

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APPEAL NO.129 OF 2020
AND
APPEAL NO. 276 OF 2021**

Dated: 3rd December, 2021

**Present: Hon'ble Mr. Justice R.K. Gauba, Judicial Member
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

APPEAL NO.129 OF 2020

In the matter of:

NRSS XXXI (B) Transmission Limited
[Through its Authorized Signatory]
503 A, Windsor,
OFF CST Road, Kalina
Mumbai-400098

.... Appellant

Vs.

1. Central Electricity Regulatory Commission
[Through its Secretary]
3rd& 4thFloor, Chanderlok Building,
36, Janpath,
New Delhi – 110001
2. U.P. Power Corporation Ltd.
[Through its Executive Engineer]
14th Floor, Shakti Bhawan Extension,
14-Ashok Marg, Lucknow,
Uttar Pradesh-226001.
3. AD Hydro Power Ltd.
Through its President/CEO,
A-12 Bhilwara Tower, Sector-1,
Noida, Uttar Pradesh-201301.

4. Haryana Power Purchase Centre
Through its Executive Engineer/LTP
Shakti Bhavan Energy Exchange,
(Room No.446), Top Floor,
Sector-6, Panchkula, Haryana-134109.
5. Punjab State Power Corporation Ltd.
Through its Chief Engineer, Power Purchase & Regulation
D-3, Shakti Vihar, PSPCL,
Patiala-147001
6. Himachal Sorang Power Pvt. Ltd.
Through its Director,
D-7, Lane-1, Sector-1,
New Shimla, Shimla,
Himachal Pradesh-171009
7. Adani Power Ltd, Mundra
Through its Asstt. General Manager
3rd Floor, Achalraj Building,
Opp. Mayor Bungalow, Law Garden,
Ahmedabad-380006
8. Rajasthan Urja Vikas Nigam Limited
Through its Managing Director
Vidyut Bhawan, Janpath, Jyoti Nagar
Jaipur-302005.
9. LancoAnpara Power Ltd.
Through its Director
Lanco House, Plot No.397,
Udyog Vihar, Phase-3,
Gurgaon-122016.
10. LancoBudhi Hydro Power Pvt. Ltd.
Through its Director
Plot No.397,
Udyog Vihar, Phase-3,
Gurgaon-122016.
11. Power Development Deptt., Govt. of J&K
Through its Chief Engineer (Commercial & Survey)

- Govt. of Jammu & Kashmir, SLDC Building,
220 kV Grid Station Premises, Gladni,
Narwal-Bala, Jammu-180006.
12. North Central Railways
Through its Chief Electrical Engineer
Head Quarter's Office, Subedarganj,
Allahabad-211033.
 13. Jaiprakash Power Ventures Ltd.
Sector-128, Noida-201304.
 14. BSES Yamuna Power Ltd.
Through its Asstt. Vice President, Power Management
2nd Floor, Shakti Kiran Building,
Karkardooma, New Delhi-110092.
 15. BSES Rajdhani Power Ltd.
Through its Head Power Management Group
BSES Bhawan, Nehru Place,
New Delhi-110019.
 16. Tata Power Delhi Distribution Ltd.
Through its Company Secretary
NDPL House, Hudson Lines,
Kingsway Camp, New Delhi-110009.
 17. New Delhi Municipal Council
Through its Chief Engineer (E-II)
NDMC, Palika Kendra, Parliament Street,
New Delhi-110001.
 18. Electricity Wing of Engineering Dept.,
Union Territory of Chandigarh
Through its Superintending Engineer,
Electricity OP Circle, 5th Floor,
New Deluxe Building, Sector-9,
Chandigarh-160009.
 19. Central Transmission Utility of India Ltd.,
Through its Chief General Manager,
Saudamini, Plot No.2, Sector-29,

Gurgaon-122001.

20. PTC (Budhil), PTC India Ltd.
Through its Senior Vice President,
2nd Floor, NBCC Tower, 15,
Bhikaji Cama Place, New Delhi-110066.
 21. PTC (Everest), PTC India Ltd.
Through its Senior Vice President,
2nd Floor, NBCC Tower, 15,
Bhikaji Cama Place, New Delhi-110066.
 22. Uttarakhand Power Corporation Ltd.
Through its Superintending Engineer-Commercial,
Victoria Cross Vijeya Gabar Singh Bhawan,
Kanwali Road, Balliwala Chowk,
Dehradun-248001, Uttarakhand.
 23. Himachal Pradesh State Electricity Board Ltd.
Through its Chief Engineer (SO&P)
HPSEB Ltd., Vidyut Bhawan,
Shimla-171004
 24. REC Transmission Projects Company Ltd
Through its Authorized Signatory
ECE House, 03rd Floor,
Annexe-II, 28 AI KG Marg,
New Delhi- 110001
- Respondents

Counsel for the Appellant (s) : Mr. Sajan Poovayya,
Sr. Adv.
Mr. Amit Kapur
Ms. Ameya Vikram Mishra
Mr. Vishrov Mukherjee
Ms. Raveena Dhamija
Mr. Yashaswi Kant
Mr. Rohit Venkat
Ms. Raksha Agarwa
Mr. Girik Bhalla
Mr. Pratyush Singh
Mr. Sharan Balakrishna

Mr. Rishabh Mishra
Mr. Janmali Manikala

Counsel for the Respondent(s) : Mr. Pradeep Misra
Mr. Manoj Kr. Sharma for R-2

Mr. R.B. Sharma
Mr. Mohit Mudgal
Mr. Sachin Dubey for R-15

Mr. Alok Shankar
Mr. Aditya Jain
Ms. Nipun Sharma for R-19

APPEAL NO. 276 OF 2021

Darbhanga-Motihari Transmission Company Limited
503 A, Windsor,
OFF CST Road, Kalina Mumbai-400098 ... Appellant

Vs.

1. Central Electricity Regulatory Commission
Through its Secretary
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi – 110001
2. Bihar State Power Transmission Co. Ltd.
Through its Chief Engineer (Transmission)
Transmission Vidyut Bhawan, 04th Floor,
Bailey Road, Patna,
Bihar (800021)
3. Bihar State Power Holding Company Limited,
Through its Chairman cum Managing Director
01st Floor, Vidyut Bhawan, Bailey Road,
Patna, Bihar (800021)
4. West Bengal State Electricity Distribution Company Ltd.
Through its Chief Engineer-PTR
Vidyut Bhawan, Kolkata-91

5. Power Grid Corporation of India Limited.
Through its Dy. General Manager (Commercial)
HVDC Pusauli, Saudamini,
Plot No. 02, Sector-29,
Near IFFCO Chowk, Gurgaon (Haryana) - 122 001
6. Grid Corporation of Orissa Ltd.
Through its Director (Commercial)
Janpath, Bhubaneshwar-751022
7. Power Deptt., Govt. of Sikkim,
Through its Addl. Chief Engineer (EHV, M&E)
Gangtok- 737101
8. Damodar Valley Corporation Ltd.
Through its Chief Engineer (Commercial)
DVC Towers, VIP Road,
Kolkata- 700054
9. Jharkhand State Electricity Board
Through its Chief Engineer (Transmission)
Engineering Building, HEC,
Dhurwa, Ranchi - 834004
10. Maithan Power Ltd.
Through its Authorised Signatory
MA_5, Gogna,
PO- Maithan DAM,
Distt. – Dhanbad, Jharkhand-828207
11. PFC Consulting Ltd.
Through its Authorised Signatory
150, Connaught Ln,
Atul Grove Road, Janpath,
Connaught Place, New Delhi, Delhi 110001... Respondents

Counsel for the Appellant (s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Amit Kapur
Ms. Ameya Vikram Mishra
Mr. Vishrov Mukherjee
Ms. Raveena Dhamija

Mr. Yashaswi Kant
Mr. Rohit Venkat
Ms. Raksha Agarwal
Mr. Girik Bhalla
Mr. Pratyush Singh
Mr. Sharan Balakrishna
Mr. Rishabh Mishra
Mr. Janmali Manikala

Counsel for the Respondent(s): Mr. Manish Kumar Choudhary
for R-2& 3

J U D G M E N T

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

1.0 These two appeals have been filed against the common Order dated 29.03.2019 passed by the first respondent, Central Electricity Regulatory Commission (hereinafter being referred to as the “**Central Commission**” or “**Commission**”) in case nos. **195/MP/2017** (“**Petition 195**”) (as modified by Review Order dated 15.01.2020 passed in Review Petition No. 07/RP/2019) and **238/MP/2017** (“**Petition 238**”) (as modified by Review Order dated 13.01.2020 passed in Review Petition No. 08/RP/2019 whereby the appellants herein had claimed compensation for certain Force Majeure and Change in Law Events. The appellants are aggrieved because, by the impugned decision, the Central commission has provided partial relief to the Appellants.

2.0 The Appellant in the first captioned Appeal (**Appeal 129/2020**) is **NRSS XXXI(B) Transmission Limited** (“**NRSS**”) and in the second captioned Appeal, the Appellant is **Darbhanga-Motihari Transmission Company Limited** (“**DMTCL**”).

3.0 The two Petitions (Petition 195 & Petition 238) were filed before the Central Commission by the Appellants seeking extension of the Scheduled Commercial Operation Date (“**SCOD**”) and compensation for certain Force Majeure and Change in Law events which impacted the “Northern Region System Strengthening Scheme- XXXI (B)” as detailed in the Transmission Services Agreement dated 02.01.2014 and “Eastern

Region System Strengthening Scheme-VI” as per work scope detailed in the Transmission Services Agreement dated 06.08.2013.

4.0 The Appellant having similar grievances against the impugned order have filed the present Appeals.

- i. Appeal 129 of 2020 has been filed on the following three counts:
 - a. The Commission has disallowed relief in terms of IDC and IEDC even after declaring the requirement of obtaining forest clearance as a Change in Law event and without assigning any reasons for such rejection.
 - b. The Commission has disallowed claims with respect to change in Kurukshetra and Malerkotla sub-stations’ gantry coordinates and subsequent change in connection arrangement for 400kV D/C Kurukshetra-Malerkotla Transmission Line as Force Majeure event though these changes occurred as a consequence of inaccuracies in the Survey Report prepared by the Bid Process Coordinator, REC Transmission Projects Company Ltd. (“RECTPCL”).
 - c. The Appellant has not been granted relief for the loss of first year tariff on account of Force Majeure and Change in Law events which delayed COD.
- ii. Appeal 276 of 2021 has been filed on the following six counts of which three are similar to the issues mentioned at su-para (i) above:

- a. While allowing the requirement of obtaining forest clearance as a Change in Law event, the Central Commission has disallowed consequential relief in terms of IDC and IEDC which were a direct consequence of these events without assigning any reason.
- b. While extending the SCOD and holding that the delay was not on account of DMTCL, the Commission has disallowed recovery of amounts paid by DMTCL to PGCIL along with interest pursuant to its order dated 01.09.2017 passed in Petition No. 209/TT/2016. DMTCL was held liable to pay these amounts on account of delay in COD of the Project. However, since delay in COD has been held to be a Force Majeure and Change in Law event, DMTCL cannot be held liable for such amounts.
- c. CERC has erred in disallowing claims with respect to change in Gantry Coordinates and Connection Arrangement at PGCIL Muzaffarpur Substation for 400kV D/C Muzaffarpur-Darbhanga Transmission line as Force Majeure and Change in Law event even though these changes occurred as a consequence of inaccuracies in the Survey Report prepared by the Bid Project Coordinator, PFFCL.
- d. CERC has erred in disallowing claims with respect to the work affected on account of increase in number of power line crossings due to inaccuracies in the Survey Report prepared by the Bid Processing Coordinator

("BPC") (i.e., PFC Consulting Ltd. ("PFCCL")) as Force Majeure and Change in Law event.

- e. CERC has erred in disallowing additional cost incurred on account of ground improvement work at Motihari sub-station land due to Geotechnical surprise as a Force Majeure event.
- f. CERC has erred in not providing relief to the Appellant for the loss of tariff on account of Force Majeure and Change in Law events which caused delay in achieving SCOD.

5.0 It may be seen that the two Appeals are similar in nature except on certain additional issues raised / claimed in second captioned Appeal which are also the outcome of Force Majeure and Change in Law Events. Considering that the issues raised in the first captioned Appeal are same as raised in the second captioned Appeal, the first captioned Appeal is considered for examining the three issues which are similar issues whereas the additional issues in the second captioned Appeal will be dealt with later in the succeeding paras.

6.0 Description of Parties(in the Appeal no. 129/2020):-

a) The Appellant, NRSS XXX1 (B) is a company incorporated under the Companies Act and is a Special Purpose Vehicle ("SPV") originally incorporated by REC Transmission Project Company Ltd. ("RECTPCL"/ "the BPC") to implement the Project which comprises of (a) 400kV D/C Kurukshetra- Malerkotla Transmission Line ("KM

Line”); and (b) 400 kV D/C Malerkotla- Amritsar Transmission Line (“MA Line”).

b) Respondent No.1, CERC, is a statutory authority constituted under the Electricity Act, 2003 and vested with the powers to adjudicate in the matter.

c) Respondent No. 2, Uttar Pradesh Power Corporation Limited, is a company formed and registered under the Companies Act for the purpose of procurement, transmission and supply of electricity in the State of Uttar Pradesh. Respondent No. 3, AD Hydro Power Ltd, is a generating company registered under the Companies Act,1956 and Respondent No. 19, Power Grid Corporation of India Ltd., is a Central Transmission Utility (CTU) and is a Public Limited Company under the Companies Act, 1956 and is regulated by the Electricity Act,2003.

d) Respondent No. 4 to 18 and 20 to 23 are also companies registered under the Companies Act or State Government Department engaged in the business of Generation, Transmission, Distribution or Trading of Electricity.

e) Respondent No. 24, REC Transmission Projects Company Ltd., is a wholly owned subsidiary of REC Ltd. REC Transmission Project Company Limited has been appointed as the Bid Process Coordinator (BPC) by the Ministry of Power for Inter State and Transmission Systems across the country on Tariff Based Competitive Mode.

