THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

Petition No. 1959/2023

QUORUM

Hon'ble Shri Arvind Kumar, Chairman

Hon'ble Shri Vinod Kumar Srivastava, Member (Law)

Hon'ble Shri Sanjay Kumar Singh, Member

IN THE MATTER OF

Petition under Section 86 of the Electricity Act, 2003 read with Articles 11, 12 and 16 of the Transmission Service Agreement dated 06.04.2018 seeking compensation on account of force majeure and change in law events and other consequential reliefs.

AND

IN THE MATTER OF

Ghatampur Transmission Limited,

through its Authorised Signatory, Adani Corporate House, Shantigram, Near Vaishno Devi Circle, S.G. Highway, Khodiyar, Ahmedabad, Gujarat-382421

..... **Petitioner**

VERSUS

1. **Paschimanchal Vidyut Vitran Nigam Limited**, through its Managing Director, Hydel Colony, Victoria Park, Meerut, Uttar Pradesh-250001.
2. **Madhyanchal Vidyut Vitran Nigam Limited**, through its Managing Director, 4 A, Gokhale Marg, Lucknow, Uttar Pradesh-226001.
3. **Purvanchal Vidyut Vitran Nigam Limited**, through its Managing Director, Vidyut Nagar, Bhikharipur, P.O. DLW, Varanasi, Uttar Pradesh-221010.
4. **Dakshinanchal Vidyut Vitran Nigam Limited**, through its Managing Director, Urja Bhawan, NH-2 (Agra-Delhi Bypass Road), Sikandra, Agra, Uttar Pradesh-282002.
5. **Neyveli Uttar Pradesh Power Limited**, through its Chief Executive Officer, B-III, 2nd Floor, Eldeco Elegance Apartment, Gomti Nagar, Lucknow, Uttar Pradesh-226010.

6. **Uttar Pradesh Power Transmission Corporation Limited**, through its Managing Director, Shakti Bhavan, 14 Ashok Marg, Lucknow, Uttar Pradesh-226001.

7. **Uttar Pradesh Power Corporation Limited,** through its Managing Director, 11th floor, Shakti Bhawan, 14 Ashok Marg, Lucknow, Uttar Pradesh-226001.

..... Respondents

THE FOLLOWING WERE PRESENT

1. Sh. Nalin Kohli, Advocate, UPPCL
2. Sh. Sourav Roy, Advocate, Petitioner
3. Sh. Kaushal Sharma, Advocate, Petitioner
4. Sh. Atharva Kotwal, Advocate, Petitioner
5. Sh. Abhishek Kumar, Advocate, UPPCL
6. Sh. Nived Veerapaneni, Advocate, UPPCL
7. Sh. Anshul Malik, Advocate, UPPCL
8. Md. Altaf Mansoor, Advocate, UPPTCL
9. Sh. Tanay Chaudhary, Advocate, UPPTCL
10. Ms. Ritu Apurva, Advocate, NUPPL
11. Sh. Deepak Raizada, CE, UPPCL
12. Sh. S.C. Joshi, SE, UPPCL
13. Sh. Rajiv Singh, EE, UPPCL
14. Sh. Rakesh Kumar, SE, UPPTCL
15. Sh. A.K. Prabhakar, EE, UPPTCL
16. Sh. V.M. Singh, AVP, ATL

ORDER

(DATE OF HEARING: 16.05.2024)

1. The instant Petition is filed by the Petitioner under Section 86 of the Electricity Act, 2003 read with Article 11, 12 and 16 of the Transmission Service Agreement dated 06.04.2018 seeking compensation on account of force majeure and change in law events and other consequential reliefs. The prayers of the Petition are as follows:

   (a) Admit the Petition;

(b) Hold and declare that the Petitioner is entitled to relief qua Element-2 and Element-3 (including extension of SCOD) on account of Force Majeure without the levy of Liquidated Damages;

(c) Hold and declare that following events amount to Change in Law events under Article 12 of the TSA:

i. Outbreak of Covid-19 Pandemic and consequent declaration of Nationwide Lockdown.

ii. Imposition of condition by the Indian Air Force to install Day Visual Aids outside 20 km radius of the defence aerodromes.

iii. Payment of Supervision Charges to WUPPTCL is a Change in Law event under the TSA.

(d) Grant relief qua Element-2 and Element-3 to the Petitioner on account of the Change in Law events along with Carrying Cost at LPS rates and principles on compounding basis.

(e) Hold and declare that the Petitioner is entitled to compensation on account of loss of tariff due to delay in achieving COD for Element-2 and Element-3 of the Project due to force majeure and associated change in law in terms stated in the present petition; or

In the alternative

Extend the term of the TSA by a period of 201 days for Element-2 and by a period of 294 days for Element-3 of the Project, which is the time period of the contract lost on account of force majeure events and associated change in law events as pleaded in the present petition treating actual COD as the first contract year;

(f) Grant relief in the form of IDC, IEDC, Commodity Price Variation to the Petitioner by way of increase in monthly transmission charges.

(g) Grant Carrying Cost to the Petitioner on the rate and principles of LPS compound interest basis towards the additional expenditure incurred pursuant to the Change in Law and Force Majeure events;

(h) Direct that the Petitioner is entitled to monetary compensation either through supplementary bill or through monthly tariff invoices, or both, as may be directed by the Commission; and

(i) Pass such other order(s) and / or direction(s) as the Commission may deem fit and proper in the facts and circumstances of the case.

Brief of the Petition

2. Ghatampur Transmission Limited ("Petitioner") is a transmission licensee under Section 2(73) of the Electricity Act, 2003 ("Act") and was granted a license by the Commission vide Orders dated 25.10.2018 and 15.11.2018.

3. Respondent Nos. 1-5 are Long Term Transmission Customers ("LTTCs") within the State of Uttar Pradesh. The Petitioner has entered into a Transmission Service Agreement dated 06.04.2018 ("TSA") with the LTTCs for establishing a transmission system for evacuation of power from 3x660 MW Ghatampur Thermal Power Project in Uttar Pradesh ("Ghatampur TPS") for a period of thirty-five years. As per Article 18.1.1 of the TSA, Paschimanchal Vidyut Vitaran Nigam Limited ("PVVNL/Respondent No. 1") is the lead LTTC.

4. Uttar Pradesh Power Transmission Corporation Limited (Respondent No. 6/ UPPTCL) is the State Transmission Utility for the State of Uttar Pradesh. It is also the nodal agency for grant of connectivity to the intra-State transmission systems and other connectivity related matters in the state of Uttar Pradesh. Uttar Pradesh Power Corporation Limited (Respondent No. 7/UPPCL), is a company responsible for the purchase of power on behalf of several State Government owned electricity Distribution Companies/Distribution Licensees in the State of Uttar Pradesh. The Respondent No.7 exercises the administrative control on the Respondent Nos. 1 to 4.

5. The scope and elements of the Project as described under Schedule-2 of the TSA are as follows:

SR. NO.	NAME OF ELEMENTS	COMPLETION TARGET
1.	- 400 kV Ghatampur TPS - Kanpur (PG) D/C line.	21 months (i.e. February 2020)
2.	- 765 kV Ghatampur TPS - Agra S/C line (including 189 MVAR Line Reactor at Agra end). - 765 kV Agra (UP) - Gr. Noida (WUPPTCL) S/C line (including 240 MVAR Line Reactor at Agra end). - 765 kV Feeder 'Bay' at following substation locations a. Greater Noida (1 No.) b. Agra (2 Nos.)	28 months (i.e. September 2020)

3.	- 765 kV Ghatampur TPS - Hapur (WUPPTCL) S/C line (including 330 MVAR Line Reactor at Hapur end). - 765 kV Feeder 'Bay' at Hapur (1 No.)	35 months (i.e. March 2021)

6. The Petitioner in the instant Petition is seeking the condonation of delay incurred in the implementation of the Project on account of the following events as force majeure and consequential extension of time in achieving Commercial Operation Date ("COD") of the Element Nos. 2 and 3 of the Project, for which the Petitioner is also entitled for Interest During Construction ("IDC"), Incidental Expenditure During Construction ("IEDC"), Commodity Price Variation("CPV") and loss of tariff on account of following:

   (a) Delays due to protest against Citizen Amendment Bill ("CAB");

   (b) Delays on account of impact of first wave of Covid-19 Pandemic;

   (c) Delays on account of impact of second wave of Covid-19 Pandemic (only for Element-3);

   (d) Delay in issuance of working permission by Divisional Forest Officer ("DFO"), Agra (only for Element-2).

7. Further, the Petition is also claiming change in law compensation along with carrying cost on account of increase in Project cost due to the following events:

   (a) Outbreak of Covid-19 Pandemic;

   (b) Imposition of requirement of installation of Day Visual Aid (only for Element-2);

   (c) Imposition of requirement to pay supervision charges to Western Uttar Pradesh Power Transmission Corporation Limited ("WUPPTCL") for Element-2 and Element-3 of the Project.

8. A party suffering from force majeure is not only discharged from performing its obligations under the TSA along with the ability to seek extension of time for achieving COD but can additionally claim relief on account of such force majeure event. In the present case, as a result of the delay on account of various force majeure events not within the reasonable control of the Petitioner, the Element -2 and Element-3 could not be commissioned by their respective Scheduled Commercial Operations Date ("SCOD") in terms of Schedule-2 of the TSA.

9. In terms of Article 11.7(a) of the TSA, the Petitioner on account of force majeure event is entitled to extension of SCOD. Further, as per Articles 11.7(b) and (c), the Petitioner is also entitled to claim relief for any force majeure event affecting its performance in relation to the obligations contained in the TSA, which include the obligation to be responsible for financing the project in terms of Article 4.1(b) of the TSA and other obligations mentioned under Article 4.1 of the TSA.

10. As such, and without prejudice to the remedies available in terms provided in the TSA, on account of the delay caused due to the aforesaid force majeure and change in law events, the Commission is vested with wide regulatory powers provided under Section 86 of the Act, which can legitimately be invoked for purposes of compensating the Petitioner qua the additional cost towards financing (IDC and IEDC), CPV and loss of tariff due to the above delay which was beyond the control of the Petitioner. Further, both in terms of the TSA and as well as under the provisions of the statute, costs on account of change in scope (due to change in law or otherwise) can be effectively compensated, so as to ensure that the economic position of the Petitioner (bidder) as on the date of the bid is retained and protected.

11. The Petitioner is an intra-state transmission licensee under Section 14 of the Act and is engaged in intra-state transmission of electricity. Further, the issues raised in the present Petition relate to recognition of force majeure and change in law events which can only be granted by the Commission through exercising its regulatory and tariff determination powers contained under Sections 86(1)(a) and (f) of the Act, read with the various provisions of the TSA.

12. Even in terms of Section 86 of the Act, as per the decision of the Hon'ble Supreme Court in the case of Energy Watchdog vs. CERC and Ors., (2017) 14 SCC 80, the Commission has jurisdiction to decide the present Petition.

(A) Extension of SCOD of the Project due to occurrence of various force majeure events

13. Through the present Petition, the Petitioner, inter alia, is seeking extension of the SCOD of Element-2 and Element-3 of the Project on account of various force majeure events.

Delay on account of protests against the Citizenship Amendment Bill -

14. On account of protests against the CAB, serious law and order problems had arisen particularly in the states of Uttar Pradesh and West Bengal. The protests against CAB had intensified since 14.12.2019 at various places, including Uttar Pradesh and West Bengal and that the Government had imposed Section 144 of the Criminal Procedure Code, 1973 ("CrPC") in various areas of Uttar Pradesh and West Bengal because of which the movement of workers from camp to site was affected as workers feared to go out. Further, the additional gang mobilisation of workers had totally stopped and the gangs carrying out construction work had left the sites for safety reasons, fearing loss of life, and the Petitioner was not able to access its project site on account of the same.

15. The Petitioner had sent a force majeure notice to the Respondents on 23.12.2019 under Article 11, intimating about the aforesaid force majeure event and stating that that on account of same, the construction of the Project has been affected and the same was beyond the reasonable control of the Petitioner.

16. In order to substantiate the severe extent of protests against the CAB, the Petitioner has relied upon the news articles - Newspaper clippings dated 17.12.2019 and 18.12.2019 from Dainik Jagran newspaper, news article dated 16.12.2019 from India Today, news article dated 19.12.2019 from the Hindu, news article dated 16.12.2019 from News 18.

17. The Petitioner sent a force majeure cessation notice to Respondents on 10.01.2020 stating that they were able to restore the Project work from 06.01.2020. The Petitioner in the said letter also stated that on account of the said force majeure event – protests against CAB, the Project work was affected from 14.12.2019 to 06.01.2020 therefore, the Petitioner was entitled to all available reliefs for the said period of 24 days.

Delays due to the impact of Covid-19 Pandemic -

18. On account of the imposition of lockdown and restriction on movement to contain the spread of Covid-19 Pandemic, Petitioner was facing issues like non-availability of goods and materials for construction, disruption of supply and installation schedule, administrative support from the Government, transportation and accessibility issues, delay in payment of compensation to landowners, availability of manpower to achieve the desired output of contract works, unworkable condition due to imposition of lockdown, delay in receiving goods for construction due to lockdown in entire country.

19. The construction activities of the Element-3 of Project were once again severely affected by the second wave of Covid-19 Pandemic and various measures taken by the State Government of Uttar Pradesh ("GOUP) to contain the spread of the Pandemic, including, but not limited to, night curfews, imposition of Section 144 of the CrPC, weekend lockdowns, and complete lockdowns.

20. Taking into account the impact of the Covid-19 Pandemic and nationwide lockdown on the transmission Project sites, Ministry of Power, Government of India ("MOP") vide its notification dated 27.07.2020 and 12.06.2021 had granted an extension of five months and three months respectively to the SCOD of the transmission Projects. A grand total of eight months extension has been granted by MOP on account of Covid-19 Pandemic.

21. Petitioner had sent a force majeure notice to the LTTCs under Article 11 of the TSA on 11.03.2020 stating that on account of spread of novel Coronavirus in China and around the world, the operation of GE's (OEM of Petitioner) supplier and their own manufacturing plants were impacted as several of the items required for production were being imported by China and that the Petitioner's supplier and contractor have expressed their inability to complete the deliveries in a timely manner. The Petitioner stated that the said event was completely beyond its control and that the Ministry of Finance, Department of Expenditure had clarified that the spread of Coronavirus in China or any other country will be covered under force majeure.

22. The various other force majeure notices were issued by the Petitioner under Article 11 of the TSA on 23.03.2020, 26.03.2020, 15.04.2020, 04.05.2020, 18.05.2020, 06.06.2020, 04.07.2020, 20.08.2020, 14.09.2020, 20.10.2020. The Petitioner's ability to perform its obligations under the TSA has been heavily impacted and the said event affecting the Project work is beyond its control and sought extension of time as per the TSA.

23. In wake of second wave of Covid-19 Pandemic, the Petitioner sent a force majeure notice to the LTTCs intimating that, inter alia, due to strict enforcement of the precautionary orders by the Governments, the Petitioner's ability to perform its obligations under the TSA for Element-3 of the Project has been heavily affected as many existing gangs/manpower of EPC agency working at site have been diagnosed Covid-19 positive which is impacting daily site execution progress severely and causing loss of productivity due to idling of

manpower. The Petitioner stated that the said event was beyond its control and therefore requested to grant extension of time as per the TSA.

24. In wake of the surge of Covid-19 cases in the second wave, the National Disaster Management Authority ("NDMA") directed the Ministries/Departments of Government of India, State Governments and Authorities to take all necessary measures to strictly enforce the Test-Track-Treat protocol in all parts of the country and promote Covid appropriate behaviour. NDMA had also authorized the states, based on their assessment of the situation, to impose local restrictions at district/sub-district and city/ward level, with a view to containing the spread of Covid-19 Pandemic. Further, the NDMA had also mandated the local district, police, and municipal authorities to take responsibility and ensure that the prescribed containment measures are strictly followed, and that the accountability of the officers concerned was ensured in this regard.

25. The impact of the second wave of Covid-19 was more severe compared to the first wave and resultantly, the Petitioner too was affected adversely. The effect of second wave of Covid-19 Pandemic subsided in August 2021. Accordingly, the Petitioner submits that natural calamity affecting the Project work is beyond the control of the Petitioner and as per Article 11.3 of the TSA, the Petitioner is an affected party. Therefore, the Petitioner is entitled to extension in the SCOD of Element-3 of the Project by five months and two months in addition to the time extension granted by MOP vide notification dated 12.06.2021 on account of force majeure event of second wave of Covid-19 Pandemic as per the TSA, without the levy of liquidated damages.

26. The Petitioner sent a force majeure cessation notice to the LTTCs on 02.11.2021 stating that the Project implementation work, which was severely affected due to Covid-19 Pandemic was slowly getting back to normalcy and that the Petitioner was able to restore the Project work. The Petitioner in the said letter also stated that the MOP has granted eight month's extension in SCOD of inter-state transmission Projects, even though the Petitioner's Project is intra-state Project, it was also affected due to lockdown and, therefore, the Petitioner is eligible to claim relief of at least eight months.

27. UPPTCL in a meeting held on 18.06.2020 has also accorded an extension of 3 months on account of Covid-19 Pandemic to all the Transmission Projects having the SCOD after 25.03.2020. The said MoM categorically mention that the

relaxation on account of Covid-19 Pandemic would be revisited by the Respondent No. 7 in future on a case-to-case basis/as a whole. However, despite mentioning the aforesaid, the UPPTCL has not granted any extension beyond a period of three months.

28. A bare perusal of the MOM dated 18.06.2020 would show that the UPPTCL while issuing such extension has relied upon the order dated 30.05.2020 issued by the Ministry of Home Affairs, Government of India. Therefore, UPPTCL while issuing the extension of there months has only considered the prevailing circumstances until May 2020 and has therefore taken an in-principle decision regarding extension of time by taking into account the prevailing circumstances till May 2020 only. Moreover, the Minutes of Meeting dated 18.06.2020 clearly state that the relaxation provided under the notification would be revisited in future on a case to case basis or as a whole.

29. While the construction of Element-2 of the Project was affected during the outbreak of first wave of the Covid-19, the construction of Element-3 of the Project was equally affected during the outbreak of the first and second wave of the Covid-19 Pandemic.

30. There was an unavoidable delay of 150 days in construction of the Element-2 and Element-3 of the Project due to first wave of Covid-19 Pandemic outbreak and a delay of 150 days in construction of Element-3 of the Project due to second wave of Covid-19 Pandemic.

Delay in issuance of working permission by DFO Agra -

31. The Petitioner had obtained the Stage–I forest clearance for an area of 79.4992 Ha from Ministry of Environment and Forest, Government of India ("MoEF") on 06.01.2020 as 765 kV Ghatampur – Agra line passes through 79.4992 Ha of forest. All the DFOs, except DFO Agra, had issued the working permission within 15 days. Petitioner submitted the compliance of the condition mentioned in Stage-I approval to DFO Agra and requested for further processing to enable the Petitioner to obtain Stage-II approval for the diversion of 5.9191 Ha forest land under Forestry Division of Agra.

32. Despite requesting early issuance of work permission and complying with the conditions mentioned in Stage–I forest clearance, DFO Agra gave working permission for 5.9191 Ha forest land on 05.08.2020 i.e. after a delay of 189

days but the same was revoked vide letter dated 14.10.2020 on the ground that the Petitioner has not paid the lease rent premium. It is pertinent to note that the DFOs of Kanpur Nagar, Kanpur Dehat, Auraiya, Etawah and Firozabad districts had already granted the work permission without the lease rent premium.

33. MoEF in its letter dated 27.10.2005 had advised that while forwarding any proposal for diversion of forest land, States/UTs should state and include all the conditions, which they desire to be imposed, in the original proposal itself, for compliance by the user agency and the Central Government after considering all conditions proposed by State/UT Government shall stipulate such conditions as it deems fit while according the approval. Accordingly, no new condition should be imposed after approval of the proposal by the Central Government.

34. In the State of Uttar Pradesh, at the time of processing and forwarding a proposal made under Section 2(ii) of the Forest Conservation Act, 1980 for diversion of forest land for non-forestry purposes, the condition of execution of lease deed, payment of lease premium and annual lease rent has not been mentioned/imposed while forwarding the proposal for seeking prior approval of Central Government. Therefore, additional conditions have been imposed by DFO Agra after in the principal approval of Stage-I clearance which is in violation of above referred guidelines. Further, in the Forest Conservation Act, 1980, Forest (Conservation) Rules, 2003 and the Guidelines issued thereunder, it is nowhere prescribed that user agency will enter into a lease deed, pay lease premium and annual lease rent for the forest land being diverted for construction of transmission line(s). Such a condition is not mentioned even in the in-principle approval as well as final approval letter issued by the MOEF&CC.

35. Petitioner had taken all necessary steps to mitigate the issue. However, in spite of the same, there had been inordinate and unforeseen delay against the stipulated timeline of 90 days required for working permission and Stage-II approval. Hence, the Petitioner sent a force majeure notice dated 08.12.2020 to LTTCs stating that foundation works for 4 locations out of 579 locations were almost at standstill due to non-receipt of working permission from DFO Agra. Petitioner stated that the said event was beyond its control and therefore requested to grant extension of time as per the TSA.

36. The Petitioner sent a force majeure cessation notice to the LTTCs on 01.02.2021 stating that they were able to restore the Project work from 21.01.2021 as the DFO Agra gave working permission on 21.01.2021. The Petitioner in the said letter also stated that on account of the said force majeure event, the Petitioner was entitled to all available relief for the said period.

37. The delay of 100 days (i.e., from 14.10.2020 to 21.01.2021) was clearly an event of force majeure, which is covered under Article 11 of the TSA.

38. The force majeure notices sent by the Petitioner were never disputed/rejected or denied by any of the LTTCs and, therefore, the same amounts to 'acceptance' and 'acquiescence' on the part of LTTCs. Further, the force majeure notices were neither disputed nor denied which also shows that the said notices were accepted by the LTTCs as valid and genuine.

