "Uncontrollable Factors" under Regulations 3(9), 11 and 12 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 ("2014 Tariff Regulations") may be referred to. have been reproduced below for convenient perusal.

6.19 The CERC failed to appreciate that it is a long standing settled industry practice that recovery of additional IDC is the appropriate relief for Change in Law. The TSA must be interpreted by applying the principle of 'business efficacy' to give effect to the intention of the parties when the TSA was executed. The TSA is a pre-executed standard form document on the basis of which the Appellant placed its bid for the Project. A key clause therein was the Change in Law clause which assures investors of protection for additional expenditure caused due to Change in Law events. It is submitted that the CERC ought not to be permitted to make fundamental alterations to settled principles on the basis of which the bid was made. Accordingly, the



Impugned Order deserves to be set aside, and the relief as claimed by the Appellant should be allowed.

- 7. We have heard learned Counsel appearing for the Appellant and the learned Counsel appearing for the Respondents at considerable length of time and we have gone through carefully their written submissions/arguments and also taken note of the relevant material available on record during the proceedings. The following issues emerge out of the Appeal for our consideration:**

**Issue No.1: Whether in the facts and circumstances of the case, the Central Commission is justified in passing the Impugned Order, denying the claims of the Appellant for IDC and corresponding Carrying Costs on account of admitted Change in Law events from Scheduled Commercial Operation Date to Actual COD?**

**Issue No. 2: Whether the Appellant is entitled for grant of an increase of 2.9872% in the non-escalable Transmission Charges as compensation for the Change in Law as per the provisions of the TSA?**

### **Our Findings and Analysis:**

#### **8. Issue No.1:**

- 8.1 The Appellant filed Petition No. 216/MP/2016 before the CERC on 15.10.2016 seeking declaratory and compensatory reliefs on account of various Force Majeure and Change in Law events which adversely impacted the Project. In the said Petition, the Appellant stated that as a result of various unforeseen and uncontrollable events that took place subsequent to

the award of the Project, the Appellant was prevented from completing the Project on time.

8.2 The various events *inter alia*, which adversely affected and delayed the commissioning of the Project as also elaborated in the aforesaid Petition and now in the Appeal are set out below:

**Force Majeure and Change in Law events:**

- (a) Delay in grant of Forest clearance;
  - i. Changes in the Ministry of Environment and Forests' Guidelines No. F. No. 11-423/2011-FC dated 13.2.2012 for Diversion of Forest Land for non-forest purposes under the Forest Conservation Act, 1980 read with the Forest Conservation Rules, 2003;
  - ii. Change in the applicable Format vide MoEF Letter No. F.No.11-68/2014-FC (pt.) dated 11.7.2014 for obtaining clearances under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forests Rights) Act, 2006.

8.3 The Central Commission vide its Order dated 25.06.2018 in Petition No. 216/MP/2016, acknowledged that the Appellant's Project was indeed impacted by the Force Majeure events and *inter alia* extended the SCOD of all the aforesaid elements to their Actual Date of Commercial Operation ("**ACOD**"). Further, the Central Commission *inter alia* granted the following liberty to the Appellant (emphasis supplied):

*"38. In our view, the letter dated 13.2.2012 issued by MoEF disintitling the persons to utilize degraded forest land on the basis of certificate from the Chief Secretary regarding non-availability of non-forest land for the purpose of compensatory afforestation where the forest cover in the State is less than 50% is covered under "a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such consents, clearances and Permits" and is therefore covered under Change in Law. However, from the documents placed on record, it cannot be conclusively proved that the Petitioner's case falls under the change in law. In particular the following need clarification and supporting documents:*

- (a) *Whether the Petitioner had applied for certificate from the Chief (Secretary) and the outcome thereof;*
- (b) *The efforts made by the Petitioner to acquire the non-forest land for compulsory afforestation;*
- (c) *Whether the guidelines dated 13.2.2012 of MoEF were issued during the pendency of its application before the Chief (Secretary);*
- (d) *Whether the Petitioner acquired the degraded forest land after the issue of MoEF letter dated 11.7.2014;*
- (e) *Whether the forest clearance was granted after the petitioner made available the degraded forest land in accordance with the MoEF letter dated 11.7.2014.*

*Therefore, the claims of the Petitioner needs to be examined in the light of the explanation/ documents as noted above. We therefore, grant liberty to the Petitioner to approach the Commission with all the relevant documents for consideration in this regard.*

8.4 Pursuant to the allowance of Change in Law events and the aforesaid liberty granted by the Central Commission vide order dated 25.06.2018 in Petition No. 216/MP/2016, the Appellant filed a consequential petition before the Central Commission being Petition No. 297/MP/2018 providing all the documents required to establish the merit and *bona fides* of its Change in Law claim. In the said petition, the Central Commission vide its order dated 24.04.2019 (Impugned order) has held that the Appellant complied with all necessary pre-requisites for claiming Change in Law relief under the TSA and that the Change in Law events actually adversely affected the Appellant's Project. However, the Central Commission has denied Change in Law relief to the Appellant.

