

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 514/MP/2020

Coram:

**Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri P.K. Singh, Member**

Date of Order: 11th August, 2022

In the matter of

Petition under Section 63 and Section 79(1)(c) and Section 79(1)(f) of the Electricity Act, 2003 seeking reliefs due to occurrence of certain Force Majeure and Change in Law events under the Transmission Service Agreement dated 6.8.2009.

And

In the matter of

**East-North Interconnection Company Limited,
F-1, The Mira Corporate Suites,
Ishwar Nagar, Okhla Crossing,
Mathura Road, New Delhi-110 065.**

...Petitioner

Vs

**1. Jodhpur Vidyut Vitran Nigam Limited,
New Power House, Industrial Area,
Jodhpur – 342 003.**

**2. Jaipur Vidyut Vitran Nigam Limited,
Vidyut Bhawan, Janpath,
Jaipur – 302 005.**

**3. Ajmer Vidyut Vitran Nigam Limited,
Old Power House, Hathi Bhatta,
Jaipur Road, Ajmer.**

**4. BSES Yamuna Power Limited,
Shakti Kiran Building,
Karkardooma, New Delhi – 110 092**

**5. BSES Rajdhani Power Limited,
BSES Bhawan, Nehru Place,
New Delhi – 110 019.**

6. North Delhi Power Limited,

(Now known as Tata Power Delhi Distribution Limited)
Sub Station Building, Hudson Lines,
Kingsway Camp,
New Delhi-110 009.

7. New Delhi Municipal Corporation,

Palika Kendra Building,
Opp. Jantar Mantar Building,
Parliament Street, New Delhi -110 001

8. Uttarakhand Power Corporation Limited,

Urja Bhawan, Kanwali Road,
Dehradun, 248 001.

9. Paschimanchal Vidyut Vitran Nigam Limited,

Victoria Park, Meerut – 250 001.

10. Poorvanchal Vidyut Vitran Nigam Limited,

Hydel Colony, Bhikharipur,
Post: DLW, Varanasi- 221 004.

11. Dakshinanchal Vidyut Vitran Nigam Limited,

220 kV Vidyut Sub-Station,
Mathura Agra by pass road,
Sikandra, Agra-282 007.

12. Madhyanchal Vidyut Vitran Nigam Limited,

4-A, Gokhle Marg,
Lucknow-226 001.

13. Uttar Haryana Bijli Vitran Nigam Limited,

Vidyut Sadan, Plot No. 16-C,
Sector-6, Panchkula- 134 109.

14. Dakshin Haryana Bijli Nigam Limited,

Vidyut Sadan, Vidyut Nagar,
Hissar-125 005.

15. Punjab State Electricity Board,

The Mall, Patiala-147 001.

16. Power Development Department,

Mini Secretariat, Jammu,
Jammu& Kashmir-180 001.

17. Himachal Pradesh State Electricity Board,

Vidyut Bhawan, Shimla-171 004.

18. North Central Railway,

Subedarganj, Allahabad- 211 033.

19. UT Chandigarh,
Chandigarh Administration,
Sector-9, Chandigarh.

...Respondents

The following were present:

Shri Jafar Alam, Advocate, ENICL
Ms. Harneet Kaur, Advocate, ENICL
Shri Ashwin Ramanathan, Advocate, ENICL
Shri Balaji Sivan, ENICL
Ms. Anisha Chopra, ENICL

ORDER

The Petitioner, East North Interconnection Company Limited ('ENICL'), has filed the present Petition under Section 63 and Section 79 (1)(c) and (f) of the Electricity Act, 2003 (hereinafter referred to as "the Act") seeking reliefs on account of occurrence of Force Majeure and Change in Law events in terms of Article 11 and Article 12 of the Transmission Service Agreement (in short, 'TSA') dated 6.8.2009. The Petitioner has made the following prayers:

"(a) Declare that the collapse of the towers forming part of the PB Line due to a sudden and unprecedented change in the course of the river Ganga is a Force Majeure Event in terms of Article 11 of the TSA;