39. The aforesaid events are beyond the reasonable control of the Petitioner and are therefore force majeure events in accordance with Articles 4.4.2 and 11 of the TSA. The Petitioner is an 'affected party' under Article 11.2.3 of the TSA. Consequently, on account of the aforesaid force majeure events, the rights and obligations of the Petitioner are suspended, and the Petitioner is entitled to claim relief on account of delay caused in achieving the SCOD. As mentioned hereinabove, the Petitioner had issued the requisite notices to the LTTCs, as required under Article 11.5.1 of TSA.

40. The break-up of the cumulative as well as individual delay caused by aforementioned force majeure events in respect of Element-2 and Element-3 of the Project is provided in the tables below:

Element-2 SCOD-07.09.2020 | COD-26.03.2021				
Sl. No.	Particulars of the Force Majeure event	Start Date	End Date	Delay in days
1.	Protest against CAB	14.12.2019	06.01.2020	24
2.	Impact of Covid-19 (1st Wave)	25.03.2020	22.08.2020	150
3.	Delay in issuance of working permission by DFO Agra	14.10.2020	21.01.2021	100
			Total	274

Element-3 SCOD-07.03.2021 | COD-25.12.2021				
Sl. No.	Particulars of the Force Majeure event	Start Date	End Date	Delay in days

1.	Protest against CAB	14.12.2019	06.01.2020	24
2.	Impact of Covid-19 (1st Wave)	25.03.2020	22.08.2020	150
3.	Impact of Covid-19 (2nd Wave)	01.04.2021	29.08.2021	150
			Total	324

41. In view of Article 4.4.2 read with Article 4.4.3 of the TSA, the Petitioner is entitled for extension of SCOD of Element-2 by 274 days and SCOD of Element-3 by 324 days without levy of any liquidated damages by the Respondents.

(B) Covid-19 pandemic and imposition of nationwide lockdown qualify as change in law event under the TSA

42. The Petitioner sent a letter dated 22.04.2020 to the Respondent No. 1 (Lead LTTC) notifying the outbreak of Covid-19 Pandemic and nationwide lockdown imposed on account of same as change in law under Article 12 of the TSA, while relying upon following documents:

(a) Order No. 1-29/2020-PP (Pt. II) dated 24.03.2020 issued by the NDMA.

(b) Order No. 40-3/2020-DM-I(A) dated 24.03.2020 issued by the Home Secretary, GOI, as the chairperson of National Executive Committee.

(c) Order No. 1-137/2018-Mit-II(FTS-10548) dated 14.04.2020 issued by NDMA.

(d) Order No. 40-3/2020-DM-I(A) dated 14.04.2020 issued by the Home Secretary, GOI, in his capacity as Chairperson, National Executive Committee.

(e) Departmental Order No. M-11011/08/2020-Media dated 20.03.2020 issued by the Joint Secretary, Ministry of Labour and Employment, GOI.

(f) Notification No. 548/Five-5-2020, dated 14.03.2020 issued by the GOUP, enacting Uttar Pradesh Epidemic Disease Covid-19 Regulations, 2020 ("U.P. Epidemic Regulations").

43. In furtherance to the aforesaid change in law notice, Petitioner sent another letter dated 26.05.2020, notifying the extension of lockdown till 31.05.2020 in terms of Order No. 40-3/2020-DM-I(A) dated 17.05.2020 issued by the Home Secretary, Government of India as a change in law event under Article 12.

44. As per Article 12 of the TSA, the present change in law event occurred after 7 days prior to the bid deadline, which in the present case was 24.04.2018; hence, it fulfils the criteria of being a change in law event as per the TSA.

45. The aforementioned orders and notifications issued by various departments of Central and the State Governments come under the definition of 'law' as per Article 1.1.1 of the TSA. The term 'law' has been defined under Article 1.1.1 to include all laws in force in India, including electricity laws and any statute, ordinance, rule, regulation, notification, order or code, or their interpretation by an Indian Governmental Instrumentality having the force of law.

46. NDMA, Ministry of Home Affairs and Ministry of Labour and Employment, Government of India and the State Government of Uttar Pradesh would qualify as 'Indian Government Instrumentality' under Article 1.1.1 of the TSA.

47. While complying with the aforesaid notifications/orders, the Petitioner had to completely shut down its operations for the period therein and, thus, as a result, the present change in law event has altered the financial edifice of the Project on the following accounts:

    (a) Increase in IDC as Project timeline for construction of the Project has been hampered;

    (b) Additional expenses on account of idling charges of resources, including plant, machinery and manpower;

    (c) Increase in Project costs;

    (d) Delay in recovery stream and consequent cash flow leading to adverse impact on the working capital cost.

48. Due to occurrence of the present change in law event, the Petitioner is entitled to an increase in payment of non-escalable transmission charges in accordance formula provided under Article 12.2 of the TSA.

(C) Other Change in Law events

Increase in cost due to requirement to install day visual aids on 765 kV Ghatampur - Agra S/C transmission line (Element-2) -

49. Clause 4.2 of the IS 5613 (Part 3/Sec 1): 1989 Code of Practice for Design, Installation and Maintenance of Overhead Power Lines requires no objection Certificate ("NOC") from the concerned aerodrome authority in cases where construction of transmission line/structure is falling within a radius of 20 kilometres around defence aerodromes.

50. 765 kV S/C Ghatampur-Agra transmission line of the Petitioner was not passing within the radius of 20 kilometres from aerodrome field of Agra, Hindan, Kanpur and Gwalior. Despite the same, the Petitioner had approached for aviation clearance on 08.08.2019 and accordingly, NOC was provided on 05.02.2020.

51. However, Head Quarters, Central Air Command, Indian Air Force vide its letter dated 03.02.2022, directed the Petitioner to install day visual aids in the interest of aviation safety to comply with the provisions of IS 5613 (Part 3/Sec 1): 1989.

52. The imposition of the aforesaid requirement has resulted in additional non-recurring expenditure to the Petitioner. Since the modified requirements are pursuant to the orders issued by Defence Aviation, i.e. a Government Instrumentality, same is being issued after the cut-off date i.e. 24.04.2018 and results in additional expenditure to the Petitioner, it qualifies for compensation under change in law in terms of Article 12 of the TSA.

53. The Petitioner had sent a change in law notice to the lead LTTC i.e., PVVNL in terms of Article 12 of the TSA on 13.05.2022 enumerating the aforesaid.

54. NUPPL rejected the aforesaid change in law notice of the Petitioner vide its letter dated 08.06.2022 on the ground that the provision to install visual aids already existed prior to the bid deadline.

55. The day visual aids were not required to be installed if the transmission line was not passing within the radius of 20 kilometres of the aerodrome and the same was introduced on 03.02.2022 by the Indian Air Force which is much after the cut-off date of 24.04.2018.

56. The Indian Air Force comes under the definition of the Indian Government Instrumentality under the TSA and the imposition of requirement of installing Day Visual Aids for granting NOC amounts to *"the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier as well as change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining the said Consents, Clearances and Permits"* under Article 12 of the TSA.

57. Imposition of condition to install day visual aids amounts to change in law event under the TSA. As a result of the same, the Petitioner incurred additional

expenditure to the tune of Rs. 7 crores due to change in law event on account of imposition of condition to install day visual aids.

Increase in cost due to requirement to pay supervision charges to WUPPTCL -

58. The Petitioner was required to construct one no. of 765 kV bay at Greater Noida sub-station and one no. of 765 kV bay at Hapur sub-station of M/s WUPPTCL. It is submitted that upon approaching M/s WUPPTCL, it demanded supervision charges for the same. The Petitioner informed that as per provisions in RFP and TSA, only Operations and Maintenance ("O&M") charges as per the Regulations of the Central Electricity Regulatory Commission ("CERC") are required to be paid and that there is no provision of supervision charges in RFP, TSA and the Regulations of the CERC. However, Respondent No. 6 intervened and asked the Petitioner and WUPPTCL to conduct joint meetings. After various rounds of discussion amongst the Petitioner, Respondent No. 6 and WUPPTCL, it was agreed that the Petitioner would pay Rs. 0.45 crores each for each bay at Gr. Noida and Hapur to WUPPTCL as supervision charges for bay extension work.

59. As per the TSA, the cut-off date for the purposes of claiming change in law relief is 24.04.2018. In terms of Article 12.1 of the TSA, the Petitioner is entitled to change in law compensation for, inter alia, occurrence of any of the events prescribed in the said Article after the cut-off date, which resulted in any additional expenditure, whether recurring or non-recurring, to the Petitioner.

60. As on the cut-off date, there was no requirement either in the Act, the Electricity Rules 2005 or the Regulations framed thereunder for the payment of supervision charges to WUPPTCL. However, in a meeting dated 14.03.2019 held between Petitioner, WUPPTCL & UPPTCL, supervision charges of Rs. 0.90 cores were imposed upon Petitioner for bay extension works at Gr. Noida and Hapur substation for *"the resources deployed by WUPPTCL towards safeguarding the existing equipment and grid and interface work as and when required"*.

61. In the meeting dated 01.02.2019 among the Petitioner, UPPTCL, WUPPTCL and Power Grid Corporation of India Limited ("PGCIL"), it was clarified by Rural Electricity Corporation Transmission Projects Company Limited ("RECTPCL") and Power Finance Corporation Consulting Limited ("PFCCL"), the companies nominated by MOP to work as BPC for TBCB Projects, that there is no provision of supervision charges in the regulations of CERC. They had also informed vide

their emails dated 09.01.2019 and 15.01.2019 that no such supervision charges have been sought in the similar projects in other states.

62. The imposition of the aforesaid requirement has resulted in additional non-recurring expenditure of Rs. 0.90 crores to the Petitioner. Since supervision charges are being paid pursuant to the orders issued by Respondent No. 6, i.e. an Indian Government Instrumentality and same has been issued after the cut-off date i.e. 24.04.2018, resulting in additional expenditure to the Petitioner, it qualifies for compensation under Change in Law in terms of Article 12.

63. As a result of the same, the Petitioner incurred additional expenditure to the tune of Rs. 0.45 crores for Element-2 and Rs. 0.45 crores for Element-3 of the Project due to change in law event on account of imposition of requirement to pay supervision charges to WUPPTCL.

64. Petitioner incurred following additional expenditure due to the above-mentioned change in law events:

Events	**Change in Law Compensation (Rs. Cr)**	
	Element-2	**Element-3**
Increase in cost due to requirement of installation of Day Visual Aid	7.00	-
Supervision Charges paid to WUPPTCL	0.45	0.45
Total	**7.45**	**0.45**

65. As per Article 12.2.1 of the TSA, for every cumulative increase/decrease of Rs. 8.05 crores in cost of the Project up to the SCOD of the Project, the increase/decrease in Non-Escalable Transmission Charges shall be an amount equal to 0.313% of the Non-Escalable Transmission Charges.

66. In order to restitute the Petitioner to its original position as prevailing before the change in law event took place, the Petitioner is entitled to an increase of 0.29% of Non-Escalable Transmission Charges for Element-2 and an increase of 0.02% of Non-Escalable Transmission Charges for Element-3 as per Article 12.1.1.

Condonation of delay in achieving COD -

67. The definition of 'force majeure' in Article 11.3 of the TSA recognizes the attributes for an event to be a force majeure event within the meaning of the TSA. Once it is established that an event, or events or a combination of events,

which are beyond the reasonable control of the Petitioner, directly or indirectly, resulted in delay in implementation of the Project, the said events fall under the definition of force majeure under Article 11 of the TSA.

68. Petitioner has suffered total delay of 274 days for Element-2 and 324 days for Element-3 on account of various force majeure events. However, the Petitioner was able to commission the Element-2 on 26.03.2021 i.e. after delay of 201 days from 07.09.2020 and Element-3 on 25.12.2021 i.e. after delay of 294 days from 07.03.2021 due to prudent efforts from the Petitioner. The said delay has to be condoned towards achieving the COD by the Petitioner. The above delay could not at all have been foreseen by the Petitioner and, as such, falls clearly within the meaning of force majeure event as provided under Article 11.

69. Delay on account of the Covid-19 Pandemic, due to which various restrictions were imposed by the Central and State Governments, was clearly an event which was beyond the control of the Petitioner, and the same is required to be condoned. In fact, the delay caused on account of the said Pandemic has been duly recognized by the Commission as a force majeure event.

70. CERC vide order dated 25.02.2021 passed in Petition No. 41/MP/2021 titled NTPC Ltd. vs. Power System Operation Corporation Limited & Ors., had held that delay in COD on account of Covid-19 pandemic is a force majeure event.

71. From the aforesaid, it can be discerned that any event or circumstance that prevents the Petitioner (being the 'Affected Party') from performing its obligations under the TSA and is beyond its reasonable control, is a force majeure event. Consequently, on account of such force majeure events, the rights and obligations of the parties are suspended. Therefore, the Petitioner is entitled to claim relief on account of delay caused in achieving the SCOD/COD qua the transmission project.

72. Article 11.7 of the TSA, which entitles the Petitioner for 'relief' on account of force majeure events, is an inclusive term which permits grant of relief which would mitigate the effect of the force majeure event(s) and place the party suffering from the force majeure event in a similar position as if such an event had not occurred. This is essentially a restitutive provision and is aimed at providing ameliorative relief to the party suffering from a force majeure event, which in this case is the Petitioner.

73. Despite the delay in achieving the SCOD due to reasons beyond the reasonable control of the Petitioner, the Petitioner took due care and acted consistent with Prudent Utility Practices to implement the transmission Project. In case of infrastructure Projects, as in the present case, which are of national importance, it is in the interest of all the parties to provide all necessary support. Hence, in terms of Article 11.7, the delay in achieving the COD is required to be condoned.

Reimbursement of costs incurred due to force majeure and associated change in law events -

74. As a consequence of the worldwide lockdown due to outbreak of Covid-19 Pandemic, the prices of input commodities skyrocketed for almost all industries including the transmission sector. This ever-increasing trend in the price of these commodities had never been experienced in the last couple of decades or even in one's whole lifetime. The miseries of TSPs were aggravated with the subsistence of lockdown for more than a year which not only resulted in time overrun but also adversely impacted the cost of the whole transmission Project because of steep rise in commodity prices.

75. Due to the increase in commodity prices, there was an increase of around 30% to 40% in overall Project cost, which made the Project unviable. Even the lenders were not comfortable lending to such projects with low to negative Internal Rate of Return. The outbreak of a Pandemic led to consequential exponential increase in price which could not have been anticipated by the TSPs who had already submitted the bids for various transmission projects.

76. Petitioner is entitled for IDC, IEDC and CPV with respect to the delay in the SCOD as in the present case, because of the delay on account of events, not within the reasonable control of the Petitioner, the Element-2 and Element-3 of the Project could not be commissioned by the SCOD.

77. As per Article 11.7(b), Petitioner is also entitled to claim relief for force majeure events affecting its performance in relation to the obligations contained in the TSA, which include the obligation to be responsible for financing the Project in terms of Article 4.1(b) and other obligations mentioned under Article 4.1.

78. As per as per the definition of "relief" under the Black's Law Dictionary, the same means *"Aid or assistance given to those in need, esp., financial aid provided by the state; the redress or benefit, esp. equitable in nature (such as*

injunction or specific performance), that a party asks of a court." Further, the Hon'ble Supreme Court in *S. Ganapathraj Surana vs. State of Tamil Nadu, 1993 Supp (2) SCC 565* has held that the use of the word "relief" envisages wide range of orders which can be passed by a court.

From the aforesaid, it is evident that the word "relief" as envisaged under a contract does not have a restricted meaning; rather, its scope is absolutely wide. As such, the term "relief" appearing under Article 11.7 of the TSA would not only include extension of SCOD but would also allow the Petitioner to seek compensatory/monetary relief.

79. In Energy Watchdog vs. CERC and Ors., (2017) 14 SCC 80, it was held that the power to regulate includes the power to determine tariff under Sections 62 and 63 of the Act. It was further held that in the event the bidding guidelines are silent on an issue, then the general regulatory powers qua tariff determination can be invoked.

80. Since the delay occasioned on account of force majeure and associated change in law events, the Petitioner ought to be reimbursed the additional costs in the nature of IDC, IEDC and CPV by invoking its regulatory powers under Section 86(1)(b) of the Act. The above costs have to be reimbursed on actual basis keeping in mind the principles contained in Sections 61 and 62, read with Section 86(1)(b) of the Act.

81. The Hon'ble Supreme Court in a catena of decisions has held that the "power to regulate" is a very wide power enabling the authority to take any such measures in order to achieve the objectives of the statute. Reference may be taken from Hon'ble Supreme Court Judgement in K. Ramanathan v. State of Tamil Nadu and Anr. (1985) 2 SCC 116 and Hon'ble Supreme Court in Tata Power Company Ltd. and Ors. vs. Reliance Energy Limited and Ors., (2009) 16 SCC 659 with respect to the powers of the State Electricity Commissions to regulate procurement process.

82. The Commission can exercise its wide regulatory powers under Section 86(1)(b) of the Act to grant IDC and IEDC and CPV to the Petitioner for the force majeure and associated change in law events.

83. The principle of the grant of IDC and IEDC for a transmission project, on account of occurrence of force majeure events, which are termed as uncontrollable

events, is recognized by the Commission under Regulations 3(25) and 19 of the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2019 ("UPERC Tariff Regulations").

84. The Commission ought to invoke its regulatory powers under the above principle, in order to compensate the Petitioner on account of occurrence of force majeure event and associated change in law events. Hence, the Petitioner is entitled to be reimbursed with actual expenditure in the nature of IDC, IEDC and CPV qua the period of delay on account of the force majeure and associated change in law events detailed in the present Petition.

85. The Petitioner places reliance upon the following judgments, where IDC and IEDC have been allowed by the Hon'ble APTEL and the Hon'ble CERC as a consequence of force majeure:

(a) APL No. 129 of 2020 titled NRSS XXXI (B) Transmission Limited vs CERC & Ors. passed by the Hon'ble APTEL.

(b) APL No. 208 of 2019 titled Bhopal Dhule Transmission Company Limited vs. CERC passed by the Hon'ble APTEL.

(c) Petition No. 141/TT/2015 titled PGCIL vs. Madhya Pradesh Power Trading Company Limited and Ors. passed by the Hon'ble CERC.

(d) Petition No. 267/TT/2015 titled Power Grid Corporation of India Ltd. vs. Assam Electricity Grid Corporation Limited and Ors.

86. Based on the aforesaid orders, the Petitioner ought to be granted the additional cost in the form of following IDC, IEDC and CPV as under:

Particulars	Compensation (in Rs. Cr)		Total (in Rs. Cr)
	Element-2	Element-3	
IDC	11.60	25.22	36.83
IEDC	18.88	16.28	35.16
Commodity Price Variation	5.54	21.55	27.09
Total	**36.02**	**63.05**	**99.08**

Reimbursement of loss of tariff due to force majeure and associated change in law events, or in the alternative, extension of the term of TSA

87. Under the TSA, the tariff for the period of 35 years commencing from 07.09.2020 for Element-2 and 07.03.2021 for Element-3, has been provided.

This was based on the SCOD of the Project and based on the aforesaid SCOD, the year-wise bid for each specific year was submitted by the Petitioner. Further, the tariff stream in the bid was such that a cash flow from SCOD was assumed.

88. The SCOD of the Project was delayed, inter alia, on account of various force majeure and associated change in law events, as enumerated hereinabove. The Petitioner had achieved Deemed Commissioning for Element-2 on 26.03.2021 (after a delay of 201 days) and Deemed Commissioning for Element-3 on 25.12.2021 (after a delay 294 days). Hence, the Petitioner started recovery of transmission charges from the year in which the Project was commissioned.

89. As a consequence, Petitioner could not recover the tariff of 201 days for period from 07.09.2020 to 26.03.2021 (Actual COD) for Element-2 and 294 days for the period from 07.03.2021 to 25.12.2021 (Actual COD) for Element-3.

90. There is a loss arising directly due to force majeure and associated change in law events for the Petitioner. Consequently, the Petitioner is entitled to be compensated for the same, either through reimbursement of the loss of tariff on account of loss of 201 days for Element-2 and 294 days for Element-3 from the contract period, or through extension of the term of the TSA. The issue of mismatch in tariff, cash flow and tariff schedule for the term of the TSA is neither addressed by the Competitive Bidding Guidelines nor provided for in the TSA.

91. Hon'ble Supreme Court in Energy Watchdog (Supra) highlighted the general regulatory power of the Central Commission under Section 79 of the Act in the absence of specific provisions in the bidding documents. It was held that in the event the bidding guidelines are silent on an issue, then the general regulatory powers qua tariff determination can be invoked.

92. That applying the above principle in the present case, since the delay occasioned on account of force majeure and associated change in law events, the Commission ought to reimburse additional costs in the nature of loss of tariff by invoking its regulatory powers qua intra-state transmission of electricity provided under Section 86(1)(b) of the Act. The above costs have to be reimbursed on actual basis keeping in mind the principles contained under Sections 61 and 62, read with Section 86(1)(b) of the Act.

93. The delay was on account of abovementioned force majeure and associated change in law events because of which the Petitioner lost its tariff for 201 days

for Element-2 and 294 days for Element-3. Thus, the Petitioner ought to be compensated for the loss of revenue to the tune of Rs. 73.86 crores for Element-2 and Rs. 91.24 crores for Element-3.

94. In the alternative to the aforesaid, the Petitioner ought to be granted extension of the term of the TSA, proportionate to the loss of 201 days for Element-2 and 294 days for Element-3 for recovery of transmission charges for 35 years as per TSA by the Commission by invoking its regulatory powers in order to off-set the impact of force majeure and associated change in law events.