7.0 Description of Parties(in the Appeal no. 276/2021):-

a) The Appellant, DMTCL, having its corporate office at 503A, Windsor, Off CST Road, Kalina, Mumbai 400098. DMTCL is a

Special Purpose Vehicle (“**SPV**”) originally incorporated by PFCCL to implement the Project which comprises of (a) 2x500 MVA, 400/220kV GIS sub-station at Darbhanga along with the Muzaffarpur-Darbhangha 400kV D/C line with triple snowbird conductor (“**Darbhangha Element**”); and (b) 2x200 MVA, 400/132kV GIS sub-station at Motihari along with LILO of Barh- Gorakhpur 400kV D/C quad line at Motihari (“**Motihari Element**”).

b) Respondent No.1, Ld. CERC, is a statutory authority constituted under the Electricity Act, 2003 and vested with the powers to adjudicate in the matter.

c) Respondent No.2, Bihar State Power Transmission Co. Ltd is a transmission licensee as defined under the Electricity Act and is carrying on intra-state transmission and wheeling of electricity under license issued by the Bihar Electricity Regulatory Commission. The company is also discharging the functions of State Load Dispatch Center(SLDC). It is the lead beneficiary under the Transmission Services Agreement with DMTCL.

d) Respondent No.3, Bihar State Power Holding Company Limited is a State-owned company responsible for promoting coordinated development of generation, supply and distribution of electricity in the State of Bihar in an efficient and economic basis of management.

e) Respondent No.4, West Bengal State Electricity Distribution Company Ltd. is a distribution licensee as defined under the Electricity Act operating in the State of West Bengal.

f) Respondent No. 5, Power Grid Corporation of India Limited is an inter-state deemed transmission licensee responsible for

transmission of electricity through Inter-State Transmission System (ISTS).

g) Respondent No.6, Grid Corporation of Orissa Ltd. is engaged in the business of bulk purchase and bulk sale of power to the four Distribution Companies within the State of Orissa and trading of surplus power through traders to promote exchange of power with neighboring States in the country.

h) Respondent No.7 is the Power Department, Government of Sikkim.

i) Respondent No.8 is Damodar Valley Corporation Ltd., which was constituted under the Damodar Valley Corporation Act, 1948.

j) Respondent No.9, Jharkhand State Electricity Board, is the largest distribution licensee operating in State of Jharkhand, incorporated primarily to carry out distribution of electricity to retail and bulk consumers in the state of Jharkhand.

k) Respondent No.10, Maithon Power Ltd., is a joint venture of Tata Power & Damodar Valley Corporation which has implemented the 1050 MW (2X525 MW units) in Nirsa District of Dhanbad in the State of Jharkhand in India.

l) Respondent No. 11 is PFC Consulting Ltd. which is Bid Processing Coordinator (“**BPC**”) for Transmission Scheme "Eastern Region System Strengthening Scheme-VI (ERSS-VI)" (“**ERSS-VI**”) notified by the Ministry of Power.

Facts of the Case (Appeal No.129 of 2020):-

8.0 The Transmission Scheme “Northern Region System Strengthening Scheme XXXI (B)” [NRSS XXXI (B)] was approved by the Standing Committee for Northern Region in its 31st meeting.

8.1 Thereafter, Ministry of Power, Govt. of India vide Notification No. 15/1/2013 has notified the REC Transmission Project Co. Ltd. (“RECTPCL”) as the Bid Processing Coordinators (“BPC”) for the said scheme. Subsequently, the RECTPCL has invited bids for commissioning of the approved inter-state Transmission Project under the competitive bidding route in accordance with the Govt. of India guidelines.

8.2 On 31.07.2013, the Request for Qualification (“RFQ”) was issued by RECTPCL for the selection of developer on build, own, operate and maintain basis for the proposed Transmission Project and further on 09.12.2013, the Request for Proposal (“RFP”) was issued by RECTPCL for the establishment of the proposed Northern Region System Strengthening Scheme along with a preliminary survey report indicating the various geographical and physical locations including route for the Right of Way (ROW) for laying of the transmission lines wherein it was indicated that no forest area falls across the transmission line routes, which is the main cause of this appeal.

8.3 Subsequently, the NRSS executed a Transmission Service Agreement (“TSA”) with the Long-Term Transmission Customers (“LTTCs”) for the Scheme on 02.01.2014. Further, on 26.02.2014, M/s Essel Infra Projects Ltd. was selected as a successful bidder and the Letter of Intent (“LoI”) was issued in favour of the company whereby the

Effective Date of the Project was fixed as 12.05.2014. As per the Tripartite Share Purchase Agreement signed by the parties namely RECTPCL, NRSS and Essel Infra Projects Ltd., the entire shareholding of NRSS was transferred in favour of Essel Infra Projects Ltd., thereby the SPV became a 100% subsidiary of Essel Infra Projects Ltd.

8.4 CERC, vide order dated 07.08.2014 passed in Petition No. 89/TT/2014, adopted Transmission Charges and vide order dated 25.08.2014 passed in Petition No. 90/TL/2014 granted transmission licence in favour of NRSS for a period of 25 years. As per the said licence, NRSS was required to complete the Project within 28 months from the Effective Date i.e., 28 months from 12.05.2014.

8.5 On 15.10.2014, Ministry of Power granted approval to set up electric lines for transmission of electricity under Section 164 of Electricity Act to NRSS.

8.6 The Appellant's Company vide letter dated 14.05.2014 requested the Power Grid Corporation of India Ltd. (PGCIL) to provide coordinates for dead-end connection where the Kurukshetra-Malerkotla (KM) and Malerkotla-Amritsar (MA) transmission lines were proposed to be terminated. In turn, PGCIL provided only single line document and layout of Kurukshetra, Malerkotla & Amritsar Sub-stations where the transmission system was proposed to be connected, however, without indicating the actual physical coordinates of the end points at which the transmission lines were proposed to be terminated.

8.7 On 27.08.2015, the Appellant company again requested PGCIL to provide the exact coordinates as against the coordinates given in the Survey Report of RECPTCL so as to start commissioning of the transmission lines. However, only on 10.10.2015, PGCIL provided the coordinates of Malerkotla Sub-station, the coordinates for the Kurukshetra Sub-station were provided only on 12.03.2016.

8.8 During the process of commissioning of the Transmission lines, the Appellant encountered certain unforeseen and uncontrollable events which were not under the control of the Appellant including the existence of forest area across the route of transmission line as against the non-existence of forest area indicated by the Survey Report.

8.9 The Appellant's project got delayed and also resulted into increased cost due to existence of forest area falling in the ROW and change in Gantry coordinates resulting into increased length of the transmission line, the Appellant's company filed the petition before the Central Commission seeking relief on account of cost and time overrun in getting the forest clearance and also the extension of the transmission line by few kms. The Central Commission observed in favour of the company but provided partial relief to the Appellant on account of Change in Law and Force Majeure Events by rejecting certain claims by the company.

Facts of the Case (Appeal No. 276 of 2021):-

9.0 On 08.10.2012, Ministry of Power, Govt. of India vide Notification No. S.O.2390(E) has notified the PFCC as the Bid Processing Coordinators (“BPC”) for the Transmission Scheme “Eastern Region System Strengthening Scheme-VI(ERSS-VI)” scheme. Subsequently, on 05.01.2013, ERSS-VI was approved in the 1st/2013 Standing Committee Meeting for the Eastern Region.

9.1 PFCCCL issued a Global Invitation for Qualification (“**RFQ**”) on 08.02.2013 for selection of developer on build, own, operate and maintain basis for ERSS-VI Transmission Project and Request for Proposal (RFP) alongwith Survey Report was issued on 27.05.2013 by PFCCCL for establishing a transmission system under ERSS-VI. The Survey Report of PFCCCL (“**Survey Report**”) for both- 400 kV D/C Muzaffarpur-Darbhanga Line and LILO of Barh-Gorakhpur 400 kV 2xD/Cline at Motihari indicated that there were no forest areas in transmission line routes.

9.2 On 06.08.2013, DMTCL executed a Transmission Services Agreement with the Long-Term Transmission Customers being Respondent Nos. 2 to 10 for the transmission scheme (“**TSA**”) and M/s Essel Infra Projects Ltd. was selected as a successful bidder and the Letter of Intent (“**LOI**”) for the Project was issued on 17.10.2013.

9.3 On 10.12.2013, by way of a Tripartite Share Purchase Agreement between PFCCCL, DMTCL and Essel Infra Projects Ltd., the entire shareholding of DMTCL was transferred in favour of Essel Infra Projects Ltd., thereby making DMTCL a 100% subsidiary of Essel Infra Projects Ltd.

9.4 CERC, vide order dated 20.05.2014 passed in Petition No. 323/TT/2013, approved the TSA and adopted transmission charges and on 30.05.2014 granted a transmission license in favour of DMTCL for a period of 25 years. As per the terms of the transmission license, the Project completion period was 30 months for Darbhanga Element and 32 months for Motihari Element from the Effective Date.

9.5 Ministry of Power vide Order dated 04.09.2014 granted approval to set up electric lines for transmission of electricity under Section 164 of Electricity Act to DMTCL.

9.6 The SCOD for the Darbhanga Element and Motihari Element were 09.06.2016 and 09.08.2016, respectively. The Project was delayed, and the COD was ultimately achieved on 31.03.2017 for Darbhanga Element and commissioning of Motihari Element was done on 10.08.2017. Subsequently, DMTCL filed petition on 30.10.2017 before the Central Commission for the extension of SCOD and attendant costs and time overrun due to certain Force Majeure and Change in Law Events.

9.7 The Impugned order was passed by the Central Commission on 29.03.2019 thereby disallowing certain claims even after acknowledging the Force Majeure and Change in Law Events.

Question of Law: (Appeal No.129 of 2020)-

10.0 The Appellant has raised following questions of Law in the present Appeal:

- i. Whether CERC has erred in refusing to grant consequential reliefs with respect to increase in IDC and IEDC on account of unexpected requirement of forest clearance despite holding that the requirement of forest clearance was a Change in Law event and the subsequent delay in obtaining forest clearance was a Force Majeure event due to errors in the Survey Report by RECTPCL?
- ii. Whether CERC has erred in disallowing claims with respect to change in Gantry Coordinates and Connection Arrangement at Kurukshetra and Malerkotla Substation for 400kV D/C KM Line as Force Majeure and Change in Law event?
- iii. Whether CERC has erred in failing to provide relief to NRSS for the loss of tariff on account of Force Majeure and Change in Law events which led to under recovery of tariff as against the tariff envisaged at the time of bid submission?

Question of Law: (Appeal No. 276 of 2021):-

11.0 The Appellant has raised following questions of Law in the present Appeal (Appeal No. 276 of 2021):

- i) Whether CERC has erred in refusing to grant consequential reliefs with respect to increase in IDC and IEDC on account of unexpected requirement of forest clearance despite holding that the requirement of forest clearance was a Change in Law event and the subsequent delay in obtaining forest clearance was a Force Majeure event due to errors in the Survey Report by PFCCL?
- ii) Whether CERC has erred in disallowing claims with respect to the work affected due to increase in number of power line crossings as Force Majeure and Change in Law event?
- iii) Whether CERC has erred in disallowing claims with respect to change in Gantry Coordinates and Connection Arrangement at PGCIL Muzaffarpur Substation for 400kV D/C Muzaffarpur-Darbhanga Transmission line as Force Majeure and Change in Law event?
- iv) Whether CERC has erred in disallowing additional cost incurred on account of ground improvement work at Motihari sub-station land due to Geotechnical surprise as a Force Majeure event?
- v) Whether CERC has erred in failing to provide relief to DMTCL for the loss of tariff on account of Force Majeure and Change in Law Events which led to Project being commissioned in the second tariff year and caused under recovery of tariff as against what was envisaged in the financial bid?

12.0 Written Submissions/ Replies by Appellant & Respondents in Appeal No. 129 of 2020.

12.1 Mr. Sajan Poovayya, Learned Counsel for the Appellant (NRSS) has filed the written submission for our consideration as under:-

I. The Appeal is filed against the Central Electricity Regulatory Commission's ("**CERC/ Respondent No.1**") Order dated 29.03.2019 ("**Impugned Order**") in Petition No. 195/MP/2017 ("**Petition 195**") (as modified by Review Order dated 15.01.2020 passed in Review Petition No. 07/RP/2019) wherein for the Change in Law and Force Majeure Events including time and cost overrun, the Central Commission vide the Impugned Order allowed certain claims and extended SCOD to actual COD, however, the following financial claims of NRSS were disallowed:

- Consequential relief of Rs. 23.80 Crores on account of IDC and IEDC which were a direct consequence of the Force Majeure and Change in Law events.
- Rs. 6.88 Crores incurred due to change in gantry coordinates and subsequent change in connection arrangement for 400kV D/C Kurukshetra-Malerkotla Transmission Line as Force Majeure event though these changes occurred as a consequence of inaccuracies in the Survey Report prepared by the Bid Process Coordinator, REC Transmission Projects Company Ltd. ("**RECTPCL**").
- Restitution for loss of first year tariff to the extent of

Rs. 58.68 Crores on account of Force Majeure and Change in Law events which delayed the COD.

II. Grant of IDC for extension of SCOD due to Force Majeure and Change in Law-

a)The Central Commission vide the Impugned Order held that the requirement of obtaining forest clearance is a Change in Law event and the time spent in obtaining forest clearances was beyond the control of, hence it is a Force Majeure Event and therefore, Appellant entitled to extension of SCOD.

b)However, CERC disallowed IDC and IEDC incurred due to such delay without assigning any reasons stating that:

“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.”