(b) Declare that the Petitioner would not be liable in any manner for a breach of its obligations under the TSA for the period consumed in restoration of the PB Line between August 2018 until December 2019 due to the occurrence of the above Force Majeure Event in terms of Article 11.7(a) of the TSA;

(c) Declare that the Petitioner be duly compensated in the amount of Rs. 82.58 crore in terms of Article 11.7 of the TSA for the unforeseen and unavoidable additional expenditure incurred in restoring the operations of the PB Line, which collapsed pursuant to the occurrence of a Force Majeure event;

(d) Without prejudice to the above and in the alternate, declare that the restoration of the PB Line required to be carried out by the Petitioner in terms of the decision arrived at in the ERPC Meeting dated 13.02.2019 amounts to a deviation from the scope of work provided in the bidding documents and is a Change in Law event in terms of Article 12 of the TSA, entitling the Petitioner to claim compensation in the amount of Rs. 82.58 crore, as per Article 12.2 of the TSA, for the additional expenditure incurred by the Petitioner after the Cut-off Date in restoration of the PB Line."

2. The Petitioner, East North Interconnection Company Limited (ENCIL) a fully

owned subsidiary of Sterlite Technology Limited, is an inter-State transmission licensee selected through the international tariff based competitive bidding under Section 63 of the Act to establish the following transmission systems on Build, Own, Operate and Maintain basis and to provide transmission service to the Long-Term Transmission Customers (LTTCs) of the transmission systems:

- (a) Bongaigaon-Siliguri 400 kV Quad D/C transmission line (BS Line); and
- (b) Purnea-Biharsharif 400 kV Quad D/C transmission line (PB Line)

3. The Petitioner has entered into TSA with LTTCs on 6.8.2009. The Commission in its order dated 28.10.2010 in Petition No. 131/TL/2010 granted transmission licence to the Petitioner for inter-State transmission of electricity. The Petitioner achieved commercial operation of PB Line and BS Line on 13.9.2013 and 11.11.2014 respectively.

4. In the present Petition, the Petitioner has claimed relief on account of the occurrence of Force Majeure and Change in Law events in terms of Article 11 and Article 12 of the TSA, namely, collapse of towers of PB Line and restoration of PB Line by construction of additional towers along the revised route on the directions of ERPC respectively.

5. The Petitioner has submitted that it has incurred the additional expenditure towards carrying out the following activities for restoration of PB Line which is covered under Change in Law:

- (a) Installation of 5 new transmission towers with open case foundation;
- (b) Installation of 3 new transmission towers with pile foundation;
- (c) Installation of 1.1 km of Special High-Performance Conductor (HPC with ACCC Conductor) between tower location AP 46/9A – AP 47/1;
- (d) Installation of around 4.386 km of additional overhead electrical lines; and

(e) Additional expenditure incurred in transporting repair material for the towers of the PB Line through a 12 km route along with Ganga river due to damage to the 12-kilometer approach road which existed prior to the inundation at the sites.

Submission of the Petitioner

6. The Petitioner has mainly submitted as under:

(a) Subsequent to the commissioning of Purnea-Biharsharif 400 kV D/C transmission line ('PB Line') on 13.9.2013, three of its towers collapsed in quick succession on 10.8.2018, 21.8.2018 and 3.10.2018 due to sudden and unprecedented change in the course of river Ganga, leading to tripping of the PB Line. The aforesaid event constitutes a Natural Force Majeure event in terms of Article 11.3 of the TSA.

(b) The Petitioner apprised the Eastern Regional Power Committee ('ERPC') about occurrence of the Force Majeure event in the subsequent meetings along with the possible alternatives. Pursuant thereof, vide minutes of meeting dated 13.2.2019 of a special Committee constituted by ERPC, the Petitioner was directed to restore the PB Line by reconstructing the damaged transmission towers and relocating the other towers of PB Line which were susceptible to damage in future, on an alternate route from the original scope of work.

