

21. The Petitioner has further submitted that it was decided in ERPC for diversion of PB line for its restoration. The Petitioner gave notices to LTTCs on 15.7.2019 *inter-alia* stating that resultant diversion in the route for the restoration for the PB Line, as required by ERPC, will lead to an escalation in the cost of the operation of the Project and amounts to a Change in Law events under Article 12 of the TSA. The Petitioner has submitted that no response was received from the lead LTTC or other LTTCs to the said notice. In our view, the Petitioner has complied with the requirement of TSA regarding prior notice to the lead LTTC regarding occurrence of Change in Law events before approaching the Commission.

22. This issue is answered accordingly.

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

23. The Petitioner has sought declaration that the collapse of the towers forming part of the PB Line due to sudden and unprecedented change in the course of river Ganga is a Force Majeure event in terms of Article 11 of the TSA.

24. The Petitioner has contended that on account of the collapse of the transmission towers, the Petitioner was left with no choice but to carry out the diversion in order to prevent further damage to the PB Line which constitutes a natural Force Majeure event under Article 11.3 of the TSA entitling the Petitioner to claim relief as per the provisions of Article 11.7 of the TSA, namely (i) reasonable time period for the restoration of the PB Line, (ii) waiver of any penalties or liabilities under the TSA for the period when the PB Line was not operational, and (iii) compensation for the expenditure incurred by the Petitioner in relocation of the towers constituting the PB Line, which the Petitioner was compelled to undertake to prevent any further damage to the PB Line.

25. We have considered the submissions made by the Petitioner. We note that the claimed force majeure period by the Petitioner on account of collapse of the towers is from 10<sup>th</sup> August, 2018 (i.e. date on which the first tower of PB Line collapsed) to 29<sup>th</sup> December, 2019 (i.e. date on which the PB Line was finally restored).

26. The provisions of the TSA with regard to “Force Majeure” are extracted hereunder:

*“11.3 Force Majeure*

*A ‘Force Majeure’ means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:*

*(a) Natural Force Majeure Events: Act of God, including, but not limited to drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years,*

*(b) Non-Natural Force Majeure Events:*

*i. Direct Non–Natural Force Majeure Events:*

*• Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the TSP; or*

*• the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by the TSP to perform their obligations under the RFP Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other Consents, Clearances and Permits required for the development/ operation of the Project, provided that a Competent Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down; or*

*• any other unlawful, unreasonable or discriminatory action on the part of an Indian Governmental Instrumentality which is directed against the Project, provided that a Competent Court of Law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down.*

*ii. Indirect Non - Natural Force Majeure Events.*

*• act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or*

*• radioactive contamination or ionising radiation originating from a source in India or resulting from any other Indirect Non Natural Force Majeure Event mentioned above,*

*excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Site by the Affected Party or those employed or engaged by the Affected Party; or*

- *industry wide strikes and labour disturbances, having a nationwide impact in India.*

#### *11.4 Force Majeure Exclusions*

*11.4.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:*

*(a) Unavailability, late delivery, or changes in cost of the machinery, equipment, materials, spare parts etc. for the Project;*

*(b) Delay in the performance of any contractors or their agents;*

*(c) Non-performance resulting from normal wear and tear typically experienced in transmission materials and equipment;*

*(d) Strikes or labour disturbance at the facilities of the Affected Party;*

*(e) Insufficiency of finances or funds or the agreement becoming onerous to perform; and*

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

*i. negligent or intentional acts, errors or omissions;*

*ii. failure to comply with an Indian Law; or*

*iii. breach of, or default under this agreement or any Project Documents.*

#### *11.6 Duty to perform and duty to mitigate*

*To the extent not prevented by a Force Majeure Event, the Affected Party shall continue to perform its obligations as provided in this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable.”*

27. The Petitioner has claimed that the towers collapsed on account of unprecedented flood and change in course of river Ganga is an act of God. Perusal of the TSA shows that the provision regarding force majeure event on account of act of God is covered under “Natural Force Majeure Events”. “Act of God” includes flood. However, in order to qualify for relief under Force Majeure, it has to be proved that the event or circumstance wholly or partly prevents or unavoidably delays the affected party from performance of its duty and such event or circumstance is not within the reasonable control, directly or indirectly, of the affected party and could not have been avoided if the affected party had taken reasonable care or complied with Prudent Utility Practices.

28. The Commission vide ROP dated 14.10.2021 directed the Petitioner to submit 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. In this regard, the Petitioner has not submitted any report of government agency, however has submitted a report, namely "Technical Report and Root Cause Analysis on Collapse of Electrical Transmission Towers Located on the Banks of River Ganga", dated 20.2.2019 prepared by Sinha & Associates, a private agency engaged by the Petitioner. The relevant portion of the said report are as follows:

***"6.0 Incident Report (From ENICL record)***

*From the ground patrolling team reports it was observed that:*

- Rise of water in the river reached alarming level on 2nd August 2018, the water line on right embankment near tower no. 47/0 was noted at 20m distance from the tower legs. On 9th August 2018 all the four legs of this tower gone under water and heavy scouring of the river bank was noted. On 10th August 2018, the transmission line tripped due to collapse of tower no: 47/0 .*
- The bank scouring was so severe and fast that, on 14<sup>th</sup> August 2018, the waterline reached at 35m from the leg of tower no. 46/9, On 21<sup>st</sup> August 2018, tower no 46/9 collapsed.*

*Main river stream reached the leg of tower no 46/8 at a later date and it was also collapsed on 03<sup>rd</sup> September 2018*

*.....*

***13.0 Findings:***

*All the available design documents and parameters are being reviewed in the line of above philosophy and findings are explained in detail. The towers had been designed in respect of the hydrological and geological parameters and the main channel profile of the river as retrieved up to the preconstruction period till 2011 and were installed in the year 2012 to 2013. Since commissioning of the transmission line, all the subject towers had exposed to several monsoons and floods in the river Ganga. From the available information/data and pictures, it is very much clear that, whatever incident of damage/collapse occurred are primarily due to the rapid and drastic change in river course, its section profile and scouring of bed. Detail findings are tabled below:*

***A: On Hydrological Data:***