- c) Appellant submitted that IDC and IEDC are a direct consequence of delay in SCOD. Once the Commission allowed extension of SCOD, the Commission ought to have allowed the consequential cost implication. Additionally, it is a settled position of law that actual expenditure as on date of commissioning must be allowed. If there is a delay in achieving COD on account of reasons beyond the control of the party in question, the party is entitled to both time and cost overruns.
- d) Further, submitted that the Commission vide the Impugned Order has failed to give reasons for disallowance of the claim for IDC and IEDC despite recognizing that the delay in achieving SCOD was due to reasons beyond the control of NRSS. It is a settled position of law that reasons ought to be provided by a judicial/ quasi-judicial body while passing an order. It is submitted that recording reasons by a judicial/quasi-judicial body is a principle of natural justice which ought to have been followed by CERC vide the Impugned Order.
- e) In regard to above, the Appellant quoted the Judgment dated 20.10.2020 in Appeal No. 208 of 2019 of this Tribunal in ***–Bhopal Dhule Transmission Company Limited v Central Electricity Regulatory Commission***

&Ors. (“Bhopal Dhule Judgment”) wherein it was held that the Commission erred in denying Change in Law relief to the appellant for IDC which is a direct consequence of the Change in Law event referring *Para Nos.8.7, 8.8, 8.11 & 8.15 of the Judgement-*

“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.”

- f) It is submitted that the TSA provisions in the Bhopal Dhule Judgment on the basis of which this Tribunal allowed the IDC claim is in *parimateria* with the TSA

entered into between NRSS and LTTCs in the present case.

- g) Also added that NRSS ought to be granted relief for increase in IDC and IEDC on account of delay in SCOD due to unexpected requirement of forest clearance which has been recognized as both Force Majeure and Change in Law event by CERC vide the Impugned Order.
- h) Attention was drawn towards Article 11.4.1 of the TSA wherein certain events which impact the Project cost have been included as Force majeure events. In this regard, it is submitted that in terms of Article 11.7(b) of the TSA, every party is entitled to relief for a Force Majeure event qua its obligations.
- i) It is submitted that if increase in cost due to Force Majeure is considered a Force Majeure event, the only possible relief is compensation. Disallowance of increase in cost on account of Force Majeure is contrary to the terms of the TSA. Article 11.7(b) of the TSA, being an inclusive and restitutive provision permits moulding of appropriate relief in order to overcome the effects of the Force Majeure event.
- j) Similarly, the relief for Change in Law in terms of Article 12.2 of the TSA is determined based on the impact the Change in Law event has on the cost of the Project. IDC impacts the cost of the Project and hence relief ought to have been granted.

III. **CERC has wrongly disallowed the claims towards Change in Gantry Coordinates and Connection Arrangement at Kurukshetra and Malerkotla Substation For 400 KV D/C Kurukshetra-Malerkotla Transmission Line as Force Majeure event-**

- a) The Appellant submitted that the RECTPCL, the Bid Process Coordinator (“**BPC**”) issued its Survey Report dated 09.12.2013 where gantry coordinates were provided for the termination of 400 kV D/C KM Line at PGCIL Kurukshetra and PGCIL Malerkotla substation. The Survey Report was given to the bidders at the time of bidding.
- b) Subsequently, there was a change in the Gantry Coordinates by PGCIL at Kurukshetra and Malerkotla Substation end from the coordinates provided in the Survey Report. The difference in coordinates is set out below: -

	Actual Coordinates	Survey Report Specification
Kurukshetra end	Easting: 692518 E, Northing: 3310118 N	Easting: 692351 E, Northing: 3310156 N
Malerkotla end	Easting: 583600.09 m E, Northing: 3380606.67 m N	Easting: 584292 m E, Northing: 3380586 m N

- c) This change in the terminating coordinates led to change in the entry alignment of 400 kV D/C KM line and increase in length by 2.5 km and by 1 km for 400 kV D/C MA Line.
- d) The Commission while noting that there was a change in coordinates from those given in the Survey Report has still proceeded to reject NRSS's claim on the basis that there was slackness on part of NRSS in pursuing the matter with PGCIL / CTU. The relevant paragraphs of the observations are quoted as below: -

"104. The Petitioner vide its letter 14.5.2014 requested for gantry coordinates and PGCIL vide its letter dated 4.7.2014 had informed the Petitioner that there may be change in North Coordinate by few meters during detailed Engineering. Thereafter, the Petitioner after a gap of more than one year vide its letter dated 27.8.2015 sought clarification pertaining to change in North Coordinate gantry at Kurukshetra. In the said letter, the Petitioner had also acknowledged the receipt of GA & SLD of the bays at Malerkotla, Kurukshetra and Amritsar Substations on 4.7.2014. The coordinates were provided by PGCIL on 10.10.2015 for Malerkotla and on 12.3.2016 for Kurukshetra.

105. It is observed that the Petitioner wrote the first letter on 14.5.2014 and the next letter was written on 27.8.2015. The Petitioner has not explained the delay of one year in pursuing the matter. Moreover, the Petitioner

has not placed on record any document to show that it was pursuing the matter with the CTU during the said period. As a TSP, it is expected on the part of the Petitioner to pursue the matter diligently with CTU. However, there was slackness on the part of the Petitioner. Therefore, we are not inclined to grant any relief in this regard.”

- e) Further, submitted that the Commission has erred in not granting relief on account of the change in gantry coordinates due to slackness on the part of the Appellant even though the increase in cost is on account of change in gantry coordinates resulting into increase in the route length hence, the alleged slackness does not have a bearing on the same.
- f) Further, there was no slackness on the part of NRSS in pursuing the matter of confirmation of Gantry Coordinates with PGCIL. NRSS had been diligently sending updates to LTTCs and CEA with respect to change in gantry coordinates through: -
- (i) Monthly Progress Reports starting from July 2014 to March 2016.
 - (ii) Other intimation letters to LTTCs and CEA dated 05.02.2016, 30.03.2016, 02.04.2016, 13.05.2016, 13.06.2016 and 23.09.2016.
- g) It is submitted that NRSS was coordinating with PGCIL

regularly at the site level. Further, even in the absence of confirmation of Gantry Coordinates by PGCIL, NRSS had completed the survey for the entire transmission line, except for the PGCIL Kurukshetra and Malerkotla Substation area for which the Gantry Coordinates were mandatorily required to enable access to NRSS. NRSS had completed works in all other areas during this period and thus, there was no reason to delayed works in the PGCIL Kurukshetra and Malerkotla substation area.

- h) As regards the unexpected requirement of forest clearance which was on account of error in the Survey Report prepared by BPC, NRSS has been granted relief by CERC vide the Impugned Order. It is submitted that the claim with respect to increase in length of the transmission line is also on account of error in the Survey Report prepared by BPC and thus, there is no basis for refusing relief to NRSS.
- i) Tribunal vide judgment dated 20.11.2019 in Appeal No. 121 of 2015 – **Sasan Power Limited vs. CERC & Ors.** (“**Sasan 121 Judgment**”) has held that while it was the responsibility of the bidder to carry out due diligence before bidding to verify the correctness of information provided in the bid documents, at the same time, respondent procurers cannot justify providing a grossly erroneous report, taking shelter under the disclaimer in the bid document. Therefore, the CERC’s reliance on the disclaimer is erroneous and NRSS cannot be denied

relief due to change in gantry coordinates on account of error in the Survey Report by RECTPCL.

IV. NRSS ought to be compensated for loss of first year tariff-

a) It is submitted that by way of the Impugned Order, the Commission has extended the SCOD to the actual COD, which was achieved on 18.01.2017 for KM Line and 27.03.2017 for MA Line. Further, CERC has held that NRSS will begin to recover tariff commencing from the year in which the Project was commissioned. The relevant portion of the Impugned Order is quoted below:-

“41. From the above, provision of TSA it is noted that it is clearly provided that in case of any extension of time period for the SCOD, the applicable transmission charges for an element shall be of the contract year in which the COD of the element has occurred. Hence, the prayer of petitioner to allow first year tariff is rejected...”

b) In terms of Schedule 6 of the TSA, the tariff for a period of 35 years, commencing on 12.09.2016, has been provided. This was based on the SCOD of the Project being 12.09.2016.

c) Based on the aforesaid SCOD, the year-wise bid for each specific year was submitted. The bid was submitted considering the tariff for the year starting on 12.09.2016 (which was the SCOD) and NRSS would have received Rs. 124.37 Crores the first calendar year (approximately 200 days for KM Line and 200 days for MA Line).

d) As a consequence, the tariff recovered for the year of commissioning is Rs. 10.07 Crores as against Rs. 124.37 Crores of prorated days linked with SCOD as envisaged at the time of bidding.

By way of illustration: -

(i) As per original project schedule, tariff for the period starting from 12.09.2016 to 31.03.2017 was to be applied.

(ii) However, since the actual COD for KM Line was achieved on 18.01.2017 and 27.03.2017 for the MA Line, tariff for the period from SCOD i.e., 12.09.2016 to 31.03.2017 for both KM and MA Lines 8 would be applied only for 72 days for the KM Line and the recovery for the MA Line is nil (as against the envisaged cash flow, for 200 days, from the SCOD i.e., 12.09.2016 to 31.03.2017 for both KM and MA Lines).

e) As a result: -

(i) There is under-recovery of Rs. 58.68 Crores for the period starting from 12.09.2016 to 31.03.2017 pertaining to both KM & MA Lines.

(ii) The under-recovery of the aforementioned tariff amount is on account of Force Majeure and Change in Law events due to the change in gantry coordinates and the requirement of obtaining forest clearance.

- f) This Tribunal in Bhopal Dhule has held that CERC erred in denying Change in Law relief to the appellant for IDC which is a direct consequence of the Change in Law event. Hence, the issue of financial compensation on account of Change in Law and Force Majeure has been settled conclusively.

12.2 Shri Pradeep Mishra, Learned Counsel for respondent no.2 (Uttar Pradesh Power Corporation Ltd. has submitted the following written reply: -

- a) That the Appellant has filed the Appeal against the order dated 29.03.2019 passed by Central Electricity Regulatory Commission (CERC) in Petition No. 195/MP/2017 (as modified by Review Order dated 15.01.2020 in Review Petition No. 07/RP/2019).
- b) That Respondent No. 15 has already made detailed submissions regarding the fact that the procedure provided in PSA has not been followed, hence the present Appeal is not maintainable. The replying Respondent adopts the submissions already made by Mr. R.B. Sharma, Advocate on behalf of Respondent No. 5.
- c) That before giving para wise reply some dates are relevant which are as follows:

02.01.2014 Transmission Services Agreement was executed between Appellant, replying Respondent and other beneficiaries.

12.05.2014 Effective date for the project.

- 12.09.2016 Scheduled Commercial Operation Date. (28 months from effective date for the project).
- 18.01.2017 Actual date of CoD for KM line (delay of 129 days).
- 27.03.2017 MA Line. (delay of 139 days).

I. Regarding Grant of IDC for extension of SCOD due to Force Majeure and Change in Law it is submitted that:

a) That Clause 3.3.4 of TSA provides as under:

“In case of inability of the TSP to fulfil the conditions specified in Article 3.1.3 due to any Force Majeure Event, the time period for fulfilment of the condition subsequent as mentioned in Article 3.1.3, shall be extended for a period of such Force Majeure Event, subject to a maximum extension period of three (3) Months, continuous or non-continuous in aggregate. Thereafter, this Agreement may be terminated by the Majority Long Term Transmission Customers or the TSP of mutually agreeable basis by giving a notice of at least seven (7) days, in writing to the other Party, with a copy to the Appropriate Commission and the Lenders’ Representative and the Contract Performance Guarantee shall be returned as per the provisions of Article 6.5.2.”

b) Provided, that due to the provisions of this Article 3.3.4, any increase in the time period for completion of conditions subsequent mentioned under Article 3.1.3, shall lead to an equal increase in the time period for the Scheduled COD.

No adjustment to the Transmission Charges shall be allowed on this account.

- c) Thus, the Appellant is not entitled for IDC, IEDC for extending the scheduled date of commissioning.
- d) That this Tribunal in Appeal No. 86 of 2015 decided on 06.04.2016 has rejected a similar contention regarding claim of IDC and IEDC.
- e) That in the decision dated 20.10.2020 passed by this Tribunal in Appeal No. 208 of 2019 on which reliance has been placed by the Appellant there was no such clause as Clause 3.3.4 in the present case. Thus, the said decision is not applicable in the present case.
- f) That Clause 11.7 is not applicable in the present case because the delay in achieving scheduled date of commissioning was extended by the Tribunal. Besides this, no other relief is to be granted to the Appellant.
- g) That because of delay in commissioning the project the replying Respondent and other beneficiaries have suffered as transmission capacity was not available to them for the period of delay.
- h) Thus, on this ground the Appellant is not entitled for any relief.

II. CERC has wrongly disallowed the claims towards Change in Gantry Coordinates and Connection Arrangement at Kurukshetra and Malerkotla Substation for 400 KV D/C Kurukshetra-Malerkotla Transmission Line as Force Majeure event.

- a) That the CERC has rightly disallowed the claim of the Appellant on this ground as the Appellant after a year has sought clarification from PGCIL regarding change in gantry coordinates. The relevant Paras of impugned order are as under:

“104. The Petitioner vide its letter 14.05.2014 requested for gantry coordinates and PGCIL vide its letter dated 4.7.2014 had informed the Petitioner that there may be change in North Coordinate by few meters during detailed Engineering. Thereafter, the Petitioner after a gap of more than one year vide its letter dated 27.08.2015 sought clarification pertaining to change in North Coordinate gantry at Kurukshetra. In the said letter, the Petitioner had also acknowledged the receipt of GA & SLD of the bays at Malerkotla, Kurukshetra and Amritsar Substations on 4.7.2014. The coordinates were provided by PGCIL on 10.10.2015 for Malerkotla and on 12.3.2016 for Kurukshetra.