(c) In the said minutes dated 13.2.2019, ERPC observed that the collapse of the towers of PB Line constituted a Force Majeure event which was beyond the reasonable control of the Petitioner. It was also observed that the Petitioner was required to be granted a reasonable period of time to overcome the impact of the said event and to restore the operation of PB Line. In the same minutes, the ERPC found that PGCIL's Patna-Kishanganj transmission line, situated at distance of approximately 200 meters, from the PB Line was also similarly affected due to the change in the course of the river Ganga.

(d) In order to restore the PB Line, the Petitioner has been required to install 8 new transmission towers, 1.1 km of special high-performance conductor and approximately 4.4 km of additional overhead lines. The restoration work of PB Line was completed in December, 2019 and it was successfully charged on 19.12.2019. In this regard, the Petitioner has incurred an additional expenditure to the tune of

Rs. 94.58 crore. After considering approximately Rs. 12 crore as insurance proceeds received, the Petitioner is claiming the balance expenditure of Rs. 82.58 crore as Change in Law compensation.

(e) The restoration of PB Line by construction of additional towers along the revised route on the direction of ERPC amounts to additional scope of work not attributable to the Petitioner. ERPC is an Indian Government Instrumentality and its orders constitute 'Law' in the meaning contemplated under the TSA. Therefore, the rerouting of the PB Line at the instance of the ERPC constitutes an event under Article 12 of the TSA. Consequently, the Petitioner is also entitled to relief in terms of Article 12.2.1 of the TSA.

(f) The Petitioner has duly issued the notices for occurrence of Force Majeure and Change in Law events in terms of TSA. However, no reply has been received from the LTTCs in this regard.

7. The matter was called out for virtual hearing on 21.5.2015 and notices were issued to the Respondents to file their replies. However, no reply has been filed by the Respondents despite notice.

8. During the course of hearing, the Commission enquired from the Petitioner as to whether the issues relating to availability of PB Line, levy of penalty/ damages due to claimed Force Majeure event, etc. have been discussed/ deliberated in the ERPC meetings, learned counsel for the Petitioner sought liberty to take necessary instructions in this regard and to file the subsequent minutes of EPRC meetings within a period of four weeks. Accordingly, the Petitioner vide its affidavit dated 18.6.2021 has placed on record the copy of the minutes of EPRC meetings.

9. The matter was heard on 14.10.2021 through video conferencing. The Petitioner was directed to file the findings of investigation/study, if any, carried out by any

independent agency/Government body including the Central Electricity Authority regarding collapse of these transmission towers.

10. The Petitioner vide its affidavit dated 3.12.2021 has placed on record the copy of the 'Technical Report and Root Cause Analysis on Collapse of Electrical Transmission Towers Located on the Banks of River Ganga' dated 20.2.2019 which has been discussed in succeeding paragraphs.

Analysis and Decision

11. Earlier, the matter was heard on 14.10.2021 and reserved for order. However, consequent upon notification of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (hereinafter referred to as "the Change in Law Rules") by the Ministry of Power, Government of India on 22.10.2021, it was considered expedient for the ends of justice to re-hear the matter in the light of Change in Law Rules. Hence, matter was re-listed for hearing on 11.1.2022 through video conferencing.

12. In the meantime, the Petitioner filed Original Petition bearing OP No. 2 of 2022 before the Appellate Tribunal for Electricity (in short, 'APTEL') under Section 121 of the Act seeking directions to the Commission to adjudicate and decide the Petition instead of applying the Change in Law Rules. APTEL directed the Commission to hear the petition and issue appropriate order.

13. In terms of the direction of APTEL, the matter was heard on 11.1.2022 on the applicability of the Change in Law Rules to the present case. The Commission vide order dated 4.2.2022 directed the Petitioner to approach the beneficiaries/LTTCs for settlement of Change in Law claims in terms of the Change in Law Rules and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.