Carrying cost on change in law and force majeure compensation -

95. Carrying cost is the compensation for time value of money and any compensation for change in law is incomplete if it does not come with carrying cost that is inherent to the very provision. The cornerstone of change in law relief is restitution i.e., relief be granted in a manner so as to place an affected party in the same economic position as if a change in law had not occurred. Restitution is therefore inherent to compensation. Further, the change in law is a restitutive provision and thus ought to be given a wide interpretation. The said carrying cost is required for the purpose of offsetting the impact of deferred recovery of the legitimate expenses incurred by the Petitioner. The Hon'ble APTEL and the Hon'ble Supreme Court, in their judgments, have already upheld the concept of carrying cost whenever there is any deferred recovery of costs.

96. Petitioner had to infuse additional capital for construction of the Project in order to offset the adverse financial impact of the force majeure and change in law events. For this purpose, the Petitioner had to borrow from its lenders and pay compound interest on such additional capital. Therefore, such additional interest paid by the Petitioner shall also form part of the additional expenditure incurred by the Petitioner due to force majeure and change in law events. Accordingly, the Petitioner is entitled to carrying cost/interest on all additional amounts incurred/paid till date on account of change in law and force majeure events.

97. Section 70 of the Indian Contract Act, 1872 ("Contract Act") states that if a person enjoys the benefit of a non-gratuitous act, the said person has to compensate the person performing such non-gratuitous act. In the instant case, the Petitioner is a commercial entity and was not performing any gratuitous acts for the LTTCs. Therefore, it ought to be compensated for the loss of time value of money in the form of carrying cost from the date on which the Petitioner had

incurred the financial liability till the date on which it raises the supplementary bill claiming the same.

98. In a recent judgement of Parampujya Solar Energy Pvt. Ltd. and Anr. vs. CERC and Ors., Appeal No. 256 of 2019, the Hon'ble APTEL has held that wherever an agreement talks about providing relief, such clause is of widest amplitude, and since the burden of carrying cost is a consequence directly flowing from the change in law event, carrying cost ought to be granted as part of change in law compensation. The Hon'ble APTEL, despite there being no express clause in the PPA regarding carrying cost), has granted the same to the solar power developers.

99. The change in law clauses in both Parampujya Solar (Supra) case as well as the present case are very wide and open ended. Further, there is no bar on granting carrying cost under the TSA. Therefore, the Commission should grant carrying cost while exercising its regulatory powers under Section 86(1)(b) of the Act.

100. The Petitioner has incurred an additional cost for which it has to be reimbursed with the "time value of money". Further, the Hon'ble APTEL in its judgment in Adani Power Ltd. vs. Central Electricity Regulatory Commission & Ors, Appeal No. 210 of 2017 has held that the carrying cost is in the nature of compensation for money denied at the appropriate time.

101. Hon'ble APTEL in SLS Power Limited vs. Andhra Pradesh Electricity Regulatory Commission and Ors, Appeal Nos. 160, 166, 168, 172, 173 of 2011 and 9,18,26,29 and 38 of 2012 held that the carrying cost is the compensation for time value of money, or the monies denied at the appropriate time and paid after a lapse of time.

102. The failure to grant the carrying cost with compound interest would defeat the underlying principle of restitution and the Petitioner will not achieve complete restitution for want of award of the same, thereby rendering the change in law article of the TSA as futile.

103. Hon'ble APTEL in Rattan India Power Limited vs. MERC and Anr., Appeal Nos. 118 of 2021 and 40 of 2022 and in Rattan India (Supra) has awarded carrying cost on the rate and principles of LPS. Therefore, Petitioner is also entitled to carrying cost as per rate and principles of LPS to ensure its complete restitution.

104. Hon'ble APTEL in the judgment dated 12.09.2014 in Wardha Power Company Ltd. vs. Reliance Infrastructure Ltd, Appeal No. 288 of 2013 has recognized the principle that in order to *"restore the affected party to the same economic position,"* compensation for change in law claims has to be such so as to reimburse the affected party for the expense actually incurred. Thus, the same will include expenditure attributable towards carrying cost.

105. The returns on the transmission projects are dependent entirely on the recovery of the project cost through the transmission tariff. If the project cost increases, or the project commissioning is delayed, the transmission service provider suffers not only on account of the cost overrun but also due to loss of revenue. The impact of such loss remains on the balance sheet of the transmission service provider for the whole life of the Project. Thus, the only way to make the Project financially viable is to increase the tariff to offset the impact of the undue cost and time overruns.

UPPCL & LTTCs (Respondent No. 1-4) Reply dated 06.07.2023

106. It is the Petitioner's case that it has achieved Deemed Commissioning for Element 2 on 26.03.2021 and Element-3 on 25.12.2021. It is relevant to highlight that the same has already been negatived by the Commission by way of Order dated 14.02.2023 in Petition No. 1850 of 2022 (Principal Order). By way of the Principal Order, the Commission declared the deemed COD for Element-2 as 26.03.2021 and Element-3 as 28.01.2022. The same has been challenged under Appeal No. 332 of 2023 before the Hon'ble APTEL, which is pending adjudication as on date and there is no stay.

107. Petitioner's prayers for grant of SCOD extension by 201 days for Element-2 and 294 days for Element-3 are erroneous and contrary to the terms of the TSA.

108. Pertinently, in terms of the letter dated 16.04.2018 issued by RECTPCL, the SCOD was specified as 26.09.2020 for Element-2 and 26.03.2021 for Element 3. Accordingly, the delay in achieving deemed COD for Element-2 works out to be 308 days. However, for reasons best known to it, Petitioner has computed the delay in achieving deemed COD for Element-2 as 201 days by taking SCOD as 07.09.2020 and deemed COD date as 26.03.2021 and for Element-3 as 294 days by taking SCOD as 07.03.2021 and deemed COD date as 26.12.2021. Notably, insofar as Element-2 is concerned, the present Petition is premised on an erroneous SCOD contrary to the letter of RECPTCL dated 16.04.2018. Insofar

as Element-3 is concerned, the present Petition is premised on SCOD and deemed COD which are both erroneous. Not only are Petitioner's submissions in the present Petition premised on facts contrary to the Commission's Principal Order (i.e., qua Element-3 deemed COD date) but also Order dated 09.07.2021 in Petition Nos. 1621 & 1622 of 2020 issued by the Commission, where the SCOD for Element-1 was taken as 26.02.2020 in line with RECTPCL's letter dated 16.04.2018.

109. Seen from whichever angle, and without prejudice to the submissions that no force majeure has occurred, the delay in achieving Deemed COD for Elements 2 & 3 cannot be condoned because it is beyond the limit of 180 days specified under Article 4.4.2 of the TSA.

Issuance of force majeure notice, strictly in terms of Article 11.5 of the TSA, is a pre-condition for entitlement to any relief under the TSA -

110. Article 11.5.1 of the TSA mandates that the force majeure notice ought to be issued as soon as reasonably practicable but not later than 7 days. While it is self-evident that issuance of notice as required by Article 11.5.1 is mandatory because the word "shall" is employed by Article 11.5.1, a proviso has also been categorically incorporated to substantiate such mandatory nature. The proviso to Article 11.5.1 stipulates that issuance of a force majeure notice, as required by Article 11.5.1, shall be a pre-condition for Petitioner's entitlement to claim relief. Additionally, the force majeure notice must mandatorily include full particulars of the event of force majeure, its effects on Petitioner and the remedial measures proposed.

111. It is pertinent to highlight that the importance of complying with mandatory notice terms provided under a contract has been underscored by the Hon'ble APTEL in its judgment in the case of Talwandi Sabo Power Limited v. Punjab State Power Corporation Limited reported as 2016 SCC OnLine APTEL 64. In the said case, interpreting Section 50 of the Contract Act, it has been held that if a contract provides that a particular thing, relating to furtherance of contract, has to be done in a particular manner, it has to be done in that manner and no other. Further, in such a situation, it is not open for the concerned party to chalk out their own manner of performing their part of the contract. Testing the present case on the anvil of the principles of law settled by the Hon'ble APTEL

above, the inordinately delayed notices issued by Petitioner cannot be considered as valid.

Re: Delay on account of public protests against Citizenship Amendment Bill -

112. The alleged public protests against the CAB do not qualify as force majeure under 11.3(b)(ii) of the TSA. Neither does this have a nationwide or state-wide impact. Moreover, without prejudice to the fact that the Petitioner has failed to establish that the construction sites of Elements 2 & 3 were affected, it is relevant to highlight that in terms of Article 11.4.1(d), strikes or labour disturbance at the facilities of Petitioner are a force majeure exclusion. Therefore, Petitioner's claims of force majeure on this count are unsustainable and merit no consideration by the Commission.

113. Further, Petitioner had failed to submit any specific documentary evidence to verify that a force majeure situation had occurred at its construction sites hampering the movement of its workers and the progress of its Project. The newspaper reports regarding imposition of Section 144 of CrPC at various places in Uttar Pradesh failed to demonstrate that the construction sites of Petitioner were adversely impacted as they contained general news items without stating specific details.

Petitioner failed to adhere to the TSA's mandatory notice requirements qua alleged force majeure on account of delayed issuance of working permission by DFO Agra thereby disentitling it from any relief -

114. Article 11 of the TSA categorically provides that the issuance of notice shall be pre-condition to the affected party's entitlement to claim relief. Therefore, without prejudice to the contention that Petitioner was not affected by force majeure, it is submitted that the letter dated 08.12.2020 does not qualify as a valid force majeure notice in terms of the TSA.

115. Indisputably, Petitioner's claim is that it was affected by force majeure from 14.10.2020 onwards. In this regard, the so-called force majeure notice came to be issued only on 08.12.2020 which is much later than the 7-day deadline prescribed by Article 11.5.1 of the TSA. To be precise, Petitioner's letter dated 08.12.2020 was issued after a lapse of 55 days from the alleged the commencement of force majeure. It cannot be the Petitioner's case in this

regard that despite commencement of force majeure, it was unaware of the same till the lapse of 55 days. It cannot also be the Petitioner's case that there was breakdown of communication around 14.10.2020 because at such relevant point in time, Petitioner was writing multiple other letters. Therefore, applying the proviso to Article 11.5.1 of the TSA, even if one were to assume for the sake of argument, but not admit, that some force majeure event has occurred, the pre-condition of issuing timely notice for being entitled to any relief has not been satisfied by Petitioner. Therefore, Petitioner's allegations do not warrant any consideration given its own conduct which is contrary to the explicit terms of the TSA.

116. The so-called notice dated 08.12.2020 issued by the Petitioner is also bereft of material particulars. The effects on Petitioner's performance of obligations and remedial measures proposed by the Petitioner in the light of such alleged force majeure are conspicuous by their absence. Additionally, Petitioner has out of nowhere produced a statutory timeline of 90 days for grant of working permission/stage II clearance by the concerned statutory authorities for forest which is not supported by any statute and therefore such bereft submissions cannot be considered by the Commission.

117. In the context of the above two violations, it is reiterated that in terms of the TSA, issuance of force majeure notice, strictly in compliance with Article 11.5.1, is a pre-condition for being entitled to any relief. The mandatory nature of Article 11.5.1 is evident from the fact that Article 11.5.1 categorically stipulates that the issuance of "such notice" is a pre-condition for being entitled to any relief.

Time expended by Petitioner in obtaining working permission from DFO Agra does not amount to force majeure -

118. It is evident that right from the stage of bidding itself, Petitioner had to carry out independent inspections and geo-technical investigation of the transmission line routes and basis such independent inspection and geo-technical investigation, Petitioner had to finalize the transmission line route. Since the Petitioner was solely responsible for obtaining all consents, clearances and permits, it also had to familiarize itself with the procedures and timeframe required to obtain the same. Therefore, at the stage of bidding itself, Petitioner had to inform itself of the requirement to obtain working permission from DFO as well as the procedures and time frame required to obtain the same.

Therefore, applying Clauses 2.14.2.1 & 2.14.2.3 to 2.14.2.6 of RFP and Article 5.1.2 of the TSA, Petitioner cannot now claim any increase in costs or time extension due to the unsuitability of the transmission line routes. Reference is apposite to the judgment of the Hon'ble Supreme Court in the case of Haryana Power Purchase Centre v. Sasan Power Ltd., 2023 SCC OnLine SC 577, wherein the Hon'ble Supreme Court has cautioned that disclaimer clauses under RFP and PPA cannot be brushed aside lightly by the Courts in declaring change in law.

119. Even if it were to be assumed, for the sake of argument without admitting, that there was some unreasonable delay in the grant of working permission from DFO Agra for the Petitioner, such event can be claimed as force majeure under the TSA only if a competent court of law declares it as such and strikes the same down. The allegation that working permission has been delayed and that lease rent premium has been demanded in violation of MOEF&CC letter dated 27.10.2005 read with Forest Conservation Act 1980, Forest Conservation Rules 2003 and applicable Guidelines are allegations against the DFO Agra and the concerned authorities. Therefore, if the Petitioner wished to claim any force majeure relief in this regard under the TSA, it ought to have approached the competent court of law which could have adjudicated upon the disputes between the Petitioner and DFO Agra and concerned authorities after duly hearing the parties, including DFO Agra, on the reasons for delay.

120. The LTTCs are not aware of the correspondence exchanged between the Petitioner and DFO Agra/other governmental authorities in relation to the said working permission. In the present Petition, even the Commission is exercising jurisdiction under Section 86(1)(f) of the Act i.e., to adjudicate upon disputes between the LTTCs and Petitioner and not the disputes between the Petitioner and the DFO Agra/other governmental authorities. Therefore, the questions such as whether the application for working permission made by the Petitioner was complete in all respects and, whether the delay caused by the DFO Agra was unreasonable and illegal are questions which need to be adjudicated upon by the competent court of law after hearing the DFO Agra.

121. Moreover, the LTTCs are revenue neutral entities who fund their operations by either charging tariff from the consumers at large, duly subject to the regulatory oversight by the Commission under the ARR proceedings, or through Government grants. Therefore, without prejudice to the fact that in the present

case, it is not established by a competent Court's order as to whether there is any default in the first place, even if it is assumed on face value that DFO Agra has unreasonably delayed the grant of working permission, the Commission ought to examine as to why the LTTCs and their consumers i.e., the general public should be made to suffer on account of such alleged default by DFO Agra.

Petitioner is not entitled to extension of time on account of alleged force majeure due to Covid-19 first wave -

122. The Petitioner's letter dated 11.03.2020 does not mention the particulars of the alleged force majeure event or even the part of the Project, which is affected by the said even. Therefore, the mandatory notice conditions prescribed under the TSA have not been complied with by the Petitioner. Accordingly, Petitioner is not entitled to claim any force majeure relief in this regard.

123. Even otherwise, in terms of the TSA, a pandemic (i.e., a disease spreading over a wide geographical area, usually worldwide, whereby the cause of such disease acts upon a large number at the same time by reason of its wide diffusion) is not a force majeure event by itself. There is no categorical provision under the TSA stipulating that a pandemic is force majeure. Assuming for the sake of argument that force majeure provision under the TSA can be expanded to bring within its fold events or circumstances or combinations of events and circumstances which wholly or partly prevent or unavoidably delay the Petitioner in the performance of its obligations under the TSA, it is relevant to highlight that no such events and/or circumstances had occurred or persisted for 150 days. The first order imposing lockdown was issued by the Ministry of Home Affairs (MHA) by circular dated 24.03.2020. The same order is relied upon by the Petitioner in its letter dated 26.03.2020. Even under this order, privately owned power transmission companies were exempted from the lockdown.

124. To the MHA circular dated 24.03.2020, an addendum was issued on 25.03.2020 and further modifications were made on 27.03.2020. Accordingly, on 28.03.2020, consolidated guidelines were issued by the MHA.

125. On 14.04.2020, MHA issued an order extending lockdown till 03.05.2020. In this regard, a letter was issued by the Petitioner on 15.04.2020 stating that it continues to be affected by force majeure. Simultaneously, on 15.04.2020 itself, MHA issued another order, whereby select additional activities were allowed

from 20.04.2020 onwards. Public utilities including generation, transmission and distribution were ordered to remain functional.

126. On 01.05.2020, MHA issued an order effectively lifting the lockdown in various parts of the country excepting identified containment zones. These guidelines were to apply for 2 weeks from 04.05.2020 i.e., till 18.05.2020.

It is noteworthy that the Petitioner did not even identify as to whether any of its elements were under containment zones and as to which of its elements fell within red zones, orange zones and green zones. No details as to which elements were affected and in which particular manner, have been set out under Petitioner's letter apart from broad allegations bereft of any material particulars. Certainly, such letters issued by Petitioner cannot qualify under Article 11.5.1 as having set out full particulars of the events of the force majeure, its effects and the remedial measures proposed.

127. On 17.05.2020, an order was issued by the MHA setting out revised guidelines which further eased the lockdown restrictions. These guidelines were to apply till 31.05.2020. In terms of the revised guidelines, MHA permitted inter-State movement of passenger vehicles and buses. All activities, except those which were specifically stated to be prohibited, were allowed in all zones.

128. On 30.05.2020, an order was issued by the MHA (Unlock 1). By way of Unlock 1, the lockdown curbs were restricted only to containment zones. Such lockdown, only in the containment zones, was imposed till 30.06.2020.

129. Respondent No. 6/UPPTCL convened a meeting on 18.06.2020, wherein UPPTCL specifically referred to Unlock 1 and stated that a blanket 3-month extension be granted to all transmission projects which, naturally, included Petitioner's Project. It is indisputable that pursuant to the MHA order dated 24.03.2020, lockdown was imposed with effect from 25.03.2020. While under the said order of 24.03.2020 itself, transmission was exempted from the lockdown curbs, MHA issued a specific order on 16.04.2020 as well stating that laying of transmission lines was never prohibited.

130. From 14.04.2020 itself, financial services were allowed to resume and even the supply of goods was gradually restored. Further, from 01.05.2020, it was specified that all construction activities could be carried out in rural areas as well as urban areas. Despite the aforesaid, considering that there was lockdown

between 25.03.2020 till 31.05.2020 (68 days), UPPTCL granted 3-month blanket extension. It was also stated that as the situation unfolds, relaxation may be revisited on case-to-case basis or as a whole. In this regard, the Petitioner never approached UPPTCL with specific details pertaining to element-wise adverse effects of Covid-19 even after Unlock 1. Therefore, 3-month extension which was granted was not required to be re-visited for the Petitioner. A complete lockdown was not re-implemented by the Government of India after Unlock 1. Therefore, there was no requirement for UPPTCL to grant further blanket extension.

131. On 29.06.2020, MHA issued an order to re-open more activities in the areas outside containment zones (Unlock 2). The lockdown was continued only in containment zones till 31.07.2020. There were no restrictions on laying of transmission lines or curbs on supply of goods/materials under Unlock 2.

132. On 29.07.2020, MHA issued re-open guidelines applicable till 31.08.2020 (Unlock 3). Lockdowns were limited to containment zones till 31.08.2020. Outside these containment zones, there were no restrictions on activities such as laying of transmission lines, procurement of related goods, etc. Petitioner communicated these guidelines on 20.08.2020.

133. On 29.08.2020, MHA issued guidelines applicable till 30.09.2020 (Unlock 4). Lockdown was only imposed in the containment zones till 30.09.2020. Even the States were directed not to impose any local lockdown without prior consultation with the Central Government. It was reiterated that there were no restrictions on inter-State and intra-State movement of persons and goods. The Unlock 4 order was communicated by the Petitioner under its letter dated 14.09.2020.

134. On 30.09.2020, MHA issued an order setting out guidelines applicable till 31.10.2020. By way of the order dated 27.10.2020, the applicability of these guidelines was extended till 30.11.2020. The lockdown was limited only to containment zones, and it was reiterated that there will be no restriction on inter-State and intra-State movement of persons and goods.

135. In this context, reference is also apposite to order of the Hon'ble CERC in the case of Rewa Ultra Mega Solar Limited & Ors. reported as 2021 SCC OnLine CERC 368.

136. In terms of Article 11.5.2 of the TSA, the Petitioner was required to give a force majeure cessation notice. While the Petitioner claims that force majeure effects on account of Covid-19 first wave ceased with effect from 22.08.2020, there is no force majeure cessation notice issued by the Petitioner. Therefore, even on this count, the Petitioner is disentitled from claiming force majeure relief.

137. In view of all the above, any force majeure relief qua Covid-19 ought to be limited to the extension of SCOD for 68 days only i.e., the period of lockdown between 25.03.2020 to 31.05.2020. Alternatively, any extension of SCOD should be limited to the 3-month blanket extension already suggested by UPPTCL under the STU MOM 1.

Petitioner is not entitled to extension of 150 days on account of alleged force majeure due to Covid-19 second wave qua Element 3 -

138. The Petitioner has not given the proper notice to the LTTCs as envisaged under the provisions of the TSA and has failed to produce any such documentary evidence, which could establish that the Petitioner approached the LTTCs at appropriate time of the commencement of the event.

139. In this regard, reliance is placed on the settled position that where a contract requires issuance of a notice within a stipulated time for invoking a force majeure clause, the benefit of force majeure cannot be granted in the absence of any such notice as per the contract/TSA. It cannot be accepted that after lapse of more than three months, the Petitioner could realize that force majeure event had taken place.

140. Even under the GOUP order dated 17.04.2021 enclosed with the Petitioner's letter dated 29.04.2021, there is nothing restricting or affecting the construction of Petitioner's transmission Project.

141. On 29.04.2021, MHA issued an order setting out the guidelines applicable till 31.05.2021. Under the guidelines, there is no restriction on any construction activities or movement of goods. Under the subsequent order issued by the MHA on 27.05.2021, similar provisions were made and there were no restrictions placed on construction activities or movement of goods.

142. In view of all the above, it is reiterated that any extension on account of force majeure situation caused by Covid-19 ought to be limited to the 68 days period between 25.03.2020 till 31.05.2020, when a lockdown was in place. The

Petitioner is not entitled to any extension on account of second wave of Covid-19. Alternatively, it is pertinent to note that by way of the Minutes of Meeting dated 13.10.2021, UPPTCL (STU MOM 2) granted extension for transmission projects affected by the second wave of Covid-19 for 3 months. Therefore, any extension for Element-3 on account of Covid-19 second wave may be limited to 3 months.