105. It is observed that the Petitioner wrote the first letter on 14.5.2014 and the next letter was written on 27.8.2015. The Petitioner has not explained the delay of one year in pursuing the matter. Moreover, the Petitioner has not placed on record any document to show that it was pursuing the matter with the CTU during the said period. As a TSP, it is expected on the part of the Petitioner to pursue the matter diligently with

CTU. However, there was slackness on the part of the Petitioner. Therefore, we are not inclined to grant any relief in this regard.”

- b) That the decision dated 20.11.2019 in Appeal No. 121 of 2015; Sasan Power Ltd. Vs. CERC &Ors. of this Tribunal is not applicable in the present case as the PGCIL vide its letter dated 04.07.2014 had informed the Petitioner as there may be change in north coordinate by few meters during detailed Engineering.
- c) It is further submitted that due to any fault on behalf of Appellant or PGCIL the replying Respondent cannot be penalized by making them to pay the higher tariff.

III. NRSS ought to be compensated for loss of first year tariff.

- a) That in this regard it is submitted that CERC in Paras 40 and 41 of the order dated 16.01.2020 passed in Review Petition No. 7 of 2019 in Petition No. 195/MP/2017 has rightly refused to grant such relief. The said Paras are as follows:

“40. We have perused the order dated 29.03.2019. We find that review petitioner had made a submission regarding the same in Petition No. 195/MP/2017. In the

present Petition, the Review Petitioner has contended that the monetary impact needs to be allowed to be recovered from the extended SCOD of the respective transmission elements. In other words, the Review Petitioner is seeking that the first contract year should start from the date of actual COD of the transmission lines, and not from the dates indicated in the TSA in order to enable the Review Petitioner to recover the tariff envisaged for the first contract year which is more than the tariff for the second contract year and correspondingly extend the last contract year. In this regard, the relevant provision i.e. Schedule -5(d) of the TSA provides as under:

Schedule: 5

Computation of Transmission charges.

d. in case of any extension of time period for the Scheduled COD, the applicable Transmission Charges in relation to an Element shall be the Transmission Charges of the Contract Year. In which the COD of such Element Occurs or it has deemed to have occurred, and in relation to the Project. The Transmission Charges applicable will be for the Contract Year in which the COD occurs.

41. From the above, provision of TSA it is noted that it is clearly provided that in case of any extension of time

period for the ScoD, the applicable transmission charges for an element shall be of the contract year in which the CoD of the element has occurred. Hence, the prayer of Petitioner to allow first year tariff is rejected. The Petitioner had raised the issue of tariff for the extended period during hearing held on 16.09.2019, and requested for liberty to file fresh petition in this regard. In this regard, we grant the Petitioner the liberty to file a separate Petition regarding tariff for the extended period.”

- b) That thus no relief can be granted regarding this issue to the Appellant.
- c) That it is submitted that whatever specifically has been provided in TSA has to be looked into and will govern the right of parties. Nothing which has not been provided in TSA can be allowed or granted to the Appellant.
- d) Since, no claim of the Appellant is admissible, hence the question of granting carrying cost does not arise.
- e) In view of aforesaid facts and circumstances the Appeal filed by the Appellant be dismissed.

12.3 Shri R.B. Sharma, Learned Counsel for Respondent no. 15, has filed the written reply as under: -

- a) The Appellant during the hearing on 09.11.2021 while rejoining issues raised by us in our reply, contended that the ‘Alternative Dispute Resolution Mechanism’ as

prescribed under Article 16 for 'Change in Law' Event is not applicable. The contention of the Appellant is misleading, misconceived and without any basis. It is submitted that 'Governing Law and Dispute Resolution' under Article 16 is not an 'alternative dispute resolution mechanism' but it is the only mechanism of dispute resolution under TSA. Article 11 for 'Force Majeure' Event and Article 12 for 'Change in Law' Event only describe when these events can occur and the dispute for relief, if any, can be claimed under Article 16. This has not been invoked by the Appellant resulting into procedural infirmity.

- b) The Appellant has also filed a copy of the Petition No. 195/MP/2017 with the Appeal. The prayer of the petition would show that the petition was for declaration of unforeseen and uncontrollable events/factors as 'Force Majeure' Event as per TSA and for claiming other compensatory relief. For claiming any relief under 'Force Majeure' Event by the TSP the provision of Regulation 11.7(d) is required to be invoked which stipulates that the Lead Long Term Transmission Customer will inspect the project on one day notice of the occurrence of 'Force Majeure' Event. Nothing was done which means no relief at the time of 'Force Majeure' Event was contemplated by the TSP. Further, the Appellant has also not chosen to invoke Article 16 and raising dispute for seeking the relief. It seems that the Appellant's move to approach the Commission through the petition was based on the erroneous legal advice without even invoking the essential

provisions for seeking relief under TSA. Unfortunately, the Commission also erred in ensuring that the Appellant was required to complete prerequisite provisions of the TSA before Approaching the Commission for claiming the relief under Petition No. 195/MP/2017. There was an all-round arbitrariness during the adjudication of this petition, ignoring all the prerequisites of TSA which are required to be followed before placing the matter to Commission.

- c) The Appellant has also cited Judgment dated 20th October, 2020 in Appeal No. 208 of 2019 by the Tribunal in support of his claim for IDC and IEDC. This Judgment is not applicable in the instant Appeal as the same is consequence of 'Change in Law' Event caused due to Change in relevant guidelines resulting in delay the grant of Forest Clearance besides change in formats of no objection certificates from the concerned district collectors. The present Appeal, however, is consequence of 'Force Majeure' Event due to unforeseen and uncontrollable factors and accordingly this Judgment is not applicable to the present Appeal. The Judgment dated 29.03.2019 in Appeal No. 86 of 2015 of the Tribunal covers IDC & IEDC for 'Force Majeure' Event which has been cited by the Commission while justifying the denial of IDC & IEDC in the impugned Order. This is also reproduced in our reply.
- d) A preliminary survey report is also enclosed with the RFP documents. The Preliminary survey is required to be undertaken at the planning stage of the project with the purpose of identification of possible transmission routes

and in this case three alternative routes were provided. Para 1.5 of the RFP explains about the Survey Report. Pre-bid meeting(s) are also held as per Para 2.12.2 which is duly explained in the reply. Further, the bidders are also directed to follow the following Paras of the RFP for survey report;

- i. Para 2.14.2.3 of the RFP states that the Bidders may visit the route of Transmission Lines associated with the project and surrounding areas and obtain/verify all information;
 - ii. Para 2.14.2.4 of the RFP states that the Bidders in their own interest should carry out required besides this, the BPC would also carry out the survey of Transmission Lines.
 - iii. Para 2.14.2.5 of the RFP states that the failure to investigate the route of Transmission Line by Bidder would not be ground to alter the Bid Deadline nor shall relieve Bidder from any responsibility.
- e) It may, thus be noted that the Appellant is negligent to perform his part of obligation even at the bidding stage and continued during the execution stage of the project besides indulging in legal infirmities.
- f) In so far as the question related to compensation for loss of first year tariff and also for the consequential interest is concerned, it is submitted that the alleged claim is without any basis as there is no such provision under the TSA. Further, it may also be mentioned that this project was

conceived to become operational with a certain time frame. The failure of the Appellant to bring the project within the projected time frame had resulted into operation of the Grid network at sub-optimum level till its operation resulting with higher losses which are borne by the Respondents. This could not be explained as the Appellant effectively blocked the mutual consent under Article 16 of the TSA.

- g) In the facts and circumstances as aforesaid as well as in the reply already filed it is respectfully prayed that the Tribunal may set aside the impugned order dated 29.03.2019 in Petition No. 195/MP/2017 along with order dated 15.01.2020 passed in Review Petition No. 07/RP/2019 and direct the Appellant to follow the prescribed procedure, if he has any grievance in the matter or pass such other order(s) as deemed fit.

12.4 Shri Alok Shankar, Learned Advocate for Central Transmission Utility (CTU), the respondent no. 19 has made the written submission as under: -

- a) It is submitted that the RFP issued by the Bid Process Coordinator, REC Transmission Project Company Limited (RECTPCL) is a standard form document. The RFP expressly instructs the bidders to undertake independent due diligence and disclaims completeness of any information. The learned Central Commission upon review of the provisions of the RFP and the conduct of the Appellant concluded that no relief could be granted. The learned CERC reviewed the conduct of all the parties

including the CTU, BPC and the Appellant and concluded as under:

“101. We have gone through the reply of PGCIL in compliance of our directions vide ROP dated 12.4.2018 pertaining to procedure adopted by CTU for informing co-ordinates in TBCB projects. PGCIL has submitted that the identified BPC approaches CTU for various inputs including co-ordinates for substations associated with the transmission project, for inclusion in the Request for Qualification (RfQ) document. On receipt of such request, in case coordinates pertain to existing substation owned by PGCIL or ISTS substations under construction by PGCIL, the co-ordinates of these substation are provided to BPC in consultation with their Engineering Department/Site with the disclaimer that “the coordinates furnished herewith are only tentative coordinates within the substation boundary wall for locating the respective substation site. These should not be treated as the final line termination coordinates.

....

104. The Petitioner vide its letter 14.5.2014 requested for gantry coordinates and PGCIL vide its letter dated 4.7.2014 had informed the Petitioner that there may be change in North Coordinate by few meters during detailed Engineering. Thereafter, the Petitioner after a gap of more than one year vide its letter dated

27.8.2015 sought clarification pertaining to change in North Coordinate gantry at Kurukshetra. In the said letter, the Petitioner had also acknowledged the receipt of GA & SLD of the bays at Malerkotla, Kurukshetra and Amritsar Substations on 4.7.2014. The coordinates were provided by PGCIL on 10.10.2015 for Malerkotla and on 12.3.2016 for Kurukshetra.

105. It is observed that the Petitioner wrote the first letter on 14.5.2014 and the next letter was written on 27.8.2015. The Petitioner has not explained the delay of one year in pursuing the matter. Moreover, the Petitioner has not placed on record any document to show that it was pursuing the matter with the CTU during the said period. As a TSP, it is expected on the part of the Petitioner to pursue the matter diligently with CTU. However, there was slackness on the part of the Petitioner. Therefore, we are not inclined to grant any relief in this regard.”

- b) Clearly, the information supplied with the RFP was not intended to be final and the same was conveyed to the appellant substantially in advance. Therefore, the delay was only attributable to the Appellant. The fact that the gantry coordinates provided in the RFP were capable of being modified becomes obvious by the fact that the Appellant itself sought a confirmation of the same from the CTU. Further, any data or estimate provided at the RfQ/RfP stage are only tentative or indicative and accordingly

the length of the transmission line as well as the cost thereof are required to be estimated by the developer of the project. It is submitted that the TSA at more than one place clearly provides that financing of the project is entirely the responsibility of the developer, TSP.

- c) Further, reliance on judgment of this Tribunal in Appeal 121 of 2015 is clearly misplaced as relief therein was granted on peculiar facts of that particular case and it clearly cannot be cited as a precedent. Admittedly the line length has changed by 2.5 km and 1 km for Kurukshetra-Malerkotla Transmission Line and Malerkotla – Amritsar Transmission Line respectively from the estimate of the appellant and not from line length prescribed in the TSA and/or RFP.
- d) Neither in the TSA nor in the competitive bidding guidelines there is any basis for revision of tariff for increase in the project cost from the estimate of the developer based on preliminary information supplied in the RFP. The Central Commission has already dealt the claim of the appellant in terms of the merits and provisions of the TSA.
- e) It is submitted that the extension of SCOD for reasons beyond the control of the parties has been specifically considered in the TSA. The Learned Central Commission in the Review Order considered the same and enforced the terms of the TSA. Schedule 5 of TSA (Pg 437 of the Appeal Paper Book) clearly provides that in the event of revision of SCOD, the tariff for the Contract Year in which

COD occurs shall be payable. The relevant provision of the TSA is extracted hereunder for ready reference:

“Schedule: 5 Computation of Transmission charges

.....

d. In case of any extension of time period for the Scheduled COD, the applicable Transmission Charges in relation to an Element shall be the Transmission Charges of the Contract Year. In which the COD of such Element Occurs or it has deemed to have occurred, and in relation to the Project, The Transmission Charges applicable will be for the Contract Year in which the COD occurs.”

- f) The present attempt of the appellant to seek compensation for loss of tariff in the first year which may be dealt in light of the direction of the Central Commission in the impugned order and specific provision of the TSA.
- g) That the instant written submission should be read with the reply filed by the answering respondent and the averments in the reply are not being repeated herein for the sake of brevity.
- h) It is therefore most respectfully prayed that this Tribunal may be pleased to hold that no relief can be granted on account of change in gantry coordinates as held by the Central Commission.