8.5 The Appellant has filed the instant Appeal before this Tribunal seeking setting aside of the Impugned Order to the extent it denies Change in Law relief to the Appellant by way of IDC and corresponding Carrying Costs on the following grounds:

- (a) The Impugned order contradicts itself by denying Change in Law relief while accepting that Change in Law has in fact adversely affected the Appellant's Project;

- (b) The Central Commission ignored its own earlier Orders; &
- (c) Grant of IDC is the appropriate relief in the instant case

8.6 It is settled law that a Change in Law clause (such as Article 12 of the TSA) has an in-built restitutionary mechanism which is meant to compensate a party affected by such a Change in Law and restore the affected party to the same position as if such Change in Law has not occurred. The import of Article 12 of the TSA is that a party affected by Change in Law must be put in the same economic position as if such Change in Law has not occurred, i.e., the party (being the Appellant herein) must be given the benefit of restitution as understood in civil law. In the present case, the Central Commission has itself accepted that Change in Law has adversely affected the Appellant's Project but erroneously refused to give due regard to the restitutionary mechanism envisaged under Article 12 of the TSA as under :

**ARTICLE: 12**

**12 CHANGE IN LAW**

**12.1 Change in Law**

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

- *the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- *a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits;*
- *any change in the licensing regulations of the Appropriate Commission, under which the Transmission License for the Project was granted if made applicable by such Appropriate Commission to the TSP;*
- *any change in the Acquisition Price; or any change in tax or introduction of any tax made applicable for providing Transmission Service by the TSP as per the terms of this Agreement.*

12.1.2 *Notwithstanding anything contained in this Agreement, Change in Law shall not cover any change:*

*a. on account of regulatory measures by the Appropriate Commission including calculation of Availability; and*

*b. in any tax applied on the income or profits of the TSP.*

## **12.2 Relief for Change in Law**

### **12.2.1 During Construction Period:**

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

*For every cumulative increase/decrease of each Rupees Nine Crores (Rs. 9,00,00,000/=) in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in non-escalable Transmission Charges shall be an amount equal to 0.32 percent (0.32%) of the Non-Escalable Transmission Charges.*

### **12.2.2 During the Operation Period:**

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

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

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

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

A perusal of the above clauses clearly shows that there are no exceptions to the grant of Change in Law relief once it has been determined that a Change in Law event has affected the Project and resulted into additional non-recurring expenditure in the form of IDC.

8.7 The Central Commission's reasoning in the Impugned Order reads in two exceptions to the grant of Change in Law relief under Article 12.1.2 of the TSA namely: (a) that IDC is not a direct consequence of the Change in Law

events and therefore must be denied; and (b) that no relief can be allowed for additional IDC incurred since IDC is not a component that is disclosed or evaluated at the time of bidding. CERC has in the same breath held that uncontrollable events in the form of Changes in Law have impacted the Project, but that the Appellant deserves no compensation for the same. Neither of these find any mention in the text of Article 12 of the TSA.

- 8.8 Since the spirit of Article 12 of the TSA is to ensure monetary restitution of a party to the extent of the consequences of Change in Law events, such exceptions cannot be read into Article 12 of the TSA. The Appellant has submitted that a crucial factor for the Appellant whilst bidding for the Project was that uncontrollable Change in Law events would be duly accounted for in accordance with Article 12 of the TSA. By the Impugned Order, the Central Commission has wrongly altered the meaning of the Change in Law clause of the TSA long after award of the bid and commissioning of the Project.
- 8.9 Further, the Central Commission has erred in passing the Impugned Order without fairly considering its own Orders in cases of Jabalpur Transmission Company Limited (“**JTCL**”) and East North Interconnection Company Limited (“**ENICL**”). It is observed that Change in Law relief has previously been granted by the Central Commission in analogous factual circumstances and for the very same Change in Law event, i.e., delay in grant of Forest Clearance on account of the Ministry of Environment and Forests, Government of India (“**MoEF**”) Notification F. No. 11-423/2011-FC dated 13.02.2012 (“**MoEF Notification**”). Change in Law relief was granted to JTCL by the Central Commission in terms of its Order dated 16.10.2015 in Petition No. 73/MP/2014 read with its Order dated 08.05.2017 in Petition No. 310/MP/2015. Vide the said Orders, the Central Commission allowed JTCL’s claims regarding additional expenditure towards IDC on loans taken during the extended construction period, which is precisely the same relief that was

sought by the Appellant in Petition No. 297/MP/2018. Despite its own orders allowing the very same Change in Law relief in the past, the Central Commission inexplicably denied the same to the Appellant vide the Impugned Order. Similarly, in its Order dated 13.09.2017 in Petition No. 174/MP/2016, the Central Commission held that the delay in getting forest clearance was beyond the control of the Petitioner therein, ENICL, and that ENICL should be allowed IDC for the extended period in order to put the ENICL in same economic position as if the Change in Law had not occurred as per the provisions of the TSA.