Petitioner's reliance on the orders issued by the MOP is misplaced -

143. Under the petition, the Petitioner has placed undue reliance on the orders dated 27.07.2020 and 12.06.2021 issued by MOP. The aforesaid orders of MOP apply only to inter-State transmission projects and not to intra-State transmission projects like the Petitioner's Project.

144. Moreover, the MOP notifications are not in continuation of each other in the sense that a cumulative extension of 8 months in the SCOD has been granted. Each of the MOP notifications caters to a separate class of inter-State transmission projects. The first MOP notification dated 27.07.2020 pertains to grant of 5 months extension for inter-State transmission projects having SCOD after 25.03.2020. The second MOP notification dated 12.06.2021 pertains to the grant of extension for inter-State transmission projects whose SCOD was after 01.04.2021. If the intent of the MOP was to grant a cumulative and blanket 8-month extension to all transmission projects in the country, the same would have been clearly stated in the notifications.

The orders issued to contain Covid-19 pandemic do not amount to change in law and Petitioner is not entitled to any relief on this count -

145. The transmission projects or companies engaged in the construction of transmission projects were never ordered to shut down their operations. In fact, to the contrary, MHA ordered such companies to function. Even the industries which manufacture essential goods as well as the industries which required continuous process were exempted from the lockdown. Therefore, Petitioner's allegation has no substance that it did not have raw material. Under the MHA order dated 16.04.2020, it was ordered that laying of transmission lines is specifically exempted.

As regards the allegation that GOI letter dated 20.03.2020 is change in law, without prejudice to the contentions that the same is not "Law", it is relevant

to highlight that there are no details forthcoming from the Petitioner's letter as to whether it even complied with such letter. The Petitioner did not furnish the registers/logbooks regarding the casual labourers and contract workers employed by it pre and post lockdown to demonstrate that it did not terminate the services of such labourers/workers. Moreover, the payslips, bank challans, etc., which could demonstrate that the Petitioner actually paid its labourers/ workers despite non-execution of work during lockdown ought to have been communicated by it as proof. However, without enclosing any material particulars, the Petitioner merely issued letters setting out bald allegations. Therefore, there is clear violation of Article 12.3.3 of the TSA and Petitioner is not entitled to claim any change in law relief.

146. Even under the present petition, Petitioner has advanced bald allegations that it ought to be paid on account of IDC, IEDC and CPV. Without setting out any documentary evidence, the Petitioner has made bald assertions that there has been overall increase in Project cost of 30%-40%. The Petitioner has also stated that there had been an unprecedented price escalation in the prices of commodities. in the past couple of years which was not experienced in last couple of decades by TSP. In the absence of the Petitioner furnishing its original computations at the time of bidding as well as invoices, payment receipts, etc. having one to one correlation and demonstrating the increase in costs, its bald allegations do not merit any consideration and are denied vehemently. In this regard, as held by the Hon'ble Supreme Court in the case of Anil Rishi v. Gurbaksh Singh reported as (2006) 5 SCC 558, it is relevant to highlight the settled principle of law that pleadings are not evidence. Therefore, Petitioner's allegations do not merit any consideration.

147. Without prejudice to the contentions that SCOD extension ought to be limited to 68 days and that the Petitioner does not have any right to invoke change in law relief, it is also relevant to highlight that once force majeure has been invoked, the Petitioner cannot claim change in law in terms of the TSA. In this regard, reference is apposite to Petitioner's own pleadings wherein it has admitted that once force majeure situation occurs, the rights of the parties are "suspended". Therefore, even assuming that it had some right to claim change in law relief in the first place, such right ought to be deemed as suspended so long as the Petitioner claims relief on account of force majeure.

Re: Increase in cost due to requirement of installation of day visual aids

148. Pertinently, under the Principal Order, the Commission has already taken cognizance of the fact that the Petitioner's transmission line/structure or a portion thereof was not passing within the radius of 20 km from aerodrome field. Despite the same, the Petitioner elected to obtain NOC which was granted by the letter dated 05.02.2020 of Head Quarters, Central Air Command, Indian Air Force (IAF). However, under the Principal Order, the Commission observed that since the issue is between IAF and Petitioner, no consideration on merits would be undertaken by the Commission.

    It has already been observed that in terms of Clause 4.2 of the IS 5613 (Part-3/Sec-1): 1989 Code of Practice for Design, Installation and Maintenance of Overhead Power Lines (Design Code), the Petitioner was neither required to install the day visual aids or approach IAF for NOC. However, out of its own volition, the Petitioner approached IAF and obtained NOC dated 05.02.2020 without there being any requirement in law.

149. Indisputably, IAF's letter dated 03.02.2022 was issued in furtherance of the NOC dated 05.02.2020. Having voluntarily approached IAF on a misinterpretation of the Design Code, thereby subjecting itself to the requirement of installing day visual aids, the Petitioner cannot claim that a change in law event has occurred.

    In response to the Petitioner's query dated 12.02.2020, a letter dated 20.02.2020 was addressed by IAF stating the requirement for installation of day visual aids (in other words obstruction lights) on transmission lines in view of safety hazards to IAF aircrafts in Local Flying Areas (LFAs). IAF states that it communicated the requirement towards installation of day visual aids/obstruction lights on 765 kV S/C Agra - Greater Noida line instead of 765 kV S/C Ghatampur to Agra line on 20.02.2020. Notably, both the aforesaid lines are components of Element 2 itself. Therefore, the cost for installation of day visual aids/obstruction lights, if any, should have been claimed by the Petitioner as change in law as of February 2020 itself for Element 2. However, the change in law notice is issued as a complete afterthought on 13.05.2022 i.e., after more than 2 years by falsely stating that the requirement of day visual aids/obstruction lights for Element 2 emanates on account of IAF letter dated 03.02.2022, not to mention that even between 03.02.2022 to 13.04.2022,

there is a gap of more than 2 months. Pertinently, in terms of Article 12.3.1 of the TSA, the Petitioner was obligated to issue change in law notice as soon as reasonably practicable after becoming aware of the same.

150. Even otherwise, there has been no enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of a law. There has been no change in the interpretation or application of any law or imposition of a requirement for obtaining any consents, clearances and permits not required earlier or the change in its terms & conditions or introduction of new terms and conditions. The NOC dated 05.02.2020 was conditional where under Paragraph 2(f) obstruction lights (i.e., nothing but day visual aids) were prescribed as per specifications given in Design Code of 1989 and ICAO Annex-14, Chapter-6.

151. The letter dated 03.02.2022 categorically reiterates that day visual aids/ obstruction lights are necessary because the transmission line route selected by the Petitioner passes through designated LFAs of Gwalior and Kanpur IAF stations. The transmission line routes were selected by the Petitioner itself after having carried out geo-technical investigation & inspection. In this regard, in terms of Article 5.1.4 of the TSA, the Petitioner was responsible for final selection of the site including its geo-technical investigation. The Petitioner had to undertake geo-technical investigation of the line route in order to determine the final route of the transmission lines. Further, the Petitioner has acknowledged under Article 5.1.2 that it shall not be entitled to any financial compensation by reason of the unsuitability of the transmission line routes for whatever reasons. In this regard, reliance placed on the Hon'ble Supreme Court's judgment in the case of Haryana Power Purchase Centre v. Sasan Power Ltd., 2023 SCC OnLine SC 577 is reiterated and not repeated to avoid prolixity.

152. Alternatively, as evidenced by the letter dated 03.02.2022 of IAF, it appears that the Petitioner addressed two letters dated 12.02.2020 and 15.12.2020 to IAF which have not been placed on record. Moreover, IAF had addressed a letter dated 20.02.2020 which has also not been placed on record. Therefore, there is suppression of material facts by the Petitioner, thereby disentitling it from any relief. If the Petitioner were to place on record these documents subsequently, UP DISCOMs and UPPCL crave the leave of the Commission to file additional submissions in this regard.

Re: Increase in cost due to requirement to pay supervision charges to WUPPTCL -

153. The Petitioner has constructed 1x765 kV bays at Greater Noida substation and Hapur substation operated by WUPPTCL, an intra-State transmission licensee in the State of Uttar Pradesh. Petitioner's allegation is that it has paid supervision charges to WUPPTCL which ought to be reimbursed by LTTCs as compensation for change in law. Notably, the Petitioner itself states under the petition that as per the provisions under the RFP and TSA, only O&M charges as prescribed under the CERC's regulations were payable by it and there is no provision requiring the payment of supervision charges to WUPPTCL. The Petitioner also relies on the meeting dated 01.02.2019 held with the Respondent No. 6/UPPTCL and PGCIL, where it was clarified by RECTPCL that there is no provision in the regulations of the CERC for payment of supervision charges for TBCB projects. However, to somehow substantiate its claim for change in law, the Petitioner alleges that such supervision charges were paid by it to WUPPTCL at the behest of UPPTCL. In fact, as admitted by the Petitioner itself, no law compels it to pay supervision charges. Therefore, the Petitioner's allegation of change in law is erroneous.

In this regard, as held by a Constitutional Bench of the Hon'ble Supreme Court in its judgment in the case of Maharaja Shree Umaid Mills v. Union of India, reported as 1963 (Supp) 2 SCR 515, it is a basic characteristic of "Law" that it does not derive authority from mere consensus. Therefore, the Petitioner cannot allege that there has been some change in law and claim reimbursement for such frivolous and illegal expenditure under the garb of change in law relief. Moreover, the Petitioner never issued a change in law notice in this regard.

Even on face value, cumulative cost increase on account of change in law claimed by Petitioner does not meet the fiscal threshold under Article 12.2.1 of TSA -

154. Without prejudice to the contentions that no change in law has occurred, it is relevant to highlight that the cost increase claimed by the Petitioner, on account of alleged change in law, fails to satisfy the fiscal threshold prescribed by the TSA for triggering change in law relief during the construction period.

As per Article 12.2.1 of the TSA, the "impact" of increase/decrease in the cost of the transmission project during the construction period is governed by a

specific formula. For a cumulative increase of every ₹8.05 crores in the transmission project cost up to SCOD, there shall be an increase in the transmission charges by 0.313%.

In the present case, even if the figures submitted by the Petitioner are taken on face value, the cumulative increase claimed by the Petitioner is ₹7.90 crores. Accordingly, the Petitioner has claimed 0.29% increase in transmission charges for Element-2 and 0.02% increase in transmission charges for Element-3. While such splitting up of the increase in transmission charges is itself illogical, it is relevant to highlight that the threshold of ₹8.05 crores increase in cost has not been satisfied. Therefore, the Petitioner is not entitled to any change in law relief.

155. In the case of Haryana Power Purchase Centre v. Sasan Power Ltd., 2023 SCC OnLine SC 577, the Hon'ble Supreme Court held that when such formula is prescribed under the contract, there cannot be any departure from the same under the garb of regulatory powers.

Present Petition and the claims raised therein are barred by the principles of res judicata & constructive res judicata -

156. Without prejudice to the above that the events claimed by the Petitioner do not qualify as force majeure or change in law events, it is also relevant to highlight that such claims are barred by the principles of constructive res judicata. It is indisputable that the Petitioner has already exhausted its opportunity of approaching the Commission qua delay in achieving COD of Element 2 and 3 under Petition No. 1850 of 2022 which was filed by the Petitioner seeking the declaration of Deemed Commissioning for Element 2 and 3.

157. Despite the position of law being pointed out under UPPCL's reply in Petition No. 1850 of 2022, the Petitioner did not crave the leave of the Commission to omit the prayers pertaining to alleged force majeure and change in law. In its rejoinder filed in Petition No. 1850 of 2022, the Petitioner merely set out a generic denial.

Since the Petitioner did not crave any leave, the Commission did not grant any such leave under the Principal Order. Therefore, the Petitioner has voluntarily relinquished its claim. Once the Petitioner renunciates and relinquishes its claims, it cannot be permitted to re-agitate those issues. By way of the Principal

Order, the Commission has already declared Deemed COD of Element 2 and 3. The Petitioner had all the occasions to raise its claim for force majeure and change in law leading to delay in commissioning of Element 2 and 3 of the Project under the aforementioned Petition whilst seeking declaration of Deemed Commissioning. However, it is indisputable that the Petitioner did not raise its claim at the first instance. Therefore, the present Petition is hit by the principle of res judicata and constrictive res judicata.

158. In the above context, reference may be made to the Hon'ble Supreme Court's judgment in the case of State of U.P. v. Nawab Hussain reported as (1977) 2 SCC 806, wherein the Hon'ble Supreme Court explained the principles of res judicata and constructive res judicata. The Hon'ble Supreme Court held that the res judicata doctrine is based on two theories i.e., finality & conclusiveness of judicial decisions for final termination of disputes in the general interest of the community as a matter of public policy and protection of the interest of the individuals in the sense that they are protected from multiplication of litigation. Therefore, not only public but even private purpose is solved by obstructing the reopening of matters which have once been adjudicated upon. A cause of action which gives rise to an action resulting in a judgment has been held to lose its identity and vitality so as to merge in the judgment when pronounced. In the present case, the cause of action qua Elements 2 and 3 is delay in achieving SCOD leading up to declaration of Deemed Commissioning of the Project. The reasons for such delay being force majeure, change in law or any other were to be alleged in Petition No. 1850 of 2022 and not under a fresh petition being the present Petition. As on date, such cause of action has lost its identity and vitality because it has merged with the Commission's Principal Order against which an appeal is pending adjudication before the Hon'ble APTEL being Appeal Nos. 332 of 2022 & 354 of 2023. Another cause of action, in the form of alleged claims owing to force majeure events and change in law events, cannot arise now on the same set of facts. Without prejudice, it is relevant to highlight that the Hon'ble Supreme Court has also held that the same set of facts may give rise to two or more causes of actions. In such a case as well, a person is not allowed to choose to sue upon one cause of action at one time and reserve the other for subsequent litigation as this will also lead to increasing the burden of litigation. In fact, such course of action has been held to be an abuse of process. Therefore, even if it is assumed for the sake of argument that the claims due to

change in law and force majeure give rise to separate causes of actions on the same facts i.e., delay in achieving SCOD of Elements 2 and 3, even in such a case, it was not open for the Petitioner to not sue for the said claims under Petition No. 1850 of 2022 while seeking declaration of Deemed Commissioning and reserve the said actions for the present petition. Applying the same, it is clear that the Petitioner has indulged in abuse of process. Therefore, the Petitioner is barred from raking up such claims under the present Petition. Constructive res judicata has been held to be an equally necessary and efficacious aspect of res judicata as it raises the bar of the general principle in subduing a cantankerous litigant like the Petitioner.

159. Reference is also apposite to the Hon'ble Supreme Court's judgment in the case of Forward Construction Co. v. Prabhat Mandal (Regd.) reported as (1986)1 SCC 100 wherein, reiterating the principle of constructive res judicata, the Hon'ble Supreme Court held that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in matters of claim or defence. In this regard, it is indisputable that these claims being raked up by the Petitioner under the present Petition come within the legitimate purview of the original action i.e., declaration of Deemed Commissioning of the Project by the Petitioner. The Petitioner had the opportunity to take up such claims under Petition No. 1850 of 2022 itself. Therefore, as held by the Hon'ble Supreme Court, where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided.

160. In its judgment in the case of Shiv Chander More v. Lt. Governor reported as (2014)11 SCC 744, the Hon'ble Supreme Court held that it is trite that the doctrine of res judicata is one of the most fundamental and well-settled rules of jurisprudence. The Hon'ble Supreme Court held that this doctrine is found in all legal systems of civilised society in the world and is founded on a twofold logic, namely, (1) that there must be finality to adjudication by the competent court; and (2) no man should be vexed twice for the same cause. The Hon'ble Supreme Court held that inasmuch as the litigants did not urge a particular point or raise a contention in the previous round of litigation ending with a judicial

pronouncement, they are debarred from raising such claims in subsequent proceedings on the principles of constructive res judicata. The principle of constructive res judicata has been held to be a part of res judicata. Referring to a catena of its earlier judgments, including Constitutional Bench judgments, the Hon'ble Supreme Court held that the rule of constructive res judicata postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action. In the present case as well, if it wished to stake the claim being agitated under the present Petition now, the Petitioner ought to have sought the same at the stage of Petition No. 1850 of 2022 since the cause of action is the same. It has been held by the Hon'ble Supreme Court that the principle of constructive res judicata is founded on the considerations of public policy. If such principles are not applied, it would be open to a litigant to take one proceeding after another and urge new grounds every time. Such course of action is plainly inconsistent with considerations of public policy. The principles of Constructive res judicata have been held to apply not only to what is actually adjudicated or determined in a case but every other matter which the parties might and ought to have litigated or which was incidental, to or essentially connected with, the subject-matter of the litigation. Therefore, it has been held that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. This principle is squarely applicable in the present case and the Petitioner is now debarred from making any claims qua Elements 2 & 3.

161. The principles of res judicata and constructive res judicata were reiterated by the Hon'ble Supreme Court recently in its judgment in the case of Asgar v. Mohan Varma reported as (2020)16 SCC 230. The Hon'ble Supreme Court held that the fundamental policy of law behind res judicata and constructive res judicata is that there must be finality to litigation and multiplicity of litigation ought to be avoided. The principle of constructive res judicata has been held to ensure that grounds of attack or defence in litigation must be taken in one and the same proceedings and a party which avoids to do so does it at its own peril.

Such settled principles of law squarely apply in the present case as well. The Petitioner's avoidance of agitating its allegations of change in law and consequential claims/ reliefs as well as force majeure due to delay in achieving COD/Deemed COD of Elements 2 and 3 under Petition No. 1850 of 2022 was at its own peril.

162. In the above context, reliance is placed on the Hon'ble Supreme Court's judgment in the case of Virgo Industries (Eng.) (P) Ltd. v. Venturetech Solutions (P) Ltd. reported as (2013)1 SCC 625 wherein it held that Order II Rule 2 contemplates a situation where the petitioner omits to sue or intentionally relinquishes any portion of its claim. In such a case, Order II Rule 2 makes it clear that such party shall not, afterwards, sue for the part of portion of the claim omitted or relinquished. Order II Rule 2(2) does not even contemplate that the petitioner can seek leave of the Court to come back later and seek what has been omitted. The obtaining of such leave is contemplated only qua a relief under Order II Rule 2(3) where a Petitioner entitled to more than one relief, from a particular cause of action, may omit to sue for such additional reliefs subject to the Court granting the petitioner such leave. In the present case, the bar under both Order II Rule 2(2) and Order II Rule 2(3) are attracted in the Petitioner's case because while it omitted to seek the claims now being sought, even qua the said reliefs, the Petitioner neither obtained nor was granted any leave to approach the Commission by way of a separate petition. A "cause of action" has been held to mean a factual situation, the existence of which, entitles one person to obtain from the Court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the petitioner to succeed, and every fact which a defendant would have a right to traverse. "Cause of action" has also been taken to mean that particular action on the part of the respondent which gives the petitioner his cause of complaint, or the subject-matter of grievance founding the action. In the present case, insofar as Elements 2 and 3 are concerned, the Petitioner has raised its claim under the present Petition arising out of an identical factual scenario of the COD/Deemed COD being delayed and consequent declaration of deemed Commissioning. Therefore, it is indisputable that the cause of action is exactly the same as Petition No. 1850 of 2022 insofar as Elements 2 and 3 are concerned. Therefore, the bar under Order II Rule 2(2) and Order II Rule 2(3) of CPC are attracted in the present case with all force.

163. The dismissal of petitions on such grounds by the appropriate Electricity Regulatory Commissions has been upheld by the Hon'ble APTEL in a catena of judgments. In this regard, reliance is placed on the Hon'ble APTEL's judgments dated 25.10.2018 in Appeal No. 185 of 2015 in the case of Kalani Industries Pvt. Ltd. v. RERC & Ors.

164. A specious allegation of geo-political uncertainty has also been raised by the Petitioner to allege that the situation had become extremely volatile. Such allegations of the Petitioner do not merit any consideration because it was always open for it to source commodities and raw material locally or from countries other than China. Such sourcing was the prerogative of Petitioner and if there is any increase in costs owing to its imprudent decisions to import, the additional costs ought not to be passed on to the LTTCs and the consumers at large.

165. Further, without prejudice to the contentions that no change in law event has occurred, it is relevant to highlight that the Petitioner was obliged to serve a change in law notice even if it was beneficially affected by change in law in any manner. The onus to issue a change in law notice in this regard was upon the Petitioner even if there was some beneficial change in law. No such notice was issued. Therefore, it is clear that the whole change in law claim being raked up by Petitioner at this stage is an afterthought. Therefore, such claims of the Petitioner do not merit any consideration by the Commission.

Apart from the extension in SCOD by 68 days, the Petitioner is not entitled to any other relief on account of alleged force majeure -

166. Without prejudice to the contentions that no force majeure has occurred, apart from lockdown due to Covid-19 pandemic which lasted for 68 days, it is pertinent to note that under the TSA, the only named relief for any force majeure during construction period is extension of SCOD by a maximum of 180 days without the levy of liquidated damages. The same is evident from a perusal of Articles 11.7(a) read with Article 6.4 and Article 11.7(b) read with Article 4.4.

167. In fact, under the TSA, the parties have explicitly agreed that the liability to each other will be limited to what is expressly provided under the TSA. Neither party i.e., the Petitioner or LTTCs is liable or responsible to the other for incidental, indirect or consequential claims resulting from the non-performance of the TSA or anything done in connection with the TSA including claims such

as lost revenues, income or profits and increased expenses irrespective of whether such claims are based upon inter alia operation of law or otherwise. Therefore, the Petitioner's consequential claims/reliefs of IDC, IEDC and CPV arising on account of alleged change in law and force majeure events are impermissible in terms of the categorical stipulations under the TSA.