14. Subsequently, APTEL vide its judgment dated 5.4.2022, *inter alia*, held that the Change in Law Rules apply only prospectively and cannot be retrospectively applied to the proceedings pending for adjudication before the Commission, particularly where the cause of action had already arisen before the said rules were brought into existence and accordingly, the Commission has been directed to consider each such case on merit and adjudicate the matter in exercise of its jurisdiction under Section 79 of the Act. Accordingly, the matter was heard on 7.6.2022. None appeared on behalf of the Respondents. We now proceed to deal with the claims of the Petitioner on merits based on the documents available on record and in terms of the judgment of APTEL dated 5.4.2022.

15. We have considered the submissions of the Petitioner and perused the documents available on record. Based on the above, the following issues arise for our consideration:

Issue No.1: Whether the Petitioner has complied with the provisions of the TSA before approaching the Commission for claiming relief under Force Majeure and Change in Law?

Issue No. 2: Whether the claims of the Petitioner are covered under Force Majeure in terms of the TSA?

Issue No. 3: Whether the claims of the Petitioner are covered under Change in Law in terms of the TSA?

Issue No. 4: What reliefs, if any, should be granted to the Petitioner in the light of the answers to the above issues?

The above issues have been dealt with in succeeding paragraphs.

Issue No. 1: Whether the Petitioner has complied with the provisions of the TSA before approaching the Commission for claiming relief under Force Majeure and Change in Law?

16. The Petitioner has claimed relief under Article 11 (Force Majeure) of the TSA. Article 11.5.1 of the TSA provides as under:

“11.5 Notification of Force Majeure Event

11.5.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement.

Provided that such notice shall be a pre-condition to the Affected Party’s entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure.

11.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.”

17. Under Article 11.5.1 of the TSA, an affected party shall give notice to the other party of any event of Force Majeure as soon as reasonably practicable, but not later than seven days after the date on which the party knew or should have reasonably known of the commencement of the event of Force Majeure. It further provides that such notice shall be a pre-condition to the affected party’s entitlement to claim relief under the TSA. Further, under Article 11.5.2 of the TSA, an affected party is also required to give notice to the other party of cessation of the force majeure event and cessation of the effects of such Force Majeure on the performance of its rights or obligations under the TSA as soon as practicable after becoming aware of each of the cessations.

18. The Petitioner has claimed relief under Article 12 (Change in Law) of the TSA. Article 12.3.1 of the TSA provides as under:

“12.3 Notification of Change in Law Event

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

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

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

19. Article 12.3 of the TSA provides that if the TSP is affected by a Change in Law in accordance with Article 12.1 and wishes to claim relief for such Change in Law, it shall give notice to the lead LTTC as soon as reasonably practicable after being aware of the same. It further provides that any notice served pursuant to Articles 12.3.1 and 12.3.2 of the TSA shall provide amongst other things, precise details of Change in Law and its effect on the TSP.

20. The Petitioner vide its letter dated 16.8.2018 had intimated the LTTCs about collapse of the transmission tower forming part of PB Line viz. location no. 47/0 on 10.8.2018. Thereafter, the Petitioner vide its letter dated 26.10.2018 further informed the LTTCs about the collapse of the subsequent towers of PB Line at location Nos. 46/8 and 46/9 on 21.8.2018 and 3.10.2018 respectively. We observe that said letters were mere intimations about collapse of towers, and as such the Petitioner did not indicate about the Clause of TSA under which such purported Notices were issued. However, in the said notices, the Petitioner had intimated about the change in course of River Ganga claiming it to be an act of God - an event beyond the Petitioner's control and which led to the collapse of the transmission towers. Accordingly, we are of the view that even though the Petitioner has not quoted the specific provision of the TSA, the Petitioner had intimated the LTTCs about the collapse of transmission towers of the PB Line and hence, the requirement under Force Majeure provisions of the TSA have been substantially complied with. We now proceed to deal with the claim of the Petitioner on merit.