13.0 Written Submissions on behalf of the Appellant in Appeal No. 276 of 2021.

13.1 Mr. Sajan Poovayya, Learned Counsel for the Appellant has filed the written submission for our consideration as under:-

- a) In Appeal No. 276 of 2021, the Appellant, Darbhanga-Motihari Transmission Company Limited ("**DMTCL**" / "**Appellant**") is a transmission licensee and has been selected for implementing the project under Section 63 of the Electricity Act, 2003 as per the Tariff Based Competitive Bidding Guidelines for Transmission Service, 2006. The Project consists of following elements:
- i. 2x500 MVA, 400/220kV GIS sub-station at Darbhanga along with the Muzaffarpur-Darbhanga 400kV D/C line with triple snowbird conductor ("**Darbhanga Element**"); and
 - ii. 2x200 MVA, 400/132kV GIS sub-station at Motihari along with LILO of Barh-Gorakhpur 400kV D/C quad line at Motihari ("**Motihari Element**") (collectively "**Project**").
- b) DMTCL has filed the present Appeal challenging Ld. Central Electricity Regulatory Commission's ("**Ld. CERC**" / "**Respondent No. 1**") Order dated 29.03.2019 ("**Impugned Order**") in Petition No. 238/MP/2017 ("**Petition 238**") (as modified by Review Order dated 13.01.2020 passed in Review Petition No. 08/RP/2019 ("**Review Petition**").
- c) As per the Transmission Services Agreement dated 06.08.2013 ("**TSA**"), the Effective Date was 10.12.2013 and the Scheduled Commercial Operation Date ("**SCOD**") was

09.06.2016 (30 months) for the Darbhanga Element and 09.08.2016 (32 months) for the Motihari Element respectively. The actual Commercial Operation Date (“**COD**”) for: -

- i. Darbhanga Element was achieved on 31.03.2017 (delay of 295 days) and
- ii. Motihari transmission element was achieved on 10.08.2017 (delay of 234 days).

d) The Commission extended the SCOD to actual COD, however, disallowed the following financial claims: -

- i. Consequential relief of Rs. 69.60 Crores on account of IDC and IEDC for the period between SCOD and COD which were a direct consequence of the Force Majeure and Change in Law events.
- ii. Rs. 3.15 Crores incurred due to change in Gantry Coordinates and Connection Arrangement at PGCIL Muzaffarpur Substation for 400kV D/C Muzaffarpur-Darbhangha Transmission line as Force Majeure and Change in Law Event even though these changes occurred as a consequence of inaccuracies in the Survey Report prepared by the Bid Processing Coordinator (“**BPC**”) (i.e., PFC Consulting Ltd. (“**PFCCCL**”)).
- iii. Rs. 1.84 Crores on account of increase in number of power line crossings due to inaccuracies in the Survey Report prepared by the Bid Processing Coordinator (“**BPC**”) (i.e., PFC Consulting Ltd. (“**PFCCCL**”)) as Force Majeure and Change in Law Event.

- iv. Rs. 7.32 Crores on account of additional cost incurred for ground improvement work at Motihari sub-station land due to Geotechnical surprise as a Force Majeure event.
- v. Rs. 55 Lakhs paid by DMTCL to PGCIL along with interest pursuant to Ld. CERC's Order dated 01.09.2017 passed in Petition No. 209/TT/2016. DMTCL was held liable to pay these amounts on account of delay in COD of the Project. However, since delay in COD has been held to be a Force Majeure and Change in Law event, DMTCL cannot be held liable for such amounts.
- vi. Restitution for the loss of first year tariff and partial second year tariff to the extent of Rs. 142.88 on account of Force Majeure and Change in Law events which caused delay in achieving SCOD.

I. Grant of IDC due to Force Majeure and Change in Law.

- a) Ld. CERC vide the Impugned Order held that:
 - i. The requirement of obtaining forest clearance is a Change in Law event;
 - ii. Time spent in obtaining forest clearances was beyond the control of DMTCL, hence a Force Majeure event; and
 - iii. DMTCL is entitled to extension of SCOD.
- b) However, Ld. CERC disallowed IDC and IEDC without assigning any reasons. The relevant portion of the Impugned

Order is quoted below:

*“65. 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 Darbhanga and Motihari transmission elements which are 31.3.2017 and 10.8.2017 respectively. **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.**”*

- c) It is submitted that IDC was a direct consequence of delay in SCOD. Once Ld. CERC allowed extension of SCOD, the consequential financial impact ought to have been allowed.
- d) Ld. CERC has not given any reasons for disallowance of the claim for IDC and IEDC despite recognizing that the delay in achieving SCOD was due to reasons beyond the control of DMTCL and was due to Force Majeure and Change in Law events. It is a settled position of law that reasons ought to be provided by a judicial/ quasi-judicial body while passing an order. It is submitted that recording reasons by a judicial/quasi-judicial body is a principle of natural justice which ought to have been followed by Ld. CERC vide the Impugned Order. **[Victoria Memorial Hall vs. Howrah Ganatantrik Nagrik Samity, reported as (2010) 3 SCC 732**

at Paras 40-42]

- e) The issue whether DMTCL is entitled to IDC for Change in Law and Force Majeure claims has been decided by this Hon'ble Tribunal in Judgment dated 20.10.2020 in Appeal No. 208 of 2019 - ***Bhopal Dhule Transmission Company Limited v Central Electricity Regulatory Commission & Ors.*** ("Bhopal Dhule Judgment"). This Hon'ble Tribunal in the Bhopal Dhule Judgment, while allowing IDC for Change in Law events, held that Ld. CERC erred in denying Change in Law relief to the appellant for IDC which is a direct consequence of the Change in Law event. B.1.6 It is submitted that the TSA provisions in the Bhopal Dhule Judgment on the basis of which this Hon'ble Tribunal allowed the IDC claim is *pari materia* with the TSA entered into between DMTCL and LTTCs in the present case.
- f) In view of the foregoing, it is submitted that DMTCL ought to be granted relief for the recovery of IDC and IEDC incurred by Appellant on account of delay in SCOD due to unexpected requirement of forest clearance which has been recognized as both Force Majeure and Change in Law event by Ld. CERC vide the Impugned Order.
- II. **Ld. CERC has wrongly disallowed the claims towards Change in Gantry Coordinates and Connection Arrangement at PGCIL Muzaffarpur Substation For 400 KV D/C Muzaffarpur - Darbhanga Transmission Line.**
- a) PFFCL, the BPC issued its Survey Report on 21.04.2014 where Gantry Coordinates were provided for the Muzaffarpur

Substation. The Survey Report was given to bidders at the time of bidding

- b) Subsequently, there was a change in Gantry Coordinates by PGCIL at Muzaffarpur Substation end from the coordinates provided in the Survey Report. The difference in coordinates is set out below:

Actual Coordinates	Survey Report Specification
Longitude: N 26° 03' 55.21; Latitude: E 85° 22' 2.25	Longitude: N 26° 03'57.8815; Latitude: E 85° 22' 6.5475

- c) This change in Gantry Coordinates resulted into a delay in completion of Transmission Line by approx. 6 months from 03.09.2015 to 11.03.2016 on account of approval of crossing proposals, design, engineering, manufacturing and supply of Gantries on standalone basis with an additional cost of approx. Rs. 3.15 Crores.
- d) Ld. CERC while noting that there was a change in coordinates from those given in the Survey Report and noting that the extension of SCOD granted covered the time extension, refused to grant cost in the absence of documentary evidence. The relevant paragraphs of the observations made by Ld. CERC have been reproduced below: -

“71. We have considered the submissions of the Petitioner.

As per the submissions of the Petitioner, change in the gantry coordinates delayed the COD by 6 months and additional cost of 3.15 crore due to increase in 1.5 km. route length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line. The additional time of 6 months claimed by the Petitioner has already been taken care by the extension of the scheduled COD to actual COD.

72. As regards the other contention of additional cost of `3.15 crore due to increase in the route length by 1.5 km, we do not find any document or auditor's certificate espousing the said additional cost on account of increase in line length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line. In the absence of any document on record, we are unable to examine the claim of the Petitioner. Hence, the claim of the Petitioner for additional cost of `3.15 crore due to increase in 1.5 km. route length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line is rejected in the absence of any supporting documents."

- e) It is submitted that the difference between the actual specifications and the Survey Report specifications resulted in change in the starting and ending point of the Project. Further, it also led to the requirement of two additional EHV power line crossings as well increase in length of the line. It is submitted that DMTCL had to prepare and submit power line crossing proposals for additional 2 EHV power line crossings and also had to

provide underpass gantries for power line crossings.

- f) It is also submitted that the requirement for further approval for the increased number of EHV power lines crossings was on account of deviation in Gantry Coordinates from what was provided in the Survey Report. Such a deviation was beyond the contemplation of DMTCL and the same affected the project completion schedule.
- g) It is submitted that though the Survey Report contains a disclaimer as to the information provided therein, the liability of an inaccuracy in the Survey Report cannot be passed onto DMTCL entirely. It is pertinent to note that a prospective bidder has a time frame of mere 2-3 months within which it is not possible to carry out a detailed analysis of the entire area upon which the Project is to be implemented.

III. Increase in the number of power line crossings in the Darbhanga and Motihari Line due to inaccuracies in the Survey Report

- a) It is submitted that DMTCL had claimed Rs. 1.84 Crores on account of increase in number of power line crossing in both Darbhanga and Motihari Line on account of inaccuracies in the Survey Report prepared by BPC. As per the Survey Report , only 2 EHV power lines were required to be crossed for the final selected route of 400 kV D/C Muzaffarpur Darbhanga Transmission Line. Subsequently, the number of EHV power line crossings increased by another 5 crossings as against the number of EHV power line crossings indicated in the Survey Report

b) And only 8 EHV power lines were required to be crossed by LILO of Barh-Gorakhpur 400 kV D/C line at Motihari for final selected route. Subsequently, the number of EHV power line crossings increased by another 6 crossings as against the number of EHV power line crossings indicated in the Survey Report.

IV. Additional Costs incurred on account of Ground Improvement at Motihari sub-station land due to Geotechnical Surprise

- a) At the time of Geotechnical Investigations at Motihari Sub-station land, it was discovered that the strata were prone to liquefaction. The consequences of liquefaction include bearing failure, lateral spreading and settlement. This factor along with very low safe bearing capacity of soil required ground improvement measures to be undertaken before start of any construction work.
- b) DMTCL also consulted some of the industry experts and as per their opinion, ground improvement measures were required to be undertaken before commencing foundation work. Thus, in line with good engineering practices and for the safety of sub-station foundations, DMTCL undertook ground improvement measures.
- c) It is submitted that the above hindrances could not have been anticipated at the time of submission of bid and thus, qualify as a Force Majeure event beyond the control of DMTCL.
- d) The above-mentioned Force Majeure event of Geotechnical surprise at Motihari Sub-station is a rarest of rare event which

resulted in stoppage of construction work at the Project site from 06.04.2015 to 21.02.2016. An additional expenditure of approximately Rs. 7.32 Crores was incurred towards sub-station ground improvement in addition to the IDC during this duration.

- e) It is submitted that Ld. CERC has in Order dated 28.04.2016 in Petition No.409/TT/2014 – **PGCIL vs. MPPMCL & Ors.** allowed relief on account of ground improvement works as beyond the control of PGCIL.
- f) It is submitted that the above events being Force Majeure events arising out of natural events/ instances were beyond the control of DMTCL. Hence, Ld. CERC ought to have granted relief to DMTCL for the financial impact it had on the Project as stated above.

V. DMTCL ought to be compensated for loss of first year tariff and partial second year Tariff

- a) It is submitted that by way of the Impugned Order, Ld. CERC has extend the SCOD to the actual COD, which was 31.3.2017 for Darbhanga Element and 10.8.2017 for Motihari transmission element. Further, Ld. CERC has held that DMTCL will begin to recover tariff commencing from the year in which the Project was commissioned. The relevant portion of the Impugned Order is quoted below: -

“33.... As per the above provision in the TSA, in case of any extension of time period from the SCOD, the applicable transmission charges for an element shall be of the contract year in which the COD of the element has occurred. Hence,

the prayer of Review Petitioner to allow first year tariff is rejected.”

- b) In terms of Schedule 6 of the TSA, the tariff for a period of 35 years commencing from the COD, has been provided which was based on the SCOD of the Project being 09.06.2016 for the Darbhanga Element and 09.08.2016 for the Motihari Element.
- c) Based on the aforesaid SCOD, year-wise bid for each specific year was submitted. The bid was submitted considering the tariff for the year starting from the SCOD and DMTCL would have received Rs 158.59 Crores of pro-rated days linked with SCOD or the first calendar year (approximately 295 days for Darbhanga Element and 234 days for the Motihari Element). The delay has been held to be on account of Force Majeure and Change in Law due to which the SCOD was extended to the actual COD. As a consequence, the applicable tariff for the second year was also lost as against the envisaged cash flow for 130 days (for the period starting from 01.04.2017 to 09.08.2017) for Motihari Element.

VI. Ld. CERC has erred in not allowing recovery of Rs. 55,34,000 paid to Power Grid Corporation of India by DMTCL

- a) Ld. CERC, while allowing the delay in the commencement of the Project and extending the SCOD, has failed to consider that DMTCL was not liable to pay additional amount of Rs. 55,34,000 to Power Grid Corporation of India Limited

(“**PGCIL**”) as IDC and IEDC for the period from 31.08.2016 to 21.04.2017 in terms of Ld. CERC’s order dated 01.09.2017 in Petition No. 209/TT/2016. The said Order was passed in the context of DMTCL having delayed SCOD. The relevant portion of the Impugned Order is quoted below: -

“81. We have carefully considered the submission of the Petitioner. In the facts and circumstances of the present case, we do not find any rationale to approve the amount of `5534000/- paid to PGCIL pursuant to the Commission’s order dated 1.9.2017 in Petition No. 209/TT/2016 as additional expenditure.”

B.6.2 Vide order dated 01.09.2017 in Petition No. 209/TT/2016 Ld. CERC has directed DMTCL to pay Rs. 55,34,000 to PGCIL as IDC and IEDC for the period starting from 31.08.16 to 21.04.2017 due to delay in DMTCL Project SCOD owing to various force majeure and change in law events.