168. Reference in this regard is also apposite to Article 18.12 of the TSA which stipulates that the liability of Petitioner and LTTCs to each other shall be limited to what is explicitly provided under the TSA. Notwithstanding anything contained under the TSA, neither of the parties are entitled to claim from each other indirect or consequential losses. In the present case, right from the title of the Petition, the Petitioner has classified its claims/reliefs as "consequential". Therefore, the Petitioner's claims of IDC, IEDC and CPV, which are admittedly consequential claims/reliefs, cannot be sought by it in view of the embargo placed by the TSA.

169. Reference is apposite to a Constitutional Bench judgment of the Hon'ble Supreme Court in the case of Chunilal V. Mehta and Sons Ltd. v. Century Spg. and Mfg. Co. Ltd. reported as 1962 Supp (3) SCR 549, wherein it has been held that when the parties name that a particular claim or relief would be permissible under the contract, such naming excludes the rights to claim anything under general law principles. Applying the same in the present case, the permissible claims and named reliefs under the TSA have been elaborated above. Apart from such reliefs, the parties have explicitly agreed not to claim anything else under general law.

170. Reference is also apposite to the Hon'ble Supreme Court's judgment in the case of Bharathi Knitting Co. v. DHL Worldwide Express Courier reported as (1996) 4 SCC 704, wherein it was held that liability ought to be limited to what has been undertaken under the contract.

171. Under the Petition, the Petitioner has placed reliance on the judgment dated 03.12.2021 of the Hon'ble APTEL in Appeal No. 129 of 2020 in the case of NRSS XXXI (B) Transmission Limited v. CERC & Ors.

In the present case, the very occurrence of a change in law event is under dispute and the force majeure claim ought to be limited to 68 days. Moreover, in the aforesaid judgment, the Hon'ble APTEL was not called upon to decide the liability of the LTTCs for payment of IDC & IEDC despite existence of a clause

under the contract prohibiting the grant of such claims i.e., such as Articles 14.5.1 and 18.12 of the TSA in the present case. In this regard, it is a settled principle of law that if an issue is not joined in a particular case, the judgment rendered therein cannot become an authority for deciding such issue. The aforesaid legal principle has been upheld by a Constitutional Bench of the Hon'ble Supreme Court in the case of Rupa Ashok Hurra v. Ashok Hurra reported as (2002) 4 SCC 388 [Para 13]. Reference is also apposite to the judgment of the Hon'ble Supreme Court in the case of Padma Sundara Rao v. State of T.N. reported as (2002)3 SCC 533 [Para 9] wherein a Constitutional Bench of the Hon'ble Supreme Court held that circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases and cautioned the courts against placing blind reliance on decisions without discussing as to how the factual situation fits in. Additionally, in the case of Ashwani Kumar Singh v. U.P. Public Service Commission reported as (2003)11 SCC 584, the Hon'ble Supreme Court held that courts should not place blind reliance on decisions without discussing as to how the factual situation of a case fits in with the factual situation on which reliance is placed. The contentions regarding the bar on placing blind reliance on judgments is reiterated and not repeated to avoid prolixity. In the NRSS judgment above, the Hon'ble APTEL was also not dealing with a case where the claims of the developer were barred by the principles of res judicata read with constructive res judicata and Order II Rule 2 of CPC. Moreover, the Hon'ble Supreme Court, by way of its judgment in the Sasan case (Supra), has settled that contract cannot be re-written under the garb of exercising regulatory powers.

172. The Petitioner has also placed reliance on the judgment of the Hon'ble APTEL dated 20.10.2020 in Appeal No. 208 of 2019 in the case of Bhopal Dhule Transmission Company Limited v. CERC & Ors.:

The Hon'ble APTEL has clearly held that denial of IDC and IEDC in the facts and circumstances of the specific case of Bhopal Dhule Transmission Limited was erroneous. The Hon'ble APTEL was concerned with the Hon'ble CERC's disallowance of IDC and IEDC contrary to its own earlier orders. There are no such allegations in the present case. Moreover, in the aforesaid judgment, the Hon'ble APTEL was not called upon to decide the liability of the LTTCs for payment of IDC & IEDC despite existence of a clause under the contract

prohibiting the grant of such claims i.e., such as Articles 14.5.1 and 18.12 of the TSA in the present case.

173. The Petitioner has also placed reliance on the order dated 15.12.2017 in Petition No. 141/TT/2015 in the case of PGCIL v. MPPTCL & Ors. issued by the Hon'ble CERC. In this regard, without prejudice to the contentions that such order is inapplicable in the present case owing to Articles 14.5.1 and 18.12 of the TSA as well as Order II Rule 2 of the CPC and applicability of the principles of res judicata and constructive res judicata, it is relevant to highlight that this order of the Hon'ble CERC was set-aside by the Hon'ble APTEL in its judgment dated 06.10.2022 in Appeal No. 73 of 2018 in the case of MB Power (Madhya Pradesh) Limited v. CERC & Ors.

174. The Petitioner has also placed reliance on the order dated 29.03.2016 in Petition No. 267/TT/2015 in the case of PGCIL v. AEGCL & Ors. issued by the Hon'ble CERC. It is relevant to highlight that such order was issued in terms of the applicable tariff regulations and in a petition where the respondents had not filed any pleadings nor had participated in the proceedings before the Hon'ble CERC. Essentially, such order is an ex-parte order where there were no objections made by the customers. Further, the Hon'ble CERC's order was issued in terms of the prevailing tariff regulations in accordance with the principles governing projects covered by Section 62 of the Act. Therefore, such order cannot form the basis for allowing Petitioner's claims/reliefs in the present case, where the LTTCs have seriously disputed the very allegations of change in law and force majeure in the first place. Moreover, in the aforesaid judgment, the Hon'ble CERC was not called upon to decide the liability of the LTTCs for payment of IDC and IEDC despite existence of a clause under the contract prohibiting the grant of such claims i.e., such as Articles 14.5.1 and 18.12 in the present case where, the TSA has been executed pursuant to the Section 63 of the Act regime.

175. In view of all the above, the Petitioner is not entitled to any "consequential" reliefs/ claims on account of alleged force majeure on account of Covid-19 pandemic leading to lockdown apart from extension of SCOD for Element 2 and 3 by 68 days between 25.03.2020 to 31.05.2020.

Petitioner's reliance on the regulatory powers of the Commission and tariff regulations to claim IDC, IEDC and CPV is misplaced -

176. The entire argument of Petitioner and its reliance on the Commission's regulatory powers under Section 86(1)(b) of the Act is premised on the Petitioner's admission that there is nothing under the TSA or the TBCB guidelines allowing the Petitioner to claim IDC, IEDC and CPV. In this regard, the provisions of TSA under Articles 14.5.1 and 18.12 are unequivocal. Such TSA has been executed pursuant to a competitive bidding process as envisaged by Section 63 of the Act. Therefore, the terms of the TSA are sacrosanct. To defeat the express terms of the TSA, the Petitioner cannot place reliance on the Commission's regulatory powers under Section 86(1)(b) of the Act. In this regard, it is a well settled principle of law that what cannot be done directly cannot be achieved indirectly. In none of the judgments cited by the Petitioner i.e., the Hon'ble Supreme Court's judgments in the cases of Energy Watchdog v. CERC & Ors. reported as (2017)14 SCC 80, K. Ramanathan v. State of Tamil Nadu & Anr. reported as (1985)2 SCC 116 and Tata Power Company Limited & Ors. v. Reliance Energy Limited and Ors. reported as (2009)16 SCC 659, did the Hon'ble Supreme Court hold that the Commission's regulatory powers ought to be exercised in a manner contrary to the explicit terms of the contract. In fact, in the Energy Watchdog judgment, change in law relief qua increase in price of coal imported from Indonesia was specifically denied because the contract only recognized change in Indian laws as change in law. Therefore, the sacrosanct nature of the TSA cannot be violated by purportedly seeking exercise of the Commission's regulatory powers. The interpretation of the Hon'ble Supreme Court's judgment in the Energy Watchdog case (Supra) has been clarified by the Hon'ble Supreme Court in the case of Sasan (Supra).

The TSA does not contemplate restitution of Petitioner. Therefore, it is not entitled to any carrying cost -

177. It is reiterated that in terms of the TSA, the Petitioner is not entitled to any monetary relief on account of force majeure events delaying the commissioning of its elements. Therefore, the question of paying any carrying cost does not arise in the first place. The only available relief under the TSA for force majeure situation, resulting in delay of commissioning, is extension of SCOD without levy of liquidated damages, which is also disputed by the answering Respondents. Further, insofar as Elements 2 and 3 are concerned, the principal relief qua force majeure itself is barred by the principles of res judicata and constructive res judicata as well as Order II Rule 2. The relief/claims being made now were

consciously omitted by the Petitioner at the stage of Petition No. 1850 of 2022. Therefore, such claims of Petitioner do not merit any consideration. Moreover, Petitioner's claims are explicitly barred by Articles 14.5.1 and 18.12 of the TSA.

178. Insofar as the Petitioner's claim of carrying cost over change in law reliefs/ claims is concerned, apart from reiterating that there is no change in law in the first place, it is relevant to highlight that the change in law relief provision under the TSA does not contemplate restitution of Petitioner to the same economic position as if no change in law has occurred.

As is discernible from the above, the TSA nowhere contemplates restitution of Petitioner to the same economic position as if change in law has not occurred. The TSA explicitly provides that there will be a tariff increase. Such increase in tariff takes within its fold the component of "Discount Factor", which is nothing but time value of money. Therefore, no carrying cost or interest, over and above ought to be granted. Grant of such carrying cost will result in double accounting of the carrying cost component. All of the costs incurred by Petitioner are deemed to have been subsumed in the % increase of non-escalable transmission charges and the Petitioner is not entitled to any relief over and above. If the intention of the parties were otherwise, the parties would have explicitly stated that the purpose of change in law relief is to restore the party to the same economic position. However, no such stipulation is present and the only named relief is 0.313% increase in non-escalable transmission charges per increase of ₹8.05 crores. Petitioner's attempt at securing carrying cost from the Commission, over and above the named relief under the TSA, is solely to mislead the Commission. Such submissions of Petitioner do not merit any consideration. Even otherwise, the named relief under the TSA for change in law events during the construction period is a % increase in non-escalable transmission charges. Further, in terms of Articles 14.5.1 and 18.12 of the TSA, the parties have agreed not to claim anything beyond what is specifically stipulated under the TSA. In this regard, it is indisputable that there is nothing in the TSA which permits grant of carrying cost. Even the change in law provision does not stipulate that the Petitioner ought to be restored to the same economic position. Therefore, the Petitioner's claim for carrying cost does not warrant any consideration by the Commission.

179. Petitioner's reliance on the Hon'ble APTEL's judgment dated 13.04.2018 in Appeal No. 210 of 2017 in the case of Adani Power Limited v. CERC & Anr. is misplaced. In fact, under the said judgment, the Hon'ble APTEL held that in agreements where there is no provision for restitution the developer to the same economic position, carrying cost cannot be granted.

Pertinently, the above findings of the Hon'ble APTEL were not interfered with even by the Hon'ble Supreme Court in its judgment in the case of Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd. reported as (2019)5 SCC 325. Therefore, in cases where the agreement does not specifically stipulate that the developer ought to be restored to the same economic position, no carrying cost is payable. In the above judgment, while denying the carrying cost, the Hon'ble APTEL distinguished the ratio of its judgment in the case of SLS Power Limited v. APERC & Ors. in Appeal Nos. 160 of 2011 & Batch. Therefore, the reliance placed by the Petitioner on such judgment is also misplaced.

180. The Petitioner's reliance on the Hon'ble Supreme Court's judgment in the case of Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd. Reported as (2023)2 SCC 624 is also misplaced because Article 13.2 of the contract therein specifically stipulated that the purpose of change in law relief is restitution to the same economic position. Even Petitioner's reliance on the Hon'ble APTEL's judgment dated 12.09.2014 in Appeal No. 288 of 2013 in the case of M/s. Wardha Power Company Limited v. Reliance Infrastructure Limited & Anr. is misplaced because Article 10.2 of the contract therein specifically stipulated that the purpose of change in law compensation is to restore the developer to the same economic position as if change in law had not occurred.

181. Insofar as the Petitioner's reliance on the Hon'ble APTEL's judgment dated 15.09.2022 in Appeal No. 256 of 2019 & Batch in the case of Parampujya Solar Energy Pvt. Ltd. & Anr. v. CERC & Ors. is concerned, apart from being factually distinguishable in view of Articles 14.5.1 and 18.12 of the TSA in the present case, it is also relevant to highlight that the Hon'ble Supreme Court, by way of its order dated 12.12.2022 in Civil Appeal No. 8880 of 2022, has directed that while the Hon'ble CERC may issue final orders as per the law set out by the Hon'ble APTEL, such orders should not be given effect. Therefore, the Petitioner's reliance on such judgment of the Hon'ble APTEL is irrelevant and does not merit any consideration.

NUPPL Reply dated 18.07.2023

182. Since the cause of action is the same in both the Petitions (1850 of 2022 and the present Petition), the Petitioner should have amended its prayers in the Petition No. 1850 of 2022, with the leave of the Commission. But the Petitioner voluntarily opted for not seeking any such permission. Having done that, the Petitioner has voluntarily relinquished its claim. Hence, the filing of the present Petition by the Petitioner is against the principles of res judicata and constructive res judicata which is applied when a Petitioner attempts to file a subsequent lawsuit on the same matter/cause of action, after having received a judgment in a previous case involving the same parties. [(Daryao v. State of U.P., (1962) 1 SCR 574, Avtar Singh v. Jagjit Singh, (1979) 4 SCC 83, Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy, (1970) 1 SCC 613 and State of U.P. v. Nawab Hussain, (1977) 2 SCC 806].

183. The claims of the Petitioner in the present Petition are hit by the provision contained in Order II Rule 2 of CPC which clearly indicates that if a Petitioner is entitled to several reliefs against the Respondent in respect of the same cause of action, he cannot split up the claim so as to omit one part of the claim and sue for the other. If the cause of action is the same, the Petitioner has to place all his claims before the Court in one suit, as Order II Rule 2 is based on the cardinal principle that the Respondent should not be vexed twice for the same cause.

184. The Petitioner had all the occasions to raise its claim for alleged force majeure and change in law qua Element-2 and Element-3 in Petition No.1850 of 2022, while seeking declaration of Deemed Commissioning of the said Elements, but the Petitioner omitted to claim the same. Therefore, the instant Petition filed by the Petitioner is liable to be dismissed as misconceived with cost in the interest of justice and equity.

185. The above position has also been settled by the Judgement of the Hon'ble APTEL dated 25.10.2018 in Appeal No. 185 of 2015 – Kalani Industries private Limited vs Rajasthan Electricity Regulatory Commission & Ors.

186. The Petitioner has filed multiple proceedings before the Commission claiming relief of time extension/extension of SCOD due to alleged force majeure events and also claiming the relief of transmission tariff. The Petitioner has also been partially successful in getting such relief from the Commission and is seeking to

get a double recovery on the very same grounds by filing the present Petition. The Petition needs to be dismissed on the short ground above.

187. The transmission system to be established by the Petitioner and the corresponding rights and obligations of the Petitioner, the Respondent Nos. 1 to 4, the distribution companies in the State of Uttar Pradesh, UPPCL and NUPPL are in terms of the TSA. The TSA has been executed in terms of the competitive bidding process and the Bidding Documents issued for the purpose. There are disputes pending between the parties regarding Element-1 which are subject matter of Appeal No. 293/2021, 333/2021 and 434/2022 before the Hon'ble Tribunal.

Re: Extension of SCOD of Element 2 and Element 3 -

188. In terms of the letter dated 16.04.2018 issued by RECTPCL, the SCOD was specified as 26.09.2020 for Element-2 and 26.03.2021 for Element-3. In terms of the said letter, the delay in achieving the COD for Element-2 works out to be 308 days. But the Petitioner has computed the delay in achieving Deemed COD for Element 2 as 201 days i.e SCOD as 07.09.2020 and Deemed COD as 26.03.2021 and for Element-3 as 294 days i.e SCOD as 07.03.20212 and Deemed COD as 26.12.2021. Evidently, the SCOD of Element-2 is contrary to the terms of the aforesaid letter.

189. Further, with regard to Element 3, it is stated that both the Deemed SCOD and COD, provided by the Petitioner in the present Petition are incorrect. This also clearly indicates that the present Petition filed by the Petitioner based on facts is contrary to what was admitted by it in the Petition No. 1850 of 2022.

Re: The terms of the TSA is binding on all the parties -

190. The prayer sought by the Petitioner in the present Petition cannot be acceded to in any condition, since it is clearly contrary to the expressed terms of Article 4.4.2 of the TSA. The SCOD can be extended, on a 'day for day' basis, for a maximum period of 180 days. Whereas, as per the claim of Petitioner in the present Petition, the delay in achieving Deemed COD for Elements-2 and 3 exceeds 180 days.

191. It is a settled law that the terms of the contract are sacrosanct and are binding on the parties. Hence, extension of more than 180 days cannot be provided to GTL in any circumstances, In terms of the following-

(a) Haryana Power Purchase Centre vs Sasan Power Limited & Ors (2023 SCC online SC 577) [PARA Nos. 78-82]

(b) Gujarat Urja Vikas Nigam Limited vs Renew Wind Energy (Rajkot) Private Limited and Others (2023 SCC online SC 411)

A notice is to be provided in the event of force majeure. In fact, the proviso to Article 11.5.1 of the TSA clearly mandates that the notice for force majeure, shall be a pre-condition for the Petitioner's entitlement to claim relief, in addition to this Petitioner was also required to provide the full particulars of the event of force majeure, its effects on Petitioner and the remedial measures provided. The said Article also mandates that the force majeure notice has to be issued within 7 days counting after the date on which the Petitioner knew about the commencement of force majeure. Since the Petitioner has clearly failed to comply with aforesaid mandatory requirements, it is disentitled to claim any relief on account of force majeure.

192. It is also a settled law that the requirement of notice is a sine qua non for claiming relief for force majeure. Therefore, notice of force majeure is to be given strictly as held by the Hon'ble Tribunal in terms of the following-

(a) Judgment of the Hon'ble Tribunal dated 07.11.2017 in Appeal No. 212 of 2016 titled Maruti Clean Coal and Power Limited v Power Grid Corporation of India Limited

(b) Judgement of the Hon'ble Tribunal dated 30.04.2015 in Appeal No. 54 of 2014 titled Himachal Sorang Power Limited vs Central Electricity Regulatory Commission & Ors

Time spent by the Petitioner in obtaining working permission from DFO Agra does not amount to force majeure -

193. It was the responsibility of the Petitioner to make independent inspections and geo-technical investigation of the transmission line routes. The selection of transmission routes was on the Petitioner. Further, it was its obligation to obtain all necessary consents, clearances and permits. Any default or delay in obtaining the said permits cannot be in any manner termed as force majeure Hence, Petitioner cannot seek extension of SCOD on such counts. This is contrary to Article 4.1 and Article 5 of the TSA.

194. Further, Article 5.1.2 of the TSA clearly states the the TSP i.e Petitioner, will not be entitled to any extension of time by reason of the unsuitability of the site or transmission line route(s) for whatever reasons and it will not be entitled to any financial compensation in this regard.

195. A simple reading of Article 5.1.2 can only lead to the construction that even if there is a delay on account of an event of default by the TSP, the TSP for any reason whatsoever cannot seek shelter under the said Article for claiming any monetary compensation.

196. On every count, the Petitioner has failed to discharge the mandatory pre-requisites of its Force Majeure claims, as per the TSA.

(a) Issuance of a force majeure notice.

(b) Demonstrating that the event alleged lead to unlawful, unreasonable or discriminatory refusal in the grant of any consents, clearances and plants required for development/operation of the transmission Project, provided that a competent Court of law declares such refusal to be unlawful, unreasonable or discriminatory. Simply submitting bald assertions unsubstantiated by any evidence, or only showing some commercial hardships are woefully inadequate to establish a force majeure event.

(c) Demonstrating that the Petitioner took all feasible and reasonable mitigative steps that a prudent utility would undertake to limit the impact of force majeure event alleged as it cannot take advantage of its own laches and negligence in overcoming the effects of force majeure, if any, event and satisfying the other party of the existence of a force majeure event.

Petitioner is not entitled to the extension of SCOD on account of alleged force majeure due to Covid-19 First wave and Second wave (150 days)

197. The letter dated 11.03.2020 cannot be in any manner termed as notice in terms of Article 11.3. The letter dated 11.03.2020 does not state anything with regard to force majeure. The Petitioner in its letter dated 11.03.2020, has simply stated that 2 NR relay modules were not supplied by its OEM, resulting in a disruption of the supply chain and subsequent delays. However, the Petitioner had not provided any supporting documentation to demonstrate the timeline of these orders, their intended transportation dates, or the actual receipt of the relays.

It is important to note that relays are necessary for the final commissioning of transmission lines and are typically required approximately one month before the SCOD or when all fieldwork has been completed. Considering that the SCOD of the Agra substation was on 26.03.2020, any delay that occurred back in March 2020 would be considered insignificant given the timeline of events.

198. Without prejudice to the aforesaid, it is submitted that the contention raised by the Petitioner is also against the terms of the TSA. Force majeure under the TSA contemplates two distinct circumstances, upon the occurrence of which an event would qualify as an event of force majeure. Evidently, disruption of supply from China does not qualify as a force majeure event under the TSA.

199. Delays in execution of the project caused on account of contracting agencies cannot be passed through as 'uncontrollable factor' and squarely fall within the ambit of 'controllable events'. Therefore, the possibility of obstacles being faced by the contracting agencies in mobilizing their workforce was a commercial risk that the Petitioner took and cannot be passed through as an 'uncontrollable factor'.