8.10 Despite the Central Commission's attention being specifically invited to its JTCL and ENICL Orders, the Central Commission deviated from its own precedents and disallowed the Change in Law relief sought by the Appellant. The Central Commission having quoted the aforesaid applicable precedents went to incorrectly rely on its Orders dated 29.03.2019 in Petition No. 238/MP/2017 and Petition No. 195/MP/2017, respectively. These decisions are irrelevant to and distinguishable from the present dispute. In its Order dated 29.03.2019 in Petition No. 238/MP/2017, the Central Commission had specifically held as follows:

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

This is in sharp contrast with the Central Commission's Order dated 25.06.2018 in Petition No. 216/MP/2016 (concerning the present dispute), which did not impose any caveat or qualification that the extension of SCOD to ACOD will not entail financial benefit in the form of IDC for the Appellant. On the contrary, in the said Order dated 25.06.2018 in Petition No. 216/MP/2016, the Central Commission requisitioned information on the various aspects of the Appellant's present Change in Law claims and

granted liberty to the Appellant to approach the Commission with all relevant documents for consideration in this regard. Further, in Petition No. 297/MP/2018, the Central Commission examined all the documents placed on record and held that Change in Law events impacted the project, however, denied any monetary relief for the said events. This brings the inexplicable contradiction in the Central Commission's approach.

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

8.12 The Appellant has submitted that it had no option but to incur additional IDC for the periods when the Project commissioning was delayed. Such additional IDC is an additional 'expenditure' as it is an outflow from the Appellant to its lenders. Such IDC has been certified by the Appellant's Chartered Accountant, which has not been disputed by any of the respondents or the Central Commission in any manner. This is a direct consequence of the Change in Law events unequivocally approved by the Central Commission itself.

8.13 The Central Commission's own tariff regulations that govern transmission projects whose tariff is determined under Section 62 of the Electricity Act, 2003 expressly recognise that the appropriate relief for Change in Law events is in the form of IDC and IEDC. In this regard, the definition of "Change in Law", "Uncontrollable Factors" under Regulations 3(9), 12 and Regulation 11 of the Central Electricity Regulatory Commission (Terms and



Conditions of Tariff) Regulations, 2014 (“**2014 Tariff Regulations**”) are reproduced below :

*“3. Definitions and Interpretations.- In these regulations, unless the context otherwise requires —*

*“(9) “Change In Law” means occurrence of any of the following events:*

*(a) enactment, bringing into effect or promulgation of any new Indian law; or*

*(b) adoption, amendment, modification, repeal or re-enactment of any existing Indian law; or*

*(c) change in interpretation or application of any Indian law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation or application; or*

*(d) change by any competent statutory authority in any condition or covenant of any consent or clearances or approval or licence available or obtained for the project; or*

*(e) coming into force or change in any bilateral or multilateral agreement/treaty between the Government of India and any other Sovereign Government having implication for the generating station or the transmission system regulated under these Regulations.”*

**“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 upto 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 upto 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 :*

*...*

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

*i. Force Majeure events.; and*

*ii. Change in law.*

*...”*

A perusal of the above regulations under the 2014 Tariff Regulations clearly shows that even under the cost-plus regime, it is IDC which is the principle relief that is granted for the purpose of compensating a party that has been impacted by Change in Law.

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

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

## 9. Issue No. 2:

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

### **12.2 Relief for Change in Law**

#### *12.2.1 During Construction Period:*

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

*For every cumulative increase/decrease of each Rupees Nine Crores (Rs. 9,00,00,000/=) in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in non-escalable Transmission Charges shall be an amount equal to 0.32 percent (0.32%) of the Non-Escalable Transmission Charges.*

#### *12.2.2 During the Operation Period:*

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

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

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

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

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

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

### **ORDER**

For foregoing reasons as stated supra, we are of the considered view that the issues raised in the instant Appeal No. 208 of 2019 have merits and hence, the Appeal is allowed.

The Impugned Order dated 24.04.2019 passed by the Central Commission is hereby set aside to the extent challenged in the Appeal and our findings given above.

There shall be no order as to costs.

Pronounced in the Virtual Court on this 20<sup>th</sup> day of October, 2020.

**(S.D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

**REPORTABLE / ~~NON-REPORTABLE~~**

mkj