- b) Since the Impugned Order extended the SCOD to actual COD, the amount of Rs. Rs. 55,34,000 ought to be refunded to DMTCL with interest by PGCIL.
- c) In any event, it is submitted that this Hon’ble Tribunal vide judgment dated 14.09.2020 in Appeal No. 17 of 2019 the case of **NRSS XXXI (B) Transmission Company Limited vs. CERC & Ors.** has held that the Appellant will not be liable to pay IDC and IEDC to PGCIL. The relevant portion of the Judgment is quoted below: -

“8.21 It would thus appear that imposing liability of IDC and IEDC on the Appellant defeats the objective of introducing the provision of force majeure in the TSA i.e. to save the Appellant from the consequences of anything over which it has no control. When the relief is available under the force majeure provisions of the contract, the Commission ought not to have penalised the Appellant for the same act outside the contract, particularly, when there is no such provision in the sharing regulations which the Appellant could have made itself aware of before bidding for the project.”

13.2 Mr. Manish Kumar Choudhary, Ld. Counsel for the Respondent Nos. 2 & 3 have submitted the following Written Submissions :

- a) BPC incorporated DMTCL as its wholly owned subsidiary on 18.12.2012 for execution of transmission project and consequently to act as TSP after being acquired by the successful bidder. The main objective of Appellant Company in its MOA is as under:

“to Plan, promote and develop an integrated and efficient power transmission system network in all its aspects including planning, investigation, research, design, engineering, preparation of preliminary, feasibility and define project reports, construction, operation and maintenance of transmission lines, sub stations, load dispatch stations and communication facilities and appurtenant works, coordination of integrated operation of regional and national grid

system, execution of turn key jobs for other utilities/organizations and wheeling of power in accordance with the policies, guidelines and objectives laid down by the Central Government from time to time
”

- b) PFCCL, as BPC, started the process of selection of successful bidder in accordance with guidelines for encouraging competition in transmission projects and competitive bidding issued by Ministry of power and the relevant dates in the entire bidding process are as under:

S. no	Events	Date
1.	Global Invitation for tender	08.02.2013
2.	Submission of request for qualification	25.03.2013
3.	Notification of list of bidders qualified for submission of request for proposal	17.05.2013
4.	Issuance of request for proposal of documents	27.05.2013
5.	Pre-bid meeting	26.06.2013
6.	Issuance of written clarifications/amendments of BPC	02.07.2013
7.	Submission of request for proposal documents	08.10.2013
8.	Opening of Non-financial bid	08.10.2013

9.	Opening of financial bids	15.10.2013
10.	Issuance of letter of intent to successful bidder	17.10.2013

- c) The salient features of the guidelines for competitive bidding issued by the Ministry of Power in 2004 in brief are as under (which are also mentioned by CERC in its order dated 20.05.2014 in Petition no. 323/TT/2013:

“(f) Standard documentation to be provided in the RFQ stage shall include definition of requirements including the details of locations and technical qualifications for each component of the transmission lines, construction, milestones and financial requirements to be met by the bidders; proposed Transmission Service Agreement; period validity of offer of bidder; conditions as specified by the Appropriate Commission for being eligible to obtain transmission license and other technical and safety criteria to be met by the bidder/TSP including the provisions of Indian Electricity Grid Code.

(g) Standard documentation to be provided by BPC I the RFP shall include specified target dates/months for commissioning and commercial operations and start of providing transmission services. TSA proposed to be entered with the selected bidder; bid evaluation methodology to be adopted by the BPC; Discount Factor to be used for evaluation of the bids; specification regarding the bid bond and project completion guarantee to be furnished by bidder,

proposed indemnification agreement between the TSP and the utilities, amount of contract performance guarantee as percentage of the project cost; and liquidated damages that would apply in the case of delay in start of providing the transmission services.”

- d) Information regarding bidding process given by BPC to CERC on 08.02.2013. Total ten bidders submitted RFQ on 25.03.2013 and they all were qualified for next stage i.e. RFP (Request For Proposal). On 08.10.2013 RFPs were submitted by the four bidders and their financial bids opened on 15.10.2013.
- e) Bidding process concluded on 15.10.2013 and Essel Infra Projects Ltd. (EIL) was declared successful bidder being lowest levelized transmission changes. LOI issued on 17.10.2013 by BPC which was accepted by EIL unconditionally and owned subsidiary after executing Sale Purchase Agreement and for furnishing contract performance guarantee of Rs.21,30,00,000/- (Rupees Twenty One Crore Thirty Lakh Only) in favour of LTTCs.
- f) During bidding process, pre-bid meeting held, clarification/amendment given by BPC. Relevant is of column no. 6 at page 187 of the Appeal. In this it was specifically clarified that survey report prepared based on the preliminary survey would be made available to the bidders in response to bidders clarifications “we request you kindly arrange to provide the feasibility/survey report with route

alignment/terrain details, soil data, important crossing detailsetc. along-with the angle point coordinators.”

g) After this, the Appellant participated in the bid knowing fully well the entire terms and conditions of RF/RFP/TSA. And once it has been participated and has now been duly found successful and LOI issued it can't lay blame upon BPC and start blaming the survey Report of BPC as grossly erroneous as it is estopped from doing so. If at all it had any grievance, it should have taken the requisite actions prior to submitting its bid. It is further relevant to state that EIL which was declared successful bidder knew fully well while participating in RFQ that it would be taking the 100 % share in the DMTCL and also the purpose for which it was incorporated which is quoted hereinabove. The EIL itself is a infrastructure company and as per its own admission, as detailed herein below, failed to carry out investigation, detailed survey pertaining to the project in question for the execution of which EIL was taking over DMTCL and this is nothing but extreme case of negligence, mistake, error, inaction on the part of the Petitioner and it is totally unjustified on its part to shift the blame upon the BPC alleging incorrect information in the RFQ/RFP etc.

h) In this context clause 2.14.2, 2.14.2.3-2.4 of RFP (Pg. 116 & 117 of Appeal) is relevant to be read alongwith:

“2.14.2 Bidders to inform themselves fully

2.14.2.1 The Bidders shall make independent enquiry and satisfy themselves with respect to all the required information, inputs, conditions and circumstances and factors that may have effect on his Bid. Once the Bidders have submitted their Bids, the Bidders shall be deemed to have inspected and examined the site conditions (including but not limited to its surroundings, its geological condition and the adequacy of transport facilities to the site), the laws and regulations in force in India, the Transportation facilities available in India, the grid conditions, the adequacy and conditions of roads, bridges, railway sidings, ports etc. for unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixes its price taking into account all such relevant conditions and also risks, contingencies and other circumstances which may influence or affect the transmission of power. Accordingly, each Bidder acknowledges that, on being selected as Successful Bidder and on acquisition of one hundred percent (100%) of equity shares shall not be relieved from any of its obligations under the RFP Project Documents nor shall the TSP be entitled to any extension in Scheduled COD mentioned in this RFP or financial compensation for any reason whatsoever.

2.14.2.3 Bidders may visit the route of the Transmission Lines associated with the Project and the surrounding

areas and obtain/verify all information which they deem fit and necessary for the preparation of their Bid.

2.14.2.4 The BPC has carried out a survey of the transmission lines associated with the project and shall provide each Bidder with its Survey Report of the Project. Bidders in their own interest should carry out required surveys and field investigation for submission of their Bid.”

- i) Further the clause 3 & 4 of Disclaimer of RPF (Pg. 95 of Appeal) read as under:

“3. While this RFP has been prepared in good faith, neither the BPC nor its employees or advisors/consultants make any representations or warranty express or implied as to the accuracy, reliability or completeness of the information contained in this RFP. The Bidders shall satisfy themselves, on receipt of the RFP document, that the RFP document is complete in all respects. Intimation of any discrepancy shall be given to this office immediately. If no intimation is received from any bidder within (10) days from the date of issue of this RFP document, it shall be considered that the issued document, complete in all respects, has been received by the bidders.

This bidding process is in accordance with the Bidding Guidelines issued by Ministry of Power, government of India under section 63 of the Electricity Act, 2003. Revisions or amendments in these Bidding

Guidelines may cause the BPC to modify, amend or supplement this RFP document, including the RFP project documents to be in conformance with the Bidding Guidelines.

4. Neither the BPC, its employees nor its consultants will have any liability to any Bidder or any other person under the law of contract, tort, the principles of restitution or unjust enrichment or otherwise for any loss, expense or damage which may arise from or be incurred or suffered in connection with anything contained in this RFP, any matter deemed to form part of this RFP, the award of the Project, the information supplied by or on behalf of BPC or its employees, any advisors/consultants or otherwise arising in any way from the selection process for the said Project”

- j) Similarly, clause 1.5(a) of RFP (Pg. 107 of Appeal) has to be read along also for proper adjudication which is quoted herein below:

“1.5 The BPC has initiated development of the Project and shall be responsible for the tasks in this regard as specified hereunder:

- a) *Provide to the Bidders a Survey report for the Project at least ninety (90) days prior to the Bid Deadline. The survey Report will contain information regarding the transmission line, i.e voltage level, line configuration (i.e S/C or D/C), indicative route*

alignment, conductor type, conductor configuration and type of terrain likely to be encountered.

Provided that neither the BPC, its authorized representative, any of the Long Term transmission Customer(s), nor their directors, employees or advisors/consultants make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omissions made in the Survey Report, or the accuracy, completeness or reliability of information contained herein, and shall incur no liability under any law statute, rules or regulations as to the accuracy, reliability or completeness of such Survey Report, even if any loss or damage is caused to the Bidders by any act or omission on their part

b) To obtain approval for laying of overhead transmission lines under Section 68 of Electricity Act, from Appropriate Government at least thirty (30) days prior to Bid Deadline.”

k) The scheduled COD in present case of Asset-I was 09.06.2016 while for Asset-II it was 09.08.2016. Three Minutes of Meeting (MoM) between Chief Engineer (CEA) and representative of projects/Appellant placed on record being Annexure- A-14 which is review of projects. Three letter

of MoM are 26.08.2015, 25.02.2016 and 18.08.2016.

- l) MoM letter dated 26.08.2015 is at page 917 and relevant at page 921 Clause 4. The Petitioner representative assured CEA that erection of GIS at both station would be completed by May, 2016 and as per Schedule, testing and commissioning would also be completed by July 2006.
- m) MoM letter dated 25.02.106 is at page 924 relevant at page 928. As on this date the scheduled COD is totally expected to be achieved. No chance of project being delayed.
- n) MoM letter 18.08.2016 is at page 939 relevant part at page 943. For the first time in meeting held on 27.07.2016 the scheduled COD is delayed by about 4 months.
- o) Clause 11.4 (Force Majeure Exclusions) of TAs (at page 455 of Appeal) need to be considered which is as under:

“11.4. Force Majeure Exclusions

11.4.1 Force Majeure shall not include (i) any event which is within the reasonable control of the parties and the following conditions, except to be the extent that they are consequences or an event of Force Majeure.

.....

(f) Non-performance caused by or connected with, the Affected Party's:

(i) negligent or intentional acts, errors or omission.”

- p) The alleged claim of Force Majeure on part of Appellant is absolutely false, incorrect, baseless and not maintainable particularly in view of the Force Majeure exclusions clause

and in fact all the claims based upon Force Majeure are in fact the apparent act of negligence, errors, omissions or intentional acts on part of Appellant which has resulted in delay of execution of project or alleged increase in cost and hence such claims are totally not justifiable and maintainable.

q) Similarly, it is further submitted that no case of claim under change in law has been made out and the same cannot be granted in view of detailed, reasoned and legally correct impugned order passed by the Ld. CERC and therefore the present appeal is liable to be dismissed in the interest of justice.

r) In the impugned order dated 29.03.2019 at page 15 the Ld. Commission has recorded the submission of the Appellant (Petitioner therein) as under:

“Though the RFP contained a disclaimer regarding the information provided the entire risk of the said information cannot be passed onto the Project Developer or the Petitioner. A prospective bidder has a time frame of a mere 2-3 months within which it is not possible to analyse the entire area of the transmission project.”

s) This in itself is sufficient to prove the huge and sheer negligence, inaction, omission and error on the part of the Appellant as it shows that it did not carry out any due diligence on its own before submitting its bid and hence it cannot shift its blame upon the BPC.

t) Similarly, at page 10 of the impugned order the Ld. Commission has recorded the submission of the Appellant in

the following words

“it came to the knowledge of the Petitioner after conducting the detailed survey of the route that the information given in the RFP regarding forest was incorrect.”

- u) This admission further reveals that prior to submitting the bid the Appellant did not carry out any due diligence and prepared its own survey report in regard to the project in question. As mentioned above the routes provided under the Preliminary Survey report were only indicative and preliminary in nature and it was the responsibility of the bidder to ascertain the same. Article 5.1.4 of the Transmission Service Agreement (“TSA”) executed by the Petitioner/DMTCL and long-term Transmission Customers, also, inter-alia, provides that the final selection of the site including its geo-technical investigation would be the responsibility of the Transmission Service Provider i.e Petitioner/DMTCL in the present case. Relevant provisions of the TSA are quoted below for ease of reference.

“5.1.4 The TSP shall be responsible for:

- (a) acquisition of land for location specific substations, switching stations or HVDC terminal or inverter stations;*
- (b) final selection of site including its geo-technical Investigation;*
- (c) survey and geo-technical investigation of line route in order to determine the final route of the Transmission lines;***

Seeking access to the Site and other places where the Project is being executed, at its own costs, including payment of any crop compensation or any other compensation as may be required”

- v) The Preliminary Survey Report clearly stated the address and coordinates of the substation land have been provided by the CTU i.e. Power Grid Corporation of India Limited, and such coordinates are only to facilitate the bidder and should not be treated as point of termination or emanation of the transmission line. The relevant Note provided of the Preliminary Survey Report is provided below:

“Note- The address and coordinates of the Sub-station land at Muzzaffarpur have been provided by the CTU and the same is reflected in the Survey report issued to the Bidders. Bidders may note that the coordinates provided in the Survey Report are to facilitate the Bidders to locate the Sub-station/switchyard and this facilitate the Bidders to locate the Sub-station/switchyard and this coordinate should not be considered as the point of termination/emanation of transmission line. The TSP shall coordinate with the agency providing the Inter connection facility for exact point of termination/emanation of transmission line”

- w) The Written Submission placed before the Ld. CERC on behalf of Respondent No 2&3 which is part of the pleadings which is a part of the instant appeal may also be treated part and parcel of the instant written submission. It is humbly that

the impugned order passed by the Ld. CERC is factually and legally correct and the same has been passed after assigning detailed reasons and also keeping in mind the interest of public at large and hence the same needs no interference in the present appeal.