200. In Halliburton Offshore Services Inc. vs. Vedanta Limited & Anr, 2020 SCC OnLine Del 2068, while recognizing that the Covid-19 pandemic may be a force majeure event in some specific circumstances, the Hon'ble Delhi High Court held that determining whether the Covid-19 pandemic justifies non-performance of contract as a force majeure event is based on facts and circumstances. Relevant factors in this regard include the conduct of the parties, the original deadline of the project and steps taken to mitigate the impact of the event. It was further held that if the party failed to perform its obligations even before the onset of the pandemic, Covid-19 cannot be used as an excuse when the original deadlines were before the outbreak itself. The said decision of the Hon'ble Delhi High Court has been approved by the Hon'ble Supreme Court in Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission reported in (2022) 4 SCC 657.

201. Further, as detailed above, there is a strict burden of proof on the Petitioner to prove each day of delay and the Petitioner cannot rely on generic assertions to claim condonation of long periods of delay.

202. Reliance is placed on the following Judgments wherein the Hon'ble Supreme Court has upheld the position that the terms of the contracts ought to be

honoured and that parties in a contract agree to risks which are expressed through the terms thereof:

(a) Phulchand Exports v. O.O.O Patriot reported as (2011) 10 SCC 300 – The Hon'ble Supreme Court while interpreting a commercial contract held that where experienced businessmen are involved in a commercial contract, the agreed terms must be respected as the parties may be taken to have regard to the matters known to them.

(b) United India Insurance Company Ltd v. Lehru, reported as (2003) 3 SCC 338 – Hon'ble Supreme Court held that all businesses carry an element of risk and hence all persons carrying on a business must take risks associated with that business.

(c) Har Shankar v. Excise & Taxation Commr., reported as (1975) 1 SCC 737 – Hon'ble Supreme Court held that commercial considerations may have revealed an error of Judgment in the initial assessment of profitability of the adventure but that is a normal incidence of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits.

203. The notifications issued by the MHA and MOP exempted power generation and supply of power from the purview of lockdown and recognized them as 'essential services.' Therefore, the outbreak of Covid-19 and imposition of lockdown in India cannot be considered as a force majeure event under the TSA.

204. The letters placed by the Petitioner are inadmissible and levy generic allegations without explaining anything. In view of the fact that the construction of transmission projects was permitted from the beginning, the Petitioner has failed to establish that Covid-19 had affected the construction of the project.

205. Further, the Hon'ble Bombay High Court in Standard Retail Pvt. Ltd. v. M/s G.S. Global Corp Ltd., in Commercial Arbitration Petition (L) No. 404 of 2020 refused to grant relief under the force majeure clause for imposition of lockdown to entities engaged in 'essential services.'

206. Further, the Petitioner has placed its reliance on the Orders dated 27.07.2020 and 12.06.2021 issued by the MOP to contend that vide the said Notifications, MOP has granted a cumulative extension of 8 months (5+3) in their SCOD. The

aforesaid Order clearly indicates that it can only be applied to inter-state transmission projects and not to intra-state transmission projects.

The orders issued in regard to Covid-19 pandemic do not amount to change in law -

207. A plain reading of the said Notifications/Orders cited by the Petitioner clearly envisages that the transmission projects were never ordered to shut down their operations.

208. In fact, in the MHA order dated 16.04.2020, it was ordered that laying of transmission lines is specifically exempted. The contentions raised by the Petitioner with regard to increase in cost, reduction in return and other financial burdens is premised on a selective reading of the aforesaid Notifications/Orders.

Re: Petitioner ought to be paid on account of IDC, IEDC and CPV -

209. As such, it is incumbent upon the Petitioner to substantiate the reasons for a delay of such magnitude and the consequent increase of cost of the Project to the tune of around Rs 8.05 crores and the increase of transmission charges to the tune of 0.30% for Element-2 and 0.03% for Element-3. It is a settled principle of Indian Evidence law that the burden of proving a fact rest on the party who makes an assertion in the affirmative and not on the party who denies such assertions.

210. The Petitioner was obligated to substantiate its assertions with a cogent body of evidence. However, it can be seen from the various averments in the Petition that the Petitioner has failed to discharge such burden. This is contrary to Article 12.3 Notification of Change in Law of the TSA.

Re: Increase in cost due to requirement of installation of day visual aid

211. The requirement to install day visual aviation lights/obstruction lights has been in existence since 01.07.1994 and even the NOC dated 05.02.2020 granted by the Aviation Authorities to the Petitioner clearly stipulated the need to install day visual aids/obstruction lights.

212. Further, vide letter dated 03.02.2022, the Aviation Authorities also pointed out Petitioner's failure to make provision for and install the day visual aviation lights /obstruction lights at the Project.

213. After the above, as an afterthought, on 13.05.2022, the Petitioner sent a Notice to PVVNL, being the Lead LTTC (with copy to all other LTTCs) purportedly in accordance with Article 12.3.1 of the TSA, stating that there was a requirement for installation of day visual lights/obstruction lights which has arisen which was allegedly for change in law.

214. NUPPL vide letter dated 08.06.2022 refuted the above claim of the Petitioner stating that the requirement for installation of day visual aviation aids/ obstruction lights on transmission lines was in existence even before the bid cutoff date and thus the same would not constitute a change in law.

215. Without prejudice to the above, it is submitted that even if the Petitioner was made aware on 03.02.2022 by the Aviation Authorities for the need to install day visual aviation aids/obstruction lights, there is no explanation as to why the Petitioner waited until 13.05.2022 (i.e., over 3 months) to issue the change in law notice.

Re: Increase in cost due to requirement to pay supervision charges to WUPPTCL -

216. The TSA defines "consents, clearances, and permits" and according to the same, the supervision charges paid to WUPPTCL can be considered as falling under the category of approvals, permits, and consents required to commence the work. Consequently, the Petitioner cannot transfer its liability to NUPPL in any manner, as it was the Petitioner's responsibility to obtain these approvals as stated in the TSA.

217. Despite any potential inaccuracies or inconsistencies in the supervision charges claimed by WUPPTCL, it remains unacceptable to transfer this additional liability to NUPPL. Even if the charges do not align with the requirements outlined in the RFP, TSA, or any applicable regulations, it is important to address and rectify the issue through proper channels rather than burdening NUPPL with unjustified liabilities.

Petitioner's Rejoinders dated 19.07.2023 & 20.07.2023 on Respondent Nos. 1 to 4 & 7 Reply and NUPPL Reply

218. The averments made in the initial submission are not being repeated herein for the sake of brevity and repetition is avoided to such extent.

Petitioner's prayer for extension of SCOD of Element-2 and Element-3 is not barred by the terms of the TSA -

219. The Petitioner has filed an Appeal before the APTEL being Appeal No. 354 of 2021 against the judgment of the Commission whereby the Commission was pleased to hold the date of Deemed COD of Element-3 of the Project as 28.01.2022 and the same is pending adjudication before the Hon'ble APTEL.

220. As per Article 11.7 of the TSA, a party shall not be in breach of its obligations under the TSA, to the extent that the same has been prevented, hindered or delayed due to a force majeure event and every party shall be entitled to claim relief for a force majeure event affecting its performance with respect to its obligations under the TSA. Therefore, in terms of Article 11.7(a), the Petitioner on account of a force majeure event is entitled to an extension of SCOD.

221. The ceiling of 180 days under Article 4.4.2 of the TSA is not absolute and the same is only relevant for the purposes of termination of the TSA by either of the parties in case the force majeure event continues beyond such ceiling. Admittedly, the UPPCL and UP Discoms have accepted the continuation of the force majeure events beyond the 180 days ceiling by not terminating the TSA.

222. UPPCL and UP Discoms are also barred from raising any dispute with regard to the extension of SCOD on account of various force majeure events notified by the Petitioner herein in light of Article 4.4.3 of the TSA. As per Article 4.4.3, the LTTCs were under an obligation to raise a 'Dispute' in terms of Article 16 of the TSA regarding the length of SCOD extension within a period of 30 days from the issuance of force majeure cessation notice by the Petitioner herein.

223. Despite the cessation notices dated 10.01.2020, 01.02.2021 and 02.11.2021, UPPCL and UP Discoms have not raised any 'Dispute' under Article 16 of the TSA with regard to the length of SCOD extension on account of the aforementioned force majeure events. Therefore, UPPCL and UP Discoms have forfeited their right to object to the extension of SCOD beyond the period of 180 days. Therefore, UPPCL and UP Discoms are hit by the doctrine of acquiescence and acceptance.

224. Article 11.7 of the TSA does not restrict the relief to the affected party to a period of 180 days. The phrase 'subject to Article 11' as used under Article 11.7 makes it amply clear that relief on account of force majeure has to be provided

within four corners of Article 11.5 of the TSA and independent of any other provisions of the TSA, including Article 4.4.2 of the TSA. Article 4.4.2 only provides an option to terminate the TSA if the force majeure event continues beyond 180 days but does not limit relief to an affected party due to force majeure event.

225. Furthermore, there are orders of various Electricity Regulatory Commissions wherein the SCOD has been extended for more than 180 days despite there being a clause similar to Article 4.4.2 of the TSA. In this regard, the following orders are noteworthy:

(a) Order dated 24.08.2016 passed by the Hon'ble CERC in Petition No. 32/MP/2014, wherein the SCOD was extended by 523 days on account of force majeure event being delay in grant of forest clearance.

(b) Order dated 25.06.2018 passed by the Hon'ble CERC in Petition No. 216/MP/2016, wherein the SCOD was extended by more than 15 months due to force majeure events.

Delay in the grant of working permission by DFO Agra is force majeure and the Petitioner had given proper notice for the same -

226. The seven days' notice requirement under Article 11.5 of the TSA is only directory and the same would not hamper the Petitioner from invoking the force majeure under Article 11 of the TSA on account of the delay in grant of working permission by the DFO Agra. Contractual stipulations akin to Article 11.5 which require the notification of force majeure within a fixed time period have been read down as directory by the various Electricity Regulatory Commissions.

227. The Hon'ble CERC vide order dated 16.10.2015 in Petition No. 73/MP/2014, titled as Jabalpur Transmission Company Limited vs. Adhunik Power and Natural Resources Limited & Ors., has granted an extension of SCOD while ignoring any delay in notification of force majeure event by the transmission licensee.

228. A similar view has been adopted by the Hon'ble Maharashtra Electricity Regulatory Commission vide order dated 01.11.2022 in Petition No. 53/2022, titled as Kharghar Vikhroli Transmission Limited vs MSEDCL & Ors., wherein it has held that delay in notification of any event as force majeure is inconsequential for grant of any time extension on account of such event.

229. The objection relating to the requirement of notice under Article 11.5 of the TSA is merely technical in nature and the UPPCL and UP Discoms should not be allowed to raise such hyper technical pleas to defeat the rightful claim of the Petitioner, especially in the facts of the present case wherein the UPPCL and UP Discoms did not raise such objections promptly after the issuance of the letters dated 08.12.2020 and 01.02.2021 by the Petitioner. Since 08.12.2020, the Respondents have maintained a complete silence regarding the aforementioned letters of the Petitioner and now after a delay of 2 years and 7 months, they have raised an objection relating to the 7-day notice requirement under Article 11.5 of the TSA. As a result of their arbitrary and whimsical conduct, UPPCL and UP Discoms should not be allowed to take refuge under Article 11.5 of the TSA.

230. The Petitioner in its letter dated 08.12.2020 had also requested for the intervention of the Respondent Nos. 1 to 7 for getting the working permission from DFO Agra as per Article 4.2 of the TSA. However, the Respondent Nos. 1 to 7 turned a deaf ear to the request of the Petitioner by not responding to the same in any manner whatsoever.

231. Article 11.3(b)(i) specifies that unlawful, unreasonable refusal for any consents, clearances and permits falls under non-natural force majeure events. It is evident that the refusal to grant working permission by the DFO Agra was unlawful, unreasonable and discriminatory and the same caused the delays in the implementation of the Project. Therefore, the same amounts to non-natural force majeure events under Article 11.3 of the TSA.

The Petitioner is entitled to an extension of SCOD on account of the first and second waves of Covid-19 Pandemic -

232. The Commission in Petition No. 1824 of 2022 titled OCBTL Judgment pertaining to another TSP in the State of Uttar Pradesh has already examined and upheld the similar force majeure notices issued by the TSP notifying the Covid-19 Pandemic as a force majeure event under the TSA, the terms of which are, mutatis mutandis, applicable to the present TSA. The Commission has already considered the first wave of the Covid-19 Pandemic as a force majeure event and has granted SCOD extension in OCBTL Judgment without any levy of LD.

233. Further any violation of the restrictions and directives under the said Notifications was punishable under the provisions of the Disaster Management Act 2005 and the Indian Penal Code 1860.

234. Even during the unlock phase, various individuals working at the project site were diagnosed with the Coronavirus. These workers were placed under isolation and treatment, which in turn had severely impacted daily work progress and thereby caused the loss of productivity due to the idling of manpower. The measures such as night curfew, creation of containment zones, contact tracing, self-isolation etc., created an additional burden on the Petitioner to have its manpower deployed at the work site.

235. During this period, the availability of manpower was also limited as every individual was mandated to undergo RT-PCR test for entry/exit from/to the state thus causing delays in getting the required number of labourers at the work site in a timely manner as all indoor or outdoor congregations were prohibited in the state without following the due safety measures.

236. The adverse effects of the Covid-19 pandemic were acknowledged by various government bodies. For instance, the MOP vide Notification dated 27.07.2020 extended the SCOD for all the under-construction transmission projects by a period of 5 months on account of the Covid-19 Pandemic and nationwide lockdown. While granting such an extension, the MOP has considered the impacts of the Covid-19 pandemic for a period beyond the lockdown.

237. The objection regarding the delay in the issuance of the force majeure notice is completely baseless as the requirement under Article 11.5 of the TSA would not apply to the force majeure notice dated 29.04.2021. The force majeure notice dated 29.04.2021 was issued by the Petitioner in continuation to the earlier force majeure notices and, thus, it would not qualify as a fresh intimation of a force majeure event under Article 11 of the TSA. The force majeure notice dated 29.04.2021was a mere follow up/update on the prevailing Covid-19 Pandemic.

238. The aforesaid submission is also bolstered by the fact that the force majeure cessation notice for the Covid-19 Pandemic was issued by the Petitioner only on 02.11.2021.

239. The Petitioner informed the LTTCs that due to the outbreak of the second wave of the Covid-19, it was facing various issues similar to Covid-19 first wave leading to delay in the completion of Element-3.

240. While recognising the adverse impact of the second wave of Covid-19 pandemic, the MOP issued a notification dated 12.06.2021 extending the SCOD by a period of 3 months of all the under-construction transmission projects.

241. The adverse impact of the second wave of the Covid-19 Pandemic was far more serious in terms of the positivity rate and fatality. The number of hospitalizations and deaths over an acute period of time surpassed the statistics of the first wave. The delta variant of the Coronavirus was twice as contagious as previous variants. During the second wave of the Covid-19 Pandemic, the situation was dynamic in nature as different states across the country were hitting peaks in terms of hospitalization and deaths at different points in time. In view of such a dynamic and ever-evolving situation, UPPCL and UP Discoms cannot expect the Petitioner to come up with a longstop date for intimating the onset and cessation of the second wave of the Covid-19 Pandemic.

242. Any objection by UPPCL and UP Discoms has to be discarded in view of the legal maxim *vigilantibus non dormientibus aequitas subvenit*, which means that equity helps the vigilant and not those who sleep over their rights.

Reliefs sought under the present Petition would not be barred by Order II Rule 2 of the CPC and/or res-judicata/constructive res-judicata

243. The applicability of Order 2 Rule 2 of the CPC was explained by the Privy Council in Mohd. Khalil Khan v. Mahbub Ali Mian, 1948 SCC OnLine PC 44. Further, the Constitution Bench of the Hon'ble Supreme Court in Gurbux Singh v. Bhooralal, (1964) 7 SCR 831, reiterated the test for applicability of bar under Order 2 Rule 2 of the CPC. The test laid down in the aforesaid decisions has been followed by the Hon'ble Supreme Court in Vurimi Pullarao v. Vemari Vyankata Radharani, (2020) 14 SCC 110.

244. In view of above judgements, it is submitted that in order to attract the bar under Order II Rule 2 of CPC, it must be established that the second suit was in respect of the same cause of action as that on which the previous suit was based. If the defendant fails to prove that the causes of action in the previous and second suit are the same, the challenge under Order II Rule 2 of the CPC would not be maintainable.

245. Order II Rule 2 is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different

causes of action even though they arise from the same transaction. The above submissions also stand reinforced by Explanation-II of Order II Rule 2.

246. The Hon'ble Supreme Court in Deva Ram v. Ishwar Chand, (1995) 6 SCC 733, explained that where the essential requirement for the applicability of Order II Rule 2, namely, the identity of cause of action in the previous suit and the subsequent suit was not established, the subsequent suit could not be said to be barred by Order II Rule 2.

247. The applicability of Order II Rule 2 of CPC hinges upon the meaning of the term "cause of action". It is submitted that the Hon'ble Supreme Court in Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I, (2004) 9 SCC 512, explained the meaning of the term "*cause of action*".

248. Similarly, the principle of res-judicata was explained by the Hon'ble Supreme Court in Subramanian Swamy v. State of T.N., (2014) 5 SCC 75, wherein it explained that when a matter whether on a question of fact or on a question of law has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed or no appeal lies, neither party will be allowed in a future suit or proceeding to canvass the matter again.

249. Furthermore, the principle of constructive res-judicata was explained by the Hon'ble Supreme Court in Ramchandra Dagdu Sonavane v. Vithu Hira Mahar, (2009) 10 SCC 273, in that that doctrine of constructive res-judicata being a sub-set of res-judicata sets to naught any claims being raised in a subsequent proceeding where in an earlier proceeding, such claim ought to have been raised and decided by the court. The doctrine of constructive res-judicata is akin to the concept enumerated under Order II Rule 2 of the CPC.

250. On the other hand, the cause of action for filing the Petition No. 1850 of 2022 before the Commission was the declaration of Deemed COD of Elements 2 and 3 and the payment of transmission charged by the LTTCs to the Petitioner.

251. The cause of action for filing the present Petition pertains to the declaration of protests against CAB, refusal of working permission by the DFO Agra and Covid-19 Pandemic and nationwide lockdown on account of Covid-19 Pandemic as force majeure and imposition of requirement to install day visual aids and levy of supervision charges by WUPPTCL as 'Change in Law' under Article 12 of the

TSA. Furthermore, the claim with regard to the IDC, IEDC, CPV and Loss of Tariff is sought on account of the delay caused by the associated force majeure and change in law event for the Project as whole.

252. The reliefs sought in the Petition No. 1850 of 2022 and present Petition would show that cause of action for filing the said Petition is entirely different from the present Petition, i.e., the bundle of facts pleaded and proved by the Petitioner for the purpose of obtaining the relief claimed in Petition No. 1850 of 2022 are entirely different form the present Petition. It is submitted that the Petition No. 1850 of 2022 dealt with the issues relation to the declaration of Deemed COD for Elements 2 and 3 and payment of transmission charges to the Petitioner, whereas under the present Petition, relief on account of Force Majeure and Change in Law event has been sought under Article 12 of the TSA. Various documentary correspondences involved in Petition No. 1850 of 2022 are entirely different from the present Petition. The Petitioner had sent different notices to the Respondents under different provisions of the TSA for claiming the two distinct reliefs.

253. In view of the aforesaid submissions, the claims in the present Petition will not be barred by Order 2 Rule 2 of the CPC and/or principles of Res-Judicata/ Constructive Res-Judicata.

Petitioner is entitled to the relief in the form of carrying cost on the change in law events -

254. The Hon'ble APTEL in Appeal No. 256 of 2019 and batch in the case of Parampujya Solar Energy Pvt. Ltd and Anr. vs. Central Electricity Regulatory Commission and Ors. has authoritatively held that carrying cost can be granted even if the term "restitution" is not mentioned in the change in law clause.

255. The judgment passed by the Hon'ble Supreme Court in Uttar Haryana (Supra) would not apply to the facts of the present case for the following reasons:

(a) PPA Clause in Uttar Haryana (Supra) and the present case are totally different as there is an inherent difference between the construction of two 'change in law' clauses.

(b) Change in law clause in Uttar Haryana (Supra) (i.e. the change in law clause in the Bid 01 PPA) was an exhaustive clause which provided for every aspect related to 'change in law' including the manner of granting

compensation. The present TSA is very wide and open ended and not an exhaustive one.

(c) In Uttar Haryana (Supra), the Hon'ble Supreme Court noticed that despite there being an exhaustive change in law clause that defines every aspect of change in law relief, there was no mention of 'restitution' in the said clause, and hence it disallowed carrying cost. In the present case, the TSA gives ample discretion to the Hon'ble CERC to grant carrying cost and there is no bar to grant of carrying cost, either impliedly or expressly.

(d) Unlike the change in law clause in Uttar Haryana (Supra), Article 12 of the present TSA grants wide powers to the appropriate Commission to acknowledge any event as change in law and grant suitable relief to restitute the affected party on account of such event.

256. Article 12.3.1 of the TSA provides for notice in case of change in law event. The said Article casts an obligation on the Petitioner to give notice to the Lead LTTC of a change in law event as soon as reasonably practicable after becoming aware of the same. Therefore, the said Article provides for the condition to give a prompt notice of a change in law event. If the notice of change in law event is not given in time, there would be delays in payment of the change in law compensation and consequently the carrying cost would pile up. Therefore, the purpose behind Article 12.3.1 of the TSA is that the carrying cost component of change in law relief does not increase because of delay in giving notice.

257. As per Article 12.2.4, the decision of the Appropriate Commission with respect to the determination of the change in law relief and the date from which the same shall become effective, shall be final and binding. This implies that the Commission has the power to grant carrying cost from the date of expenditure till the supplementary bill is raised. There was no reason for the TSA to say that the Commission will have to determine the date for purposes of change in law compensation as it could have simply said that compensation would be restricted to date on which actual expenditure is incurred.