- x) All the issues raised herein in the appeal has been dealt with and correctly answered by CERC in the order under challenge.

13.3 Additional Written Submissions on behalf of Respondents No. 2 & 3.

- a) That the present appeal was listed on 09.11.2021 and arguments were heard and the Hon'ble Tribunal was pleased to direct the parties to file this updated written submissions and in compliance thereof the instant Additional written submissions is being filed in continuation of the written submission dated 12.10.2021 filed by the Answering Respondent.
- b) That it is pertinent to state here that the tender was invited with the sole object to select a 'Transmission Service Provider' (TSP) through Tariff based Competitive Bidding Process. Initially RFQ was issued on 25.03.2013 in which 10 bidders participated and then RFP was issued on 25.05.2013 and the last date to submit the bid was 08.10.2013 i.e. almost after 5 months. The prospective bidder has nearly 7 months to conduct due diligence before submitting their final bid by October, 2013 and it has been admitted in Para B.3.9 at page 12 of the Written submissions

filed by Appellant that it was their responsibility to carry out due diligence before bidding to verify the correctness of information provided in the bid documents. However, no such due diligence/survey report was carried out by the Appellant prior to submitting its bid.

- c) That perusal of said chart reveals that the preparation of survey report of both element took almost 89 and 90 days respectively. So, survey report for both (Darbhanga and Motihari) were completed in July, 2014 & August, 2014. It is case of Appellant that they came to know of the changes in Gantry etc. after conducting its survey and in that event it is surprising to note that in its very letter dated 30.04.2014 at page the Appellant have reported the changes in Gantry and the likely effect of it on the project while at that point of time survey was not over and report not prepared. This raises a serious doubt about the stand and submissions on part of Appellant and it seems that their entire claim is false, incorrect, mala-fide and have been made after concealing true and correct facts and it also therefore appears to have been made with intent to play fraud which cannot be permitted.
- d) That it is an established principal of law that fraud/falsehood vitiates everything. It is humbly submitted that Appellant are not entitled for any claim whatsoever on account of their own act and omission and the negligence and error.
- e) That in this regard it is further pointed out that Appellant has filed Annexure A-13 and at page 589 a detailed chart is provided with time schedule various task executed. A perusal

of same reveals that survey report by Appellant was carried out in March 2014 & April, 2014 of Darbhanga element and Motihari element respectively. This proves that no survey was done prior to submission of bid at all by the Appellant and this was a deliberate omission, error and negligence on its part and hence sub-clause (f) of Clause 11.4 of TSA (page no. 455 of Appeal) get attracted.

- f) That it is important to bring to the notice of this Hon'ble Tribunal that this failure/omission to carry out the due diligence to verify the correctness of bid documents was totally deliberate and intentional and was done with sole intention/purpose to be successful bidder in the entire bid process and to be lowest in tariff rates. For this reason, the exercise of due diligence or preparation of its own survey report was not carried out in March-April, 2014 which otherwise would have escalated the bids. Once the Appellant was declared successful, thereafter due diligence was carried out and all the alleged shortcomings, minor errors etc of the bid documents have been raised and the Appellant with mala-fide intent and design has tried to bring its claim under the ambit of change in law/force majeure etc. which cannot be permitted.
- g) That in the entire Appeal and even during the course of previous hearing, the Appellant has so far not furnished the details of its due diligence or survey report. The entire act/omission on the part of Appellant is mala-fide, wrong and incorrect and it is clear that it has not approached this Hon'ble Tribunal or the Commission with clean hand as it has

knowingly suppressed the true and correct factual position and hence not entitled for any relief as it has been settled by the Hon'ble Supreme Court in Amar Singh Vs. UOI (2011) 7 SCC 69 (para 57 to 62).

- h) That a perusal of prayer Clauses (a) & (c) of the Petition filed by the Appellant before CERC (at page 1155 of the Appeal) would further make it clear that it had specifically prayed to declare the unforeseen and uncontrollable events having occurred subsequent to submission of bid as to Constitute Force Majeure and there was never a prayer to declare it as change-in-law and when there was no prayer to the said effect then Appellant is itself barred from seeking any such relief.
- i) That once the Appellant has participated in the bid on the basis of tender documents and survey report annexed therein and pre-bid meeting clarification sought and given and no objection to any of the bid documents, its terms and conditions etc. ever raised and LOI executed thereafter, then Appellant is stopped from questioning the veracity/correctness of any such documents or process and also it has no locus to raise finger upon the BPC and the report prepared by it.
- j) That Article 5.1.2 of TSA (at page 426 of Appeal) is extremely relevant and the same reads as under:
"5.1.2. The TSP acknowledges and agrees that it shall not be relieved from any of its obligation under this Agreement or to be entitled or to any extension or time by reason of the unsuitability of the site or Transmission Line route(s) for

whatever reasons. TSP further acknowledges and agrees that it shall not be entitled to any financial compensation in this regard.”

- k) That similarly Article 16 of TSA (page no476 of Appeal) which governs the Dispute Resolution is also to be taken into account and the mechanism provided therein are mandatory in nature and cannot be side tracked as same is binding on the Appellant.
- l) In view of the submissions made the present Appeal deserves to be dismissed in the interest of justice.

14.0 We have heard learned counsel appearing for the Appellant and learned counsels 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 records during the proceedings. On the basis of the pleadings and submissions available, the following issue emerges in the instant Appeals which are common for our consideration: -

- (a) **Issue No. 1-Whether in the facts and circumstances of the case, the Central Commission is justified in passing the Impugned Order disallowing relief in terms of IDC and IEDC to the Appellant even after declaring forest clearance as a Change in Law event?**
- (b) **Issue No. 2-Whether the Commission is justified in disallowing claims with respect to change in Kurukshetra**

and Malerkotla sub-station gantry coordinates and subsequent change in connection arrangement for 400kV D/C Kurukshetra-Malerkotla Transmission Line as Force Majeure event though these changes occurred as a consequence of inaccuracies in the Survey Report prepared by the Bid Process Coordinator, REC Transmission Projects Company Ltd. (“RECTPCL”)?

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

15.0 Further, the following three issues will be considered additionally for the second captioned Appeal (Appeal no. 276/2021) after the three common issues:

- (a) Issue No. 4-While extending the SCOD and holding that the delay was not on account of DMTCL, CERC has erroneously disallowed recovery of amounts paid by DMTCL to PGCIL along with interest pursuant to its order dated 01.09.2017 passed in Petition No. 209/TT/2016. DMTCL was held liable to pay these amounts on account of delay in COD of the Project.
- (b) Issue No. 5-CERC has erred in disallowing claims with respect to the work affected on account of increase in number of power line crossings due to inaccuracies in the Survey Report prepared by the Bid Processing

**Coordinator (“BPC”) (i.e. PFC Consulting Ltd. (“PFCCL”))
as Force Majeure and Change in Law event.**

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

Our observations and analysis:

16.0 We have carefully considered the submissions made by the learned counsel(s) for the Appellant and the Respondents and observed that the issues which are common in the two captioned Appeals are the fallout of the erroneous Survey Report prepared by the BPC. The three common issues are: -

1. Whether the Commission is justified in disallowing the claim of IDC & IEDC?
2. Whether the Appellant need to be compensated for the increased length of the transmission line?
3. Whether the Appellant deserves to be compensated for the loss of tariff in the first year due to extension of COD?

Issue No. 1

16.1 The Commission in the impugned order has held the unexpected requirement of obtaining forest clearance as Change in Law and Force Majeure in the following terms:

“74. Taking into consideration the above submissions of the Petitioner duly supported by documentary evidence, we are of the view that the amount paid by the Petitioner to the forest authorities is unexpected requirement of forest clearance and all expenditure Order in Petition No. 195/MP/2017 Page 59 of 80 incurred by the Petitioner on account of securing forest clearance is covered under “Change in Law”. Accordingly, the amount paid by the Petitioner to the forest authorities for obtaining diversion of forest land and other legitimate expenditure incurred in connection with forest clearance shall be reimbursable on account of Change in Law.

.....

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.”

- 16.2** On the contrary the Learned Counsel for Respondent no. 19 has challenged the impugned order and pleaded for setting aside the order. In our opinion, the Respondents, if aggrieved by the impugned order, should have challenged it earlier which they have not preferred at any stage. He brought our attention to Article 16 (Governing Law and Dispute Resolution) and submitted that Article 11 for 'Force Majeure' Event and Article 12 for 'Change in Law' Event only describe when these events can occur and the dispute for relief, if any, can be claimed under Article 16. This has not been invoked by the Appellant resulting into procedural infirmity.
- 16.3** This is factually incorrect as it is only when the issue was brought before the Commission that the Commission has declared Forest Clearance as unforeseen and uncontrollable event beyond the control of the Appellant and thus Change in Law and Force Majeure Event. It couldn't have been ascertained under Article 16 of the TSA.
- 16.4** We are not entertaining and deciding on such argument in these appeals as the present Appeals have been filed for specific claims which have been denied by the Commission. Our focus is on the merits of the challenge to the impugned decision regarding grant of time extension and cost compensation due to Change in Law and Force Majeure events.
- 16.5** Our attention was invited towards Clause 11.7(d) of the TSA which provides that Lead Long Term Transmission Customer may, from time to time on one day notice, inspect the project on one day notice. It also does not hold any relevance to the present

Appeal as it pertains to the function which may be performed by the Customer and not by the Transmission Service Provider.

- 16.6** Mr. Pradeep Mishra, Learned Counsel for Respondent no. 2 has argued that in case of inability of the TSP to fulfil the conditions specified in Article 3.1.3 due to any Force Majeure Event, the time period for fulfilment of the condition subsequent as mentioned in Article 3.1.3, shall be extended for a period of such Force Majeure Event, subject to a maximum extension period of three (3) Months, continuous or non-continuous in aggregate. He further submitted that as per Article 3.3.4, any increase in the time period for completion of conditions subsequent mentioned under Article 3.1.3, shall lead to an equal increase in the time period for the Scheduled COD. No adjustment to the Transmission Charges shall be allowed on this account. Thus, the Appellant is not entitled for IDC, IEDC for extending the scheduled date of commissioning.
- 16.7** The Article 3 of the TSA pertains to “Conditions Subsequent”, and none of the six conditions specified there in are relevant in the present Appeal as such we reject the contention of the respondent. Further, the argument that there was no such clause as Clause 3.3.4 when the decision dated 20.10.2020 was passed by this Tribunal in Appeal No. 208 of 2019 on which reliance has been placed by the Appellant also finds no merit in it as the Article 3.3.4 is not applicable in the instant case.
- 16.8** The Appellant has submitted that IDC and IEDC are a direct consequence of delay in SCOD. Once the Commission has declared forest clearance as Force Majeure event and amount paid for it as Change in Law, also allowed extension of SCOD,

Commission ought to have allowed the consequential cost implication. In this regard our attention was drawn towards Articles 11 and 12 of the TSA which states that:

“11. FORCE MAJEURE

...

88.2. Available Relief for a Force Majeure Event

Subject to Article 11

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

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

...

88.. CHANGE IN LAW

...

12.2 Relief for Change in Law

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

For every cumulative increase/decrease of each Rupees One Crore Fifteen Lakh Eighty Thousand Only (Rs. 1.75 Crore) in the cost of the project upto the Scheduled COD of the project,

the increase/decrease in non-escalable transmission charges shall be an amount equal to Zero point Three One Three percent (0.32%) of the non-escalable transmission charges.”

16.9 Undisputedly, the survey report prepared by the BPC was misleading and all the issues have arisen due to incorrect information provided therein. The bid of the Appellant was based on the disclosure made in the Survey Report that there was no forest land involved in the project which required forest clearance to be obtained. Presence of forests certainly affected the timely completion of the project in addition to additional cost incurred by the Appellant in getting the forest Clearance. The Central Commission has rightly acknowledged it and granted extension of time and compensation for the extra expenditure incurred by the TSA. However, the Commission, without assigning reason, has rejected the claim made by the Appellant. The Commission observed that:

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

16.10 The Central Commission failed to understand that the IDC and IEDC is not a financial benefit to the Appellant but due to the financial liability to be borne by the Appellant. This Tribunal vide Judgment dated 20.10.2020 in Appeal No. 208 of 2019 in – ***Bhopal Dhule Transmission Company Limited v Central***

Electricity Regulatory Commission &Ors. (“Bhopal Dhule Judgment”) held that the Commission erred in denying Change in Law relief to the appellant for IDC which is a direct consequence of the Change in Law event. The relevant extract of the Judgement is reproduced herewith

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

1.15 Since the spirit of Article 12 of the TSA is to ensure monetary restitution of a party to the extent of the consequences of Change in Law events, such exceptions cannot be read into Article 12 of the TSA. The Appellant has submitted that a crucial factor for the Appellant whilst bidding for the Project was that uncontrollable Change in Law events would be duly accounted for in accordance with Article 12 of the TSA. By the Impugned Order, the Central Commission has wrongly altered the meaning of the Change in

Law clause of the TSA long after award of the bid and commissioning of the Project.

.....

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

...