258. Hon'ble Supreme Court in the case of R.C. Cooper vs. Union of India, (1970) 1 SCC 248, had noted in Paragraph 83 that as per the dictionary meaning, "compensation" means anything given to make things equal in value: anything given as an equivalent, to make amends for loss or damage.

259. The Hon'ble Supreme Court in Yadava Kumar vs. The Divisional Manager, National Insurance Co. Ltd. and Anr., (2010) 10 SCC 341, held that the compensation is a comprehensive term and is aimed at restoring a party to the same position as if no injury was caused to it.

260. The Petitioner will not achieve complete restitution unless compensated along with the carrying cost. Reference is made to judgment of the Hon'ble Supreme Court in South Eastern Coalfields Ltd. vs. State of M.P. and Ors, (2003) 8 SCC 648 and to the Hon'ble Supreme Court in Kavita Trehan and Anr. vs. Balsara Hygience Products Ltd, (1994) 5 SCC 380, where it is provided that the jurisdiction to make restitution is inherent in every court.

261. The Hon'ble APTEL in Maharashtra State Electricity Distribution Co. Ltd. vs. Maharashtra Electricity Regulatory Commission and Ors, Appeal No. 15 of 2007, held that the payment of interest is a natural corollary of any delayed payment.

262. The Hon'ble APTEL in PTC India Ltd. vs. Gujarat Electricity Regulatory Commission and Anr, 2014 ELR (APTEL) 1243, despite there being no express provision in PPA, granted carrying cost in the form of interest on the principles of equity by relying upon its previous judgments.

263. In Alok Shanker Pandey vs. Union of India and Ors., (2007) 3 SCC 545, it was held by Hon'ble Supreme Court that interest was not in the nature of penalty.

UPPTCL (Respondent No.6) Reply dated 20.07.2023

264. UPPTCL was neither a party to the TSA between the Petitioner and the LTTCs i.e. Respondent no. 1 to 4 nor was it involved in any contractual relationships between the parties to the instant dispute.

Whether the claim of the Petitioner is barred by the principle of constructive res judicata?

265. The Petitioner had previously filed Petition No. 1850 of 2022 which came to be decided by the Commission through its Order dated 14.02.2023. As far as cause of action for filing the instant petition as well as Petition No. 1850 of 2022, both find place in the same set of facts, that is to say that the cause of action for filing the instant petition as well as Petition No. 1850 of 2022 would be the same set of facts and, as such, the Petitioner ought to have raised the claims sought for in the instant while filing Petition No. 1850 of 2022.

266. The principle of constructive res judicata provides that if a party is to raise a claim arising out of a cause of action, it must raise the entirety of the claim in one go. The party is subsequently barred from raising claims in subsequent proceedings pertaining to the same cause of action.

In case a party is to raise a claim vis-à-vis a cause of action, a complete claim must be raised by the party and it cannot raise a partial claim and thereafter in subsequent proceedings raise the remainder of the claim. It is this specific eventuality that would be hit by the principle of constructive res judicata barring the subsequent claim of a party which ought to have been raised at a previous stage.

267. In the instant matter, the Petitioner, while filing Petition No. 1850 of 2022 was aware of all the facts and circumstances which have been pleaded in the instant Petition, however, chose not to bring the same before the Commission and therefore has forfeited his claim to agitate this issue before the Commission in view of the principle of constructive res judicata/Order II Rule 2 of CPC.

The Hon'ble APTEL in the case of Bihar Steel Manufacturers Association v. BSEB; 2011 SCC Online APTEL 78 has held that the principles contained in Order II Rule 2 of CPC are applicable to proceedings before the Hon'ble APTEL and as a corollary, the same would also apply to proceedings before the Hon'ble Commission. Therefore, the instant Petition deserves to be dismissed outrightly on this ground alone.

Whether the instant petition fails due to non-joinder of necessary party i.e., WUPPTCL?

268. The instant Petition filed by the Petitioner also suffers from non-joinder of necessary party. The Petitioner in the instant Petition has claimed that WUPPTCL which is a transmission licensee for the State of Uttar Pradesh has allegedly imposed supervision charges on the Petitioner. The Petitioner has made a specific case against WUPPTCL and UPPTCL regarding supervision charges. However, WUPPTCL even though has been pleaded against, has not been made a party to the instant Petition. The Petitioner is alleging that WUPPTCL incorrectly imposed supervision charges on the Petitioner for the Bay extension work at Greater Noida and Hapur substation of WUPPTCL. It was pertinent for the Petitioner to have impleaded WUPPTCL as a party to the instant dispute and therefore the instant Petition suffers from non-joinder of necessary parties.

Whether the claims of the petitioner vis-à-vis force majeure events are tenable in the eyes of law?

269. By means of the instant Petition, the Petitioner has primarily claimed force majeure on account of the occurrence of three independent events.

Outbreak of Covid-19 pandemic and subsequent declaration of nationwide lockdown

270. UPPTCL granted a blanket extension of 90 days during the first wave of Covid-19 pandemic to all transmission projects by means of its minutes of meeting dated 18.06.2020.

271. Thereafter, UPPTCL granted an extension of 90 days to all transmission projects in view of the second wave of the Covid-19 pandemic by means of minutes of meeting dated 13.10.2021.

272. In the case of the Petitioner, any extension beyond the blanket extensions provided by UPPTCL for Covid-19 would be between LTTCs & Petitioner, subject to approval by the Commission.

Imposition of condition by the Indian Air Force to install day visual aids outside 20 km radius of the defence aerodromes as change in law

273. As far as the issue of force majeure is concerned, the same is a dispute and an issue between the LTTCs and the Petitioner subject to the decision of the Commission, and UPPTCL does not have any specific role to play in the same.

Payment of supervision charges to WUPPTCL as a change in law event under the TSA

274. UPPTCL is a State Transmission Utility ("STU") for the state of Uttar Pradesh and has no contractual role to play in the instant Project. Being an STU for the State of Uttar Pradesh, UPPTCL is cast with a duty for effective maintenance and development of the intra-state transmission system. UPPTCL is also duty bound to facilitate coordination between various licensees of the State in issues pertaining to transmission.

275. Being the STU for the State of Uttar Pradesh, UPPTCL merely acts as a facilitator between various licensees to facilitate the dialogue between the parties. As far the Petitioner and the WUPPTCL are concerned, both these licensees are corporate entities and are independent decision makers. In case the Petitioner

has entered into any kind of understanding with WUPPTCL for their construction work, they cannot at this stage allege that the said understanding was due to pressure on the part of the UPPTCL.

276. The Petitioner has alleged that the UPPTCL has intervened and asked the Petitioner and WUPPTCL to conduct joint meetings. The said averment on the part of the Petitioner is nothing but a bald assertion which is not substantiated by even an iota of documentary evidence.

277. UPPTCL has no role to play and is not a party to the TSA. However, being an STU, UPPTCL is obliged to ensure facilitation between various licensees in the State of UP for coordinated and economical development of the transmission network for the State.

278. A perusal of the minutes of the meeting dated 01.02.2019 reveals that WUPPTCL and Petitioner were to conduct joint meetings in presence of the Superintending Engineer, Electricity Transmission Circle, Noida to decide themselves the actual expense for the construction and interconnection to be incurred by WUPPTCL in case bays are being constructed by the other licensees and joint report in this reference had to be submitted by 06.02.2019. In furtherance to the same, both parties (the Petitioner & WUPPTCL) entered into dialogues. Thereafter, a meeting was held on 14.03.2019 wherein WUPPTCL and Petitioner mutually agreed upon payment of Rs. 90 lacs to WUPPTCL as supervision charges for bay extension works.

279. It is also equally settled that a party cannot be allowed to approbate and reprobate i.e., to say blow hot and cold at the same time. The Petitioner having mutually agreed with WUPPTCL to pay WUPPTCL a certain amount, cannot, at this stage, come out and say that the said agreement was as per the directions of UPPTCL. The Petitioner has made frivolous and false statement vis-à-vis UPPTCL in the instant Petition pertaining to the issue of agreement with WUPPTCL.

Petitioner's Rejoinder dated 22.07.2023 to UPPTCL Reply

280. UPPTCL has taken contradictory pleas before the Commission. In the Petition No. 1850 of 2022 filed by the Petitioner herein seeking declaration of Deemed COD of Element-2 and 3 of the Project and payment of transmission charges, UPPTCL had filed an application seeking deletion from the array of parties in the

said Petition on the ground that it was neither a necessary nor a proper party to the said proceedings.

281. However, in the present matter, which also pertains to Elements-2 and 3 of the same Project, UPPTCL has now filed its substantive Reply on merits, including the contention that the present Petition is barred by Order II Rule 2 of the CPC.

282. It is a settled law that that a party cannot be permitted to approbate and reprobate at the same time. The Petitioner in this regard has referred to Judgements of Hon'ble Supreme Court in Mumbai International Airport (P) Ltd. v. Golden Chariot Airport, (2010) 10 SCC 422 and Hon'ble Supreme Court in Shyam Telelink Limited vs. Union of India [(2010) 10 SCC 165].

283. UPPTCL cannot be allowed to approbate and reprobate and should not be permitted to take contradictory pleas as per its convenience.

WUPPTCL is not a necessary or a proper party to the present proceedings

284. WUPPTCL is neither a necessary nor a proper party to the present proceedings and no relief has been claimed against it in the instant Petition. The Petitioner is only claiming change in law compensation with respect to the supervision charges levied by WUPPTCL.

285. If UPPTCL's argument is accepted then in every case where a change in law relief is being claimed, the party whose action amounts to change in law will have to be impleaded. The Petitioner would like to demonstrate the same with few examples:

(a) In case a party is claiming Change in Law compensation on account of New Coal Distribution Policy, 2013, which was the issue before the Hon'ble Supreme Court in GMR Warora Energy Limited vs. Central Electricity Regulatory Commission and Ors., 2023 SCC OnLine SC 464, Ministry of Coal, Government of India should have been made a party.

(b) Whether MoEFCC should be made a party if change in law compensation is being claimed on account of imposition of requirement on Thermal Power Plants to transport Fly-Ash by MoEFCC which was the subject matter of Appeal No. 148 of 2019 before the Hon'ble APTEL.

(c) In case change in law compensation is being claimed on account of imposition of safeguard duty, which was the subject matter of Petition No. 1741 of 2021 and Petition No. 1742 of 2022, whether Ministry of Finance, Government of India should have been made a party.

(d) In various orders passed by the Hon'ble CERC holding imposition of GST laws as change in law, Ministry of Finance, Government of India was not a party.

286. A party is only required to be joined if it is an LTTC or a party to the TSA or any relief is being claimed against it on account of default liability principle.

Petitioner's Additional Affidavit dated 29.03.2024

287. The Petitioner through additional affidavit has placed documents before the Commission in relation to the issue of grant of work permit by the DFO Agra qua the 765 kV Ghatampur TPS-Agra (UP) S/C line ("Element 2") forming part of the TSA between the parties. The Petitioner has made extensive pleadings on the said issue in the main Petition itself and the present Additional Affidavit is being placed to amplify the submissions already made besides placing on record the additional documents annexed to the present Additional Affidavit.

288. The work permit was sought pursuant to 'Guidelines for diversion of forest land for non-forest purpose under the Forest (Conservation) Act 1980-Simplified procedure for grant of permission for felling of trees standing on forest land to be diverted for execution of linear projects: reg.' as issued by the MOEF&CC on 28.05.2015.

289. DFO Agra's demand for payment of lease rent is completely illegal and arbitrary and therefore, the delay caused by it amounts to force majeure for the following reasons:

(a) The levy of lease rent and premium by the State Government is not permissible for the proposals submitted under Section 2(ii) of the Forest Act, therefore, any demand for payment of lease rent by the DFO Agra was non-est in law in the first place.

(b) Furthermore, Stage-I/In-Principle Approval dated 06.01.2020 states that the State Government will not impose any additional conditions on the User Agency after the grant of Stage-I/In-Principle Approval by the MOEF&CC. The revocation of the work permit by the DFO Agra on

14.10.2020 on account of non-payment of lease rent is nothing but an additional condition as it was not a condition imposed either on 06.01.2020 (when Stage-I approval was given) or on 05.08.2020 (when the work permit was initially given by the DFO Agra).

(c) MoEF&CC vide letters dated 27.10.2005 and 08.08.2014 has made it amply clear that the State Governments cannot impose any additional conditions on the User Agencies after the grant of Stage-I/In-Principle Approval by the MOEF&CC.

(d) In the present case-

i. In the first place, the DFO Agra did not have any power or authority under the law to revoke the work permit on account of non-payment of lease rent.

ii. The DFO Agra could not, in any event, have revoked the work permit on 14.10.2020 after having initially given a work permit on 05.08.2020. The revocation of the work permit on 14.10.2020 on the purported ground of non-payment of lease rent, in effect, is a new condition/additional condition that cannot be imposed upon the user agency in any case.

(e) The Petitioner further places reliance on the MOEF&CC letter dated 20.08.2020 wherein the MOEF&CC specifically asked the Government of Uttar Pradesh to not impose any lease rent and premium after the grant of Stage-I/In-Principle Approval. Further, the State Government cannot impose the lease rent and premium as the user agency already deposits the compensatory levies in the CAMPA Fund of the respective State under Section 4(3) of the Compensatory Afforestation Fund Act 2016 in lieu of forest land diversion.

(f) Following the law of the land, the other DFOs of Kanpur Nagar, Kanpur Dehat, Auraiya, Etawah and Firozabad regions granted work permit to the Petitioner without any demand for payment of lease rent and premium. The DFO Agra could not have conducted himself contrary to the said law. This shows that the requirement of lease rent was not mandatory and a pre-requisite for the grant of work permit.

(g) Even otherwise, it remains an established practice whereby several DFOs in the past have issued work permits to transmission projects/public projects in the State of Uttar Pradesh after obtaining an undertaking regarding the non-applicability of lease rent to the proposal submitted under Section 2 (ii) of the Forest Act.

Hearings dated 19.12.2023, 14.03.2024 and 16.05.2024

290. Sh. Sanjay Sen, learned Senior Counsel, appearing on behalf of the Petitioner gave a brief background of the Petition and stated the major issues on which the Petitioner is claiming relief due to the occurrence of force majeure and change in law events. There is a delay of 201 days in the commissioning of Element 2 and 294 days in commissioning of Element 3. Further, he submitted that the majority of the issues are similar to the pleas raised under Petition No. 1920 of 2022 filed in the OCBTL matter. He further submitted that the issue of protests against the Citizenship Amendment Bill amounting to force majeure has already been disallowed by the Commission in its Order dated 03.10.2022 in Petition No. 1824 of 2022 (i.e., OCBTL LOT-I Order) and no appeal has been filed in this regard. Therefore, the Petitioner is not agitating on this issue. The instant Petition raises additional issues apart from the ones raised in the Petition No. 1920 of 2022 by OCBTL such as the requirement of day visual aids (for Element 2) and payment of supervision charges to WUPPTCL (for Element 2 and 3) amounting to change in law. There is a delay in the commissioning of these elements. Under force majeure and change in law, the Petitioner is entitled for 274 days for Element 2, and 334 days for Element 3. However, effectively, Element 2 is commissioned in 201 days and Element 3 is commissioned within 294 days from the scheduled commercial operation date.

291. He further submitted that when the NUPPL threatened to invoke the bank guarantee, the Petitioner approached the Commission and NUPPL was inhibited from invoking the bank guarantee by the Commission, however, the NUPPL was allowed to withhold 44 crores. So, once the period of delay of 201 days and 294 days is condoned, the Petitioner will be entitled to that money. Apart from that, the very fact that they have not commissioned the thermal power plant till today, there is no question of withholding the money.

292. He further submitted that the construction of Element 2 was delayed due to the unlawful revocation of working permission by DFO Agra for the 5.9191 acres of

forest area. While Stage-I forest clearance was already granted by the Ministry of Environment, Forests and Climate Change (MoEFCC) on 06.01.2020 itself, the DFO Agra revoked the working permission on 14.10.2020 and unlawfully imposed additional condition of paying lease rent premium which was not demanded by the DFOs of any other areas. Imposition of such additional condition post grant of Stage-I clearance by the MoEFCC is illegal. However, the Petitioner was constrained to pay such amount under protest and the working permission was again granted on 21.01.2021. He submitted that the MoEFCC by letter dated 27.10.2005 has specifically warned the State Governments against the imposition of any additional condition on the user agency after the approval of the original forest proposal by the MoEFCC. The Petitioner is not claiming it as a change in law. While the Petitioner informed the LTTCs, including UP DISCOMs, of force majeure due to the revocation of working permission by the DFO Agra, UP DISCOMs or UPPCCL never objected to the allegations made by the Petitioner.

293. He further submitted that in regard to the installation of day visual aid, there is a notification by the Indian Air Force that if it is within a 20-kilometre radius, then only day visual aid is required. The Petitioner was not within 20-kilometre radius, but much beyond that. They gave us permission and after almost 2 years, they gave directions to install day visual aids. Therefore, change in law relief is sought on account of the condition imposed by the Indian Air Force for the installation of day visual aids on the Ghatampur to Agra S/C line forming part of Element 2 of the Project.

294. Further, supervision charge was not envisaged at the time of the bidding. There was no requirement in law to pay supervision charges to the WUPPTCL. However, the Petitioner was constrained to pay the same which is established through the minutes of meeting that was held among the Petitioner, WUPPTCL and UPPTCL. Therefore, the same is change in law.

295. He argued that the Government Notification in the case of Covid-19 would qualify as change in law because these were issued by a Government Instrumentality. Due to these notifications, the work at project stopped and also impacted on cost of the Project not directly, not like a tax, but indirectly, or idling charges and, other charges. Thus, the Petitioner is entitled to reimbursement for IDC, IEDC and CPV. There is a catena of judgments where

it has been held that "or" may sometimes be interpreted to mean "and". As per Article 11.7(b) of the TSA, the Commission can provide relief due to force majeure events. This clause of the TSA has to be read bearing in mind the business efficacy and intent of parties at the time of signing the TSA. The Petitioner has sought relief in the form of loss of tariff and has also made alternative prayers that because of the delay, the project has failed to recognize tariff therefore, Petitioner must be entitled to get tariff for 35 years.

296. He further submitted that the Commission in its Order dated 14.02.2023 has upheld 26.03.2021 as the Deemed COD for Element 2, and 28.01.2022 as the Deemed COD for Element 3. At that time, no liquidated damages were imposed. Therefore, no condonation of delay in achieving the COD was sought, and only approval of COD was sought by the Petitioner, so that the monthly transmission charge gets paid. This judgment has not been challenged by LTTCs, and thus, LTTCs have accepted the aforementioned Deemed COD, for Elements 2 and 3.

297. He further submitted that force majeure notices were issued on account of Covid-19 pandemic and imposition of lockdown. However, LTTCs never objected to force majeure notices. Such conduct amounts to acceptance. The Petitioner is relying on the Ministry of Power notifications in regarding to total extension of 8 months on account of Covid-19 both waves being recognized as a force majeure event and Commission's order in which Covid-19 first wave was considered as force majeure event.

298. He further argued that for levying liquidated damages, a party has to prove that it has suffered actual loss. Further, under Article 4 of the TSA, there is an article for extension of time. It specifically provides that time can be extended if there is a default on the part of LTTCs or there is a force majeure. There is a separate provision under Article 11 for the grant of relief on account of force majeure. So, the argument has been that a relief for force majeure is in addition to a relief possible for extension of time. Otherwise, the contract would not have two separate articles. One deals specifically with the extension of time; the other is a broader article that a relief can be claimed. So, relief is not restricted to the extension of time. There can be a relief beyond the extension of time. He referred to many judgments in support of his argument on various issues.

299. Sh. Nalin Kohli, the learned Counsel appearing on behalf of Respondent 1 to 4 and 7 submitted that the primary relief sought by the Petitioner is in relation to

Element 2 and Element 3 including extension of SCOD on account of force majeure without levying the liquidated damages. He further submitted that it is settled, by way of judgments issued by the Hon'ble APTEL as well as the OCBTL LOT-I Order, that issuance of force majeure notice satisfying the twin conditions prescribed under Article 11.5.1 of the TSA is mandatory. The proviso mandates twin conditions i.e. first requirement is that the notice be issued within seven days and other is the requirement of full details of event, its effects and remedial measures to be given. The OCBTL LOT-I Order emphasizing mandatory requirement of notice in terms of TSA has attained finality.

300. Further, he submitted that the contention qua CAB protests is not pressed by the Petitioner, because the allegation that CAB protests were force majeure has already been disallowed under the OCBTL LOT-I Order which has attained finality. The allegation of force majeure due to the delay in issuance of working permission by DFO also cannot be pressed by the Petitioner because the force majeure notice was delayed. The notice issued by the Petitioner for such delay is belated and cannot even be considered as a force majeure notice because it concludes by merely stating that the assistance of UPPCL is sought in obtaining working permission from the DFO. Therefore, Article 11.5.1 of the TSA has not been complied with as the date of alleged commencement is 14.10.2020, whereas notice was issued on 08.12.2020. The notice fails to comply with the twin conditions - (a) Notice ought to have been issued within 7 days from the date on which the Petitioner knew or should have reasonably known about the commencement. (b) Notice ought to include full particulars of the event, its effects and remedial measures proposed. Further, under Article 4.1(a) of the TSA, the obligation to procure all consents and clearances vests with the Petitioner and the Petitioner itself selected the transmission line route for Element 2, which passes through forest area, pursuant to independent investigations. Accordingly, Petitioner should have ensured to obtain timely approvals as disclaimer clauses cannot be brushed aside. Further, if the Petitioner felt that the actions of the DFO Agra were contrary to law, it ought to have obtained declaration to such effect from the competent court as per Article 11.3(b)(i) of the TSA. Allegations that the DFO Agra violated laws such as the Forest Conservation Act, 1980 (Forest Act), etc. cannot be adjudicated by the Commission under the Electricity Act, 2003.