1.17 *We are of the view that the Central Commission erred in denying Change in Law relief to the Appellant for IDC and corresponding Carrying Costs on account of admitted Change in Law events after having arrived at unequivocal findings of fact and law that Change in Law events adversely affected the Appellant's Project in accordance with the TSA. Therefore, the impugned order passed by the Central Commission is liable to be set aside as the same is in contravention of settled law laid down by the Hon'ble Supreme Court (Supra) and also the previous orders passed by the Central Commission in Petition Nos.*

73/MP/2014 read with 310/MP/2015 and 174/MP/2016 wherein the same issue has been dealt by the Commission differently. In view of these facts, the Appellant is entitled for the change in law relief as prayed for in the instant Appeal. The issue is thus, decided in favour of the Appellant.

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

Issue No. 2

17.0 The Appellant has claimed compensation on account of increase in length of the transmission lines due to change in the Gantry Coordinates from the one indicated in the Survey Report. The Commission duly acknowledged the increase in length of the transmission lines but denied the claim on account of slackness on the part of the Appellant. The Commission observed that:

“104. The Petitioner vide its letter 14.5.2014 requested for gantry coordinates and PGCIL vide its letter dated 4.7.2014 had informed the Petitioner that there may be change in North Coordinate by few meters during detailed Engineering. Thereafter, the Petitioner after a gap of more than one year vide its letter dated 27.8.2015 sought clarification pertaining to change in North Coordinate gantry at Kurukshetra. In the said letter, the Petitioner had also acknowledged the receipt of GA &

SLD of the bays at Malerkotla, Kurukshetra and Amritsar Substations on 4.7.2014. The coordinates were provided by PGCIL on 10.10.2015 for Malerkotla and on 12.3.2016 for Kurukshetra.

105. It is observed that the Petitioner wrote the first letter on 14.5.2014 and the next letter was written on 27.8.2015. The Petitioner has not explained the delay of one year in pursuing the matter. Moreover, the Petitioner has not placed on record any document to show that it was pursuing the matter with the CTU during the said period. As a TSP, it is expected on the part of the Petitioner to pursue the matter diligently with CTU. However, there was slackness on the part of the Petitioner. Therefore, we are not inclined to grant any relief in this regard.”

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

17.2 Shri Pradeep Mishra, Learned Counsel for Respondent No. 2 submitted that the decision dated 20.11.2019 in Appeal No. 121 of 2015; Sasan Power Ltd. Vs. CERC &Ors. of this Tribunal is not

applicable in the present case as the PGCIL vide its letter dated 04.07.2014 had informed the Petitioner as there may be change in north coordinate by few meters during detailed Engineering. Further, submitted that due to any fault on behalf of Appellant or PGCIL the replying Respondent cannot be penalized by making them to pay the higher tariff.

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

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

17.5 The Commission has duly acknowledged the fact that the Survey Report is erroneous and misled the Appellant by granting extension of SCOD and cost incurred in obtaining the Forest Clearance. The change in Gantry Coordinates have

also been acknowledged, however, compensation has not been granted for reasons as explained in the said judgement of the Commission which is unjustified. The point of challenge is compensation on account of unforeseen and uncontrollable events occurred due to the erroneous Survey Report and not the RFP document.

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

Issue No. 3

18.0 The Appellant has claimed for the loss of tariff on account of Force Majeure and Change in Law events which led to under recovery of tariff as against the tariff envisaged at the time of bid submission due to change in the SCOD.

18.1 The relevant dates in reference to Appeal 129 of 2020 are as follows:

02.01.2014	Transmission Services Agreement was executed between Appellant, replying Respondent and other beneficiaries.
12.05.2014	Effective date for the project.
12.09.2016	Scheduled Commercial Operation Date. (28 months from effective date for the project).
18.01.2017	Actual date of CoD for KM line (delay of 129 days).
27.03.2017	MA Line. (delay of 139 days).

18.2 The Appellant is claiming that the SCOD is 12.09.2016 as per the TSA and because of extended SCOD, the COD for KM line shifted to 18.01.2017 and for MA line to 27.03.2017. On this account the Appellant claim is that there is a tariff loss for 129 days for KM line whereas loss for 139 days for MA line.

18.3 The two lines during this period were not commissioned and no transmission service can be provided by the TSP to LTTCs. There is no provision in the TSA where Transmission Charges can be levied where the TSP cannot serve the LTTCs.

18.4 The TSA provides that the Monthly Transmission Charges to be paid by the LTTCs to the TSP for providing Transmission Service for any Contract Year during the term of the Agreement shall be in accordance with this Schedule i.e., Schedule 5. The relevant sub clause is as reproduced below:

“Schedule: 5 Computation of Transmission charges

.....

d. In case of any extension of time period for the Scheduled COD, the applicable Transmission Charges in relation to an Element shall be the Transmission Charges of the Contract Year in which the COD of such Element Occurs or it has deemed to have occurred, and in relation to the Project, the Transmission Charges applicable will be for the Contract Year in which the COD occurs.”

18.5 Further, the Transmission Tariff can be charged against the transmission service actually provided or deemed to have been provided which can be possible only once the Transmission System is fully commissioned and achieved COD.

18.6 The Learned Counsel for Respondent No. 19 submitted that the extension of SCOD for reasons beyond the control of the parties has been specifically considered in the TSA. The Learned Central Commission in the Review Order considered the same and enforced the terms of the TSA. Schedule 5 of TSA clearly provides that in the event of revision of SCOD, the tariff for the Contract Year in which COD occurs shall be payable.

18.7 The Commission denied such compensation by observing that:

“40. We have perused the order dated 29.03.2019. We find that review petitioner had made a submission regarding the same in Petition No. 195/MP/2017. In the present Petition, the Review Petitioner has contended that the monetary impact needs to be allowed to be recovered from the extended SCOD of the respective transmission elements. In other words, the Review Petitioner is seeking that the first contract year should start from the date of actual COD of the transmission lines, and not from the dates indicated in the TSA in order to enable the Review Petitioner to recover the tariff envisaged for the first contract year which is more than the tariff for the second contract year and correspondingly extend the last contract year.”

18.8 Learned Counsel for Respondent no. 15 submitted that there is no such provision under the TSA in so far as the question related to compensation for loss of first year tariff and also for the consequential interest is concerned. Further, it may also be mentioned that this project was conceived to become operational with a certain time frame. The failure of the Appellant to bring the

project within the projected time frame had resulted into operation of the Grid network at sub-optimum level till its operation resulting with higher losses which are borne by the Respondents.

18.9 We inclined to accept the contentions of the Respondents in the light of the fact that the Appellant has already been granted relief in respect of additional expenditures incurred and extended SCOD as mentioned under preceding paras.

18.10 It also need emphasis that tariff can be levied only for the services provided and not on account of Force Majeure or Change in Law Events. In the present case the commissioning of the Transmission System of the Appellant has delayed and any Tariff can be billed only once the COD has been achieved. Any change at this stage will result into amendment to the TSA.

18.11 In the present case, we have agreed to the claims of the Appellant on account of the Change in Law and Force Majeure Events:

- i. Expenses made for obtaining Forest Clearance,
- ii. Extension of SCOD for Forest Clearance, and
- iii. Compensation for increased length of the Transmission Lines.

18.12 The time extension granted has also saved the Appellant from levying of any penalty on account of delay in commissioning of the project.

18.13 It may be seen that the Appellant has already been fully compensated for the delay and others as stated above due to Change in Law and Force Majeure Events.

18.14 As such we decline to accept the submission of the Appellant.

- 19.0** The Appellant in the second captioned Appeal i.e., Appeal no. 276 of 2021: Darbhanga-Motihari Transmission Company Limited vs Central Electricity Regulatory Commission &Ors. has aggrieved by:
- (a) While allowing the requirement of obtaining forest clearance as a Change in Law event, CERC has erroneously disallowed consequential relief in terms of IDC and IEDC which were a direct consequence of these events.
 - (b) While extending the SCOD and holding that the delay was not on account of DMTCL, CERC has erroneously disallowed recovery of amounts paid by DMTCL to PGCIL along with interest pursuant to its order dated 01.09.2017 passed in Petition No. 209/TT/2016. DMTCL was held liable to pay these amounts on account of delay in COD of the Project. However, since delay in COD has been held to be a Force Majeure and Change in Law event, DMTCL cannot be held liable for such amounts.
 - (c) CERC has erred in disallowing claims with respect to change in Gantry Coordinates and Connection Arrangement at PGCIL Muzaffarpur Substation for 400kV D/C Muzaffarpur-Darbhanga Transmission line as Force Majeure and Change in Law event even though these changes occurred as a consequence of inaccuracies in the Survey Report prepared by PFFCL.
 - (d) CERC has erred in disallowing claims with respect to the work affected on account of increase in number of power line crossings due to inaccuracies in the Survey Report prepared by the Bid Processing Coordinator (“BPC”) (i.e. PFC

Consulting Ltd. (“PFCCL”)) as Force Majeure and Change in Law event.

- (e) CERC has erred in disallowing additional cost incurred on account of ground improvement work at Motihari sub-station land due to Geotechnical surprise as a Force Majeure event.
- (f) CERC has erred in not providing relief to the Appellant for the loss of tariff on account of Force Majeure and Change in Law events which caused delay in achieving SCOD.

Issue No. 4

20.0 We have already considered the issues raised at sub paras (a), (c) and (d) of Para 19 above. As such, only issues mentioned at para (b)- Issue no. 4, para (e)- Issue no. 5 and para (f)- Issue no. 6 will be taken up in the subsequent paras. The issue raised at sub para (b) above is similar to issue raised in **Appeal No. 17 of 2019: NRSS XXXI (B) Transmission Company Limited vs. CERC &Ors.** The relevant paras of the Judgement in the said Appeal is as follows:

“8.21 It would thus appear that imposing liability of IDC and IEDC on the Appellant defeats the objective of introducing the provision of force majeure in the TSA i.e., to save the Appellant from the consequences of anything over which it has no control. When the relief is available under the force majeure provisions of the contract, the Commission ought not to have penalized the Appellant for the same act outside the contract, particularly, when there is no such provision in the sharing regulations which the Appellant could have made itself aware of before bidding for the project.”

20.1 Therefore, we agree with the submissions made by the Appellant seeking relief for the recovery of amounts paid by DMTCL to PGCIL along with interest pursuant to its order dated 01.09.2017 passed in Petition No. 209/TT/2016. DMTCL was held liable to pay these amounts on account of delay in COD of the Project.

Issue No. 5

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

21.1 The Respondents raised the similar contention that the Survey Report is mere indicative only and the bidder should have ascertained all the facts given in the Survey Report through its own survey. The provisions of the RFP were also brought before us. We are not inclined to accept the arguments as the erroneous and misleading report has resulted into the present cause of these Appeals. We are of the firm opinion that in case a diligently and accurately prepared Survey Report cannot be provided by the BPC, it should be left to the bidder to carry out its Survey before participating in the bids. We agree with the Appellant’s submissions

made on this issue and again advise the Central Commission to formulate and specify a suitable Regulatory mechanism to deal with such erroneous reports. The decision cannot be burdened with such misleading informations.

Issue No. 6

22.0 In regard to the issue of CERC disallowing additional cost incurred on account of ground improvement work at Motihari sub-station land due to Geotechnical surprise as a Force Majeure event.

22.1 Certainly, it is not an issue which can be attributed to the Survey Report prepared by the BPC. The Appellant was well aware of the locations of the sub-stations at which the Transmission Lines were required to be terminated. However, the Appellant has submitted that at the time of Geotechnical Investigations at Motihari Sub-station land, it was discovered that the strata were prone to liquefaction. The consequences of liquefaction include bearing failure, lateral spreading and settlement. This factor along with very low safe bearing capacity of soil required ground improvement measures to be undertaken before start of any construction work. Appellant also consulted some of the industry experts and as per their opinion, ground improvement measures were required to be undertaken before commencing foundation work. Thus, in line with good engineering practices and for the safety of sub-station foundations, Appellant undertook ground improvement measures.

22.2 It is submitted that the above hindrances could not have been anticipated at the time of submission of bid and thus, qualify as a Force Majeure event beyond the control of DMTCL. The abovementioned Force Majeure event of Geotechnical surprise

at Motihari Sub-station is a rarest of rare event which resulted in stoppage of construction work at the Project site from 06.04.2015 to 21.02.2016. An additional expenditure of approximately Rs. 7.32 Crores was incurred towards sub-station ground improvement in addition to the IDC during this duration. It is submitted that CERC has in Order dated 28.04.2016 in Petition No. 409/TT/2014 – PGCIL vs. MPPMCL &Ors. allowed relief on account of ground improvement works as beyond the control of PGCIL.

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

Summary of Findings:

23.0 Based on the issuewise discussions and findings, we sum up our findings hereunder: -

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

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

Issue No.3:- We hold that the tariff can be levied only for the services provided and not on account of Force Majeure or

Change in Law Events. In the present case the commissioning of the Transmission System of the Appellant has delayed and any Tariff can be billed only once the COD has been achieved. Any change at this stage will result into amendment to the TSA. Therefore, decline to grant any compensation on this account.

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

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

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

ORDER

In light of the above, we are of the considered view that some issues raised in the Batch of Appeals have merits and hence the Appeals are allowed. The impugned common order dated 29.03.2019 in Petition No. **195/MP/2017** and **238/MP/2017** passed by Central Electricity Regulatory Commission is hereby set aside to the extent of our findings under Para23 above.

The matter is remitted back to the Central Commission for passing a reasoned order pursuant to our directions are scrupulously complied with expeditiously and in a time-bound manner and for this purpose shall

have recourse to all enabling powers available to it under the law.

The appeals are disposed of in above terms. Pending IAs, if any, shall stand disposed of.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERENCING ON THIS 3rd DAY OF DECEMBER, 2021.

(Sandesh Kumar Sharma)
Technical Member

pr

(Justice R.K. Gauba)
Judicial Member