301. Further, regarding whether wave 1 of the Covid-19 pandemic was force majeure, he submitted that notices issued on 11.03.2020 and 26.03.2020, fail to fulfil the twin test prescribed by Article 11.5.1 of the TSA as the notices are bereft of particulars. Under Article 11 of the TSA, pandemic is nowhere mentioned as a force majeure event. Transmission services, even construction/ laying of transmission lines specifically were exempt under the MHA orders issued from time to time. In support, MHA orders dated 25.03.2020 and 16.04.2020 were referred. Despite the same, 90 days extension was already given by the UPPTCL. Therefore, no further extension due to force majeure is warranted. Apart from 68 days lockdown, pre-lockdown and post-lockdown periods are not force majeure and the Pandemic by itself cannot be treated as force majeure. Only measures such as lockdown pursuant to pandemic can be force majeure. Moreover, Article 4.4.2 of the TSA envisages extension on a day-to-day basis. Therefore, the Petitioner ought to have explained the delay due to Covid-19 on a day-for-day basis.

302. Further, regarding whether wave 2 of the Covid-19 pandemic was force majeure, he submitted that Covid-19 wave 2, which has been alleged to be force majeure qua Element 3 only, also does not amount to force majeure. The notice issued by the Petitioner fails to satisfy the twin test as it is both belated and bereft of material particulars. The MHA order dated 23.03.2021 merely prescribed a test-track-treat protocol and GOUP's order dated 17.04.2021 also did not impose lockdown. Even otherwise, extension has already been granted by the UPPTCL as STU due to Covid-19 wave 2 as well. Therefore, no further extension is warranted.

Regarding the relief on account of force majeure and change in law, he submitted that allegations of force majeure are barred by the principles of res judicata, constructive res judicata and Order II Rule 2 of the CPC. The alleged change in law notice qua Covid-19 was belated and bereft of particulars such as effects on the Petitioner. He extensively argued that the Petition is barred by the principles of res judicata, constructive res judicata and Order II Rule 2 of CPC because while it omitted to seek the claims now being sought, even qua the said reliefs, the Petitioner neither obtained nor was granted any leave to approach the Commission by way of a separate Petition. A cause of action has been held to mean a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been

held from the earliest times to include every fact that is material to be proved to entitle the Petitioner to succeed and every fact which a defendant would have a right to traverse. Cause of action has also been taken to mean that a particular action on the part of the Respondent gives the Petitioner his cause of complaint or the subject matter of grievance founding the action. He further submitted that the Petitioner had filed Petition No. 1850 of 2022 on 17.05.2022. However, the Petitioner was aware as early as February 2022 that liquidated damages were going to be imposed. He referred to the UPPCL letter dated 11.04.2022 and 18.04.2022 of the Petitioner. Thus, in the present case, the Petitioner had raised its claim under the present Petition arising out of an identical factual scenario of the COD, Deemed COD being delayed and consequent declaration of Deemed Commissioning.

303. Further, the MHA order dated 24.03.2020 and NDMA order dated 14.04.2020 do not amount to a change in law in terms of the TSA. In any case, construction of transmission lines was specifically exempt from 16.04.2021 onwards. The Labor Ministry's letter dated 20.03.2020 is merely an advisory and does not qualify as law. It does not satisfy the basic characteristics of law as laid down under the Hon'ble Supreme Court's judgment in the case of Maharaja Shree Umaid Mills v. Union of India, 1963 (Supp) 2 SCR 515. The UP COVID-19 Regulations also do not amount to change in law under the TSA as the Petitioner failed to intimate the LTTCs as to which of its construction sites were demarcated by the Government of UP under such regulations.

304. Regarding the issue pertaining to day visual aids, he argued that the requirement to install day visual aids does not amount to change in law. Despite there being no requirement to obtain the NOC beyond 20 kms, where the Petitioner's lines were passing through, the Petitioner approached the IAF to obtain NOC. The NOC dated 20.02.2020 itself specified the requirement to install obstruction lights and the subsequent letter dated 03.02.2022 merely reiterated the earlier requirement to align with the guidelines issued in 1989. The notice issued by the Petitioner alleging change in law is belated. Therefore, it fails to satisfy the twin test under Article 12.3.1 of the TSA. It cannot seek any extension or financial compensation for the unsuitability of the line. Under the TSA, it is the Petitioner's obligation to obtain and maintain all clearances, consents and permissions. Reliance on disclaimer clauses was reiterated.

Further, day visual aids and obstruction lights being one and the same, were required to be installed in terms of the NOC dated 05.02.2020. The law has been in existence right from 1994 and there is no change in law which occurred in the year 2022.

305. He argued that supervision charges paid by the Petitioner to the WUPPTCL, a private transmission licensee, does not qualify as change in law. Even the Petitioner has admitted that such payment was never mandated by law. Therefore, there cannot be any change in the law. UPPTCL never directed the Petitioner to pay supervision charges. UPPTCL merely participated in the meeting, whereas the Petitioner itself undertook to pay.

306. Sh. Kohli further submitted that the Petitioner's claim for IDC and IEDC is contrary to the provisions of the TSA such as Articles 14.5.1 and 18.12, where the parties agreed to limit their liability to payments expressly mentioned under the TSA. The relief for force majeure is extension of time, which has already been granted qua Covid-19, and no other relief can be granted. For change in law, specific formula is prescribed, and the same has not been triggered. Therefore, the Petitioner is not entitled to any other relief. As the Petitioner is not entitled to any monetary relief, any claim for carrying cost does not arise. Even otherwise, the TSA does not contemplate the restitution. In the absence of a clause for restitution or a clause empowering the Commission to decide the appropriate relief, carrying cost cannot be claimed. He referred to many judgements in support of his arguments on various issues. He also argued that judgments of Hon'ble APTEL and CERC placed by the Petitioner cannot be read like a statute because the arguments taken by the UPPCL have not been considered therein.

307. Ms. Ritu Apurva on behalf of NUPPL adopted the submissions of Respondents 1 to 5 and 7. She submitted that since similar allegations of force majeure due to Covid-19 made by NUPPL are not agreed by the Petitioner, therefore, the Petitioner's allegations of force majeure ought to be disallowed.

308. Sh. Altaf Mansoor appearing on behalf of UPPTCL submitted that UPPTCL is not a proper party to the proceedings. However, the Petitioner always disputed it. Now, when the UPPTCL has made arguments on the merits of the Petition, the Petitioner has argued to the contrary that the UPPTCL is not an affected party or a proper party who can make submissions on merits.

309. Sh. Sourav Roy on behalf of the Petitioner submitted that delay in issuance of working permission by the DFO Agra and Covid-19 are force majeure events in terms of the TSA as they were beyond the Petitioner's control. Besides other reliefs, the Petitioner is entitled to the extension of SCOD without levy of liquidated damages. The DFO Agra acted in violation of Section 2(2) of the Forest Act read with the Forest Conservation Rules. Once conditions were stipulated under Stage-I consent order by the Central Government, the DFO could not impose any additional conditions. Imposition of condition for payment of lease rent for the issuance of working permission amounts to force majeure because the Petitioner could not access construction sites under the DFO Agra's jurisdiction. There is a clear letter issued by the MoEF&CC prohibiting the DFOs from imposing lease rent because payments to CAMPA Funds are being made by transmission licensees. The Petitioner did not approach the appropriate court because it did something better by depositing money under protest. The Petitioner saved time by avoiding litigation. This inures to the benefit of the beneficiaries.

310. Further, he submitted that multiple force majeure and change in law notices issued by the Petitioner have not been responded to by the UPPCL. In law, if notices are not objected, there is waiver and acquiescence by the other party. There is acceptance by sub-silentio. Notices were issued in compliance of the TSA terms.

311. Due to force majeure, the Petitioner is entitled to extension without levy of liquidated damages. Moreover, liquidated damages cannot also be imposed because the UPPCL has not suffered any actual loss because NUPPL's thermal power plant is not ready. Apart from the extension of time without levy of liquidated damages, the Petitioner is entitled to IDC, IEDC and CPV. The TSA entitles the Petitioner to "Relief" under Article 11.7(b). Where there is a delay, there can be extension of time and entitlement to relief. The Petitioner is also entitled to either extension of TSA term or reimbursement of transmission charges during the time there was force majeure. Extension of TSA term and shifting of tariff has been allowed under the Fatehgarh-Bhadla judgment.

312. Further, he submitted that imposition of liquidated damages came only in 2023. Earlier letters merely seek instructions, etc. There was no imposition of

liquidated damages. Therefore, there was no cause of action under Petition No. 1850 of 2022.

NUPPL Written Submission dated 30.05.2024

313. The averments made in the initial submission are not being repeated herein for the sake of brevity and repetition is avoided to such extent.

314. As on the date 7 days prior to the Bid Deadline, a sum equivalent to 3.33% of monthly transmission charges applicable for the Element of the Project for each day of delay upto 60 days and beyond that time limit, at the rate of 5%, failing which the Bank Guarantee can be invoked by the LTTC(s). This is only due to a consequence of the default of the Petitioner under the TSA.

315. In terms of the above, NUPPL has a contractual right to encash the Bank Guarantee if the sums demanded by it are not paid. This is the term of a commercial contract entered into between two commercial entities and cannot be changed or wished away by any authority including the Commission.

316. In any event, the status of NUPPL cannot be compared with the status of LTTC's or any other party. The liquidated damages sought by NUPPL much more than are compared to other LTTCs.

317. The Petitioner is claiming compensation and consequential reliefs for work done despite NUPPL repudiating the notice sent by the Petitioner for requirement of installation of day visual aid vide its letter dated 08.06.2022. For a decision taken by Petitioner on its own, the liability of the same cannot be imposed upon the LTTCs including NUPPL.

318. In fact, Petitioner's claims are baseless and contrary to their stand taken while denying NUPPL's claim of force majeure on account of Covid-19. On the same grounds on which the Petitioner had earlier denied the said claim of NUPPL is the Petitioner is today claiming Force Majeure on account of Covid-19.

319. With regard to the time taken in obtaining working permission from the DFO Agra, the Petitioner has also contended that it did not approach competent court because that would have taken more time. Even in that case, the Petitioner would have sought for consequential reliefs for the said delay in proceedings before the competent court. In any case, the Petitioner had the option to reach out to the competent court and seek for some interim relief.

320. A mere perusal of the prayers in the present Petition and comparing the same with the relief sought in Petition 1850 of 2022 would show that the cause of action for both are identical. The Petitioner should have amended the reliefs sought in the earlier Petition to include the ones that it seeks to pray in this Petition.

321. Terms of a contract are sacrosanct and are binding on the parties. Hence, considering the cap on the extension of the SCOD in Article 4.4.2 of the TSA, extension cannot be sought for a period exceeding 180 days by the Petitioner contrary to the terms of the contract. Reliance is placed on Judgements of the Hon'ble Supreme Court in Haryana Power Purchase Centre v. Sasan Power Limited, 2023 SCC OnLine SC 577 and Gujarat Urja Vikas Nigam Limited v. Renew Wind Energy (Rajkot) Pvt Ltd.

322. Even if there were some delays in getting clearances, there is nothing provided by the Petitioner to show that the delay is covered under Article 11.3 (b) (1) – Natural Force majeure events. Covid-19 is not a force majeure event under Article 11.3 of the TSA (neither is it natural force majeure event nor a non-natural force majeure event). Delays on account of controllable factors shall not be passed through and delay in mobilising workforce by the contractor is a clear controllable factor and a commercial risk of the Petitioner. The delay caused by such controllable factors cannot be passed through to NUPPL. In this regard, reliance is placed on Haliburton Offshore Services Inc. v. Vedanta Limited & Anr, 2020 SCC OnLine Del 2068, Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission, (2022) 4 SCC 657, Phulchand Exports v. O.O.O Patriot, (2011) 10 SCC 300, United India Insurance Company v. Lehru, (2003) 3 SCC 338, and Har Shankar v. Excise & Taxation Commissioner, (1975) 1 SCC 737.

323. The supervision charges paid to the WUPPTCL was never brought to the notice of NUPPL before the present Petition was heard. Under Article 4.1 of the TSA, it is without any doubt the Petitioner's responsibility to acquire required consents, clearances and permits. Since the supervision charges paid to WUPPTCL falls within the category of approvals, permits and consents required to commence the work, the same liability cannot be transferred to NUPPL since the TSA clearly leaves it up to the Petitioner. As per the TSA, the Petitioner is responsible for the supply, erection, and commissioning of PLCC and associated equipment at

both ends of the lines. However, for smoother coordination, NUPPL voluntarily took on the responsibility of supplying all the PLCC and associated equipments at its own expense. This adjustment reduced the Petitioner's original scope as outlined in the TSA. Despite this, NUPPL has not made any claims against the Petitioner. The Petitioner is now requesting compensation for these matters unnecessarily, as they are already the Petitioner's responsibility according to the TSA.

UPPCL & Discom's Written Submission dated 31.05.2024

324. The averments made in the initial submission are not being repeated herein for the sake of brevity and repetition is avoided to such extent.

Contentions of force majeure and change in law are barred by the principles of res judicata and constructive res judicata as well as Order II Rule 2 of CPC 1908 –

325. Pertinently, it was specifically highlighted that if there is omission by the Petitioner to sue for a particular relief, unless such omission has been made with the leave of the court, the Petitioner would not be allowed afterwards to sue in respect of the portion omitted or relinquished. Even in its rejoinder filed in Petition No. 1850 of 2022, the Petitioner neither specifically denied the contention of UPPCL nor obtained leave to sue for the omitted reliefs by way of a separate subsequent petition. Instead, Petitioner merely stated that the submissions of UPPCL were not relevant to Petition No. 1850 of 2022 and that the Petitioner reserved its rights to respond at an appropriate stage if directed by the Commission. However, at no subsequent stage in Petition No. 1850 of 2022, Petitioner denied and responded to the submissions of UPPCL. Therefore, the reliefs of force majeure and change in law sought by the Petitioner do not merit any consideration by the Commission.

326. In the above context, reference is also apposite to the judgment of the Hon'ble Supreme Court in the case of P.K. Vijayan v. Kamalakshi Amma reported as (1994)4 SCC 53 wherein the Hon'ble Supreme Court has held that the principle of constructive res judicata even applies to beneficial legislations.

As per the above, a litigant is expected to raise all pleas available to her at the relevant point in time. It is a sheer abuse of the process of the court to raise, at each successive stages, different pleas resulting in protraction of litigation or

to multiplicity of proceedings. Omission of raising claims/pleas at the time of the original action constitutes constructive res judicata, thereby preventing such party to raise claims at a later point in time. Such claims/pleas are deemed to be waived. These principles squarely apply to the present case as well. The Petitioner's omission to raise claims qua change in law and/or force majeure, which are admittedly one of the reasons for claiming declaration of Deemed Commissioning of Elements 2 and 3, constitutes constructive res judicata and such rights, even if they are assumed to have existed in the first place, are now deemed to be waived.

327. In addition to the above, the reliefs claimed by the Petitioner under the present Petition qua Elements 2 and 3 are also barred by Order II Rule 2 of the CPC 1908.

328. In its rejoinder submissions during the course of hearing of the present Petition, Petitioner submitted that when Petition No. 1850 of 2022 was filed (i.e., as on 17.05.2022), there was no cause of action for seeking extension of SCOD without levy of liquidated damages due to the alleged force majeure events. It is Petitioner's case that the cause of action to seek extension arose only once it was within the Petitioner's knowledge that liquidated damages may be imposed by UPPCL. Such contentions of the Petitioner are factually erroneous and a complete afterthought. Pertinently, levy of liquidated damages due to delay in commissioning was an issue brought to Petitioner's notice even under the letter dated 11.04.2022 addressed to the Petitioner.

Allegation of force majeure due to delay in grant of work permit by the DFO Agra (For Element 2- claimed delay 100 days)

329. There is admittedly no ambiguity or subjectivity surrounding the commencement date which was well within the Petitioner's knowledge. The notice issued by Petitioner on 08.12.2020 is belated. The 7-day period to issue a force majeure notification qua an event commencing on 14.10.2020 expired on 21.10.2020. The Petitioner's notice is more than a month beyond the mandatory 7-day period stipulated under the TSA. Therefore, there is non-compliance with a mandatory term of the TSA which disentitles the Petitioner from claiming any relief in this regard.

330. Article 11.5.1 of the TSA also stipulates that a notice intimating force majeure shall include full particulars of the event of force majeure, its effects on the

party claiming relief and the remedial measures proposed. The letter issued by the Petitioner on 08.12.2020 fails to set out full particulars of the event of force majeure. Without giving reference of any governing legislation, Petitioner states that the "stipulated" timeline of 90 days for the grant of working permission and Stage-II approval has not been followed by the DFO Agra. Therefore, even on this count, the letter dated 08.12.2020 issued by the Petitioner cannot be treated as a force majeure notice issued in compliance with Article 11.5.1 of the TSA, thereby disentitling the Petitioner from claiming relief.

331. The Petitioner had to familiarize itself with the time frame required to obtain working permit from the DFO Agra and whether lease rent premium is required to be paid or not. Mere allegation by the Petitioner that actions of the DFO Agra were contrary to law does not amount to force majeure under the TSA terms.

332. Any unlawful action on the part of an Indian Governmental Instrumentality directed against the Transmission Project can qualify as force majeure only if a competent court of law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down. While there can be no cavil with the fact that the Commission is competent to adjudicate disputes between the Petitioner and the LTTCs under Section 86(1)(f) of the Act, it cannot the be Petitioner's case that the Commission can decide as to whether the actions of the DFO Agra are illegal as being violative of Forest Conservation Act, CAMPA and MOEFCC's letters dated 27.10.2005, 08.08.2014 and 20.08.2020.

333. A declaration that the actions of the DFO Agra were illegal and contrary to the provisions of the Forest Act, CAMPA and MOEFCC's letters dated 27.10.2005, 08.08.2014 and 20.08.2020 necessitates hearing the submissions of the DFO, Agra as well. Otherwise, the principle *audi alteram partem*, which is one of the Principles of Natural Justice, would stand violated. Moreover, the DFO Agra is a statutory functionary and disputes between the Petitioner and the DFO Agra cannot be adjudicated under Section 86(1)(f) or any other provision of the Act. In the absence of declaration by a competent court that the DFO's actions were contrary to law, a presumption cannot be drawn in the Petitioner's favour that the DFO's actions were unlawful. Therefore, even on this count, the Petitioner's allegation of force majeure ought to be rejected.

334. In its note for arguments dated 21.02.2024, the Petitioner has placed reliance on Article 11.3(b)(i) 2nd bullet. Even this provision does not substantiate the

Petitioner's allegations of force majeure. Under the said provision also, it is mandatory for the Petitioner to obtain declaration from competent court of law that revocation of any consents, clearances and permits was unlawful. Additionally, such revocation had to be struck down as unlawful. Be it the 2nd or 3rd bullet of Article 11.3(b) of the TSA, it cannot be the Petitioner's case that the Commission can strike down the action of the DFO Agra as being unlawful, thereby ordering refund of lease rent premium. Having slept over its rights by failing to challenge the DFO's so-called illegal actions, the ramifications now cannot be passed on the ultimate consumers in the State of Uttar Pradesh. It is a settled principle of law that *vigilantibus, non dermientibus, jura subveniunt* (the law gives help to those who are watchful and not to those who sleep).

335. The TSA nowhere stipulates that the UPPCL must object to a force majeure notice or provide assistance. There is no requirement for UPPCL to respond to the Petitioner's allegations by denying or objecting to its force majeure invocation. In fact, quite contrary to the Petitioner's allegations that the UPPCL has accepted invocation of force majeure by the Petitioner due to its conduct or silence, Article 18.18 stipulates that no waiver by either party, regarding performance of provisions of the TSA, would be effective unless such waiver is in writing and duly executed by an authorized representative of such party. Even failure by either party to insist, on any occasion, upon performance of terms, conditions and provisions of the TSA, nor time or other indulgence granted by one party to other shall act as waiver of such breach or acceptance of any variation_or relinquishment of any such right or any other right under the TSA which shall remain in full force and effect. Although there was no requirement in the first place for the UPPCL to object and deny force majeure notices or to assist the Petitioner when UPPCL received a letter from Petitioner purporting to be a force majeure notice, the TSA categorically provides that unless given in writing by an authorized representative, there cannot be any acceptance or waiver. Therefore, such contentions of the Petitioner ought to be rejected as being contrary to the TSA.

Allegation of force majeure due to Covid-19 wave 1 (For Elements 2 & 3: Claimed delay of 150 days)

336. In terms of Article 11.3, pandemic by itself is not force majeure. Only if there is a complete lockdown prohibiting or preventing or unavoidably delaying the

Petitioner's performance can the situation be considered as force majeure. However, under MHA notification dated 24.03.2020 itself, power transmission units and services were exempted from lockdown provisions. Specifically, in terms of an order issued by the MHA on 16.04.2020, construction of transmission lines including laying/erection of power transmission lines in rural areas was exempted from lockdown.

337. As regards the MHA order dated 16.04.2020, which is the only MHA order suppressed by the Petitioner from UPPCL in its letters as well as the Commission under the present Petition, it is relevant to highlight that while construction of transmission lines specifically in rural areas had been exempted, the Petitioner failed to highlight as to whether the construction sites of its transmission lines pass through urban areas or rural areas. When a specific order is issued by the MHA exempting erection and laying of transmission lines in rural areas, in terms of Article 11.5.1 of the TSA, which requires the Petitioner to set-out full particulars, its effects and remedial measures, the Petitioner ought to have set out such particulars if it wished to claim the benefit of force majeure.

338. In terms of Article 11.5.2 of the TSA, the Petitioner was under a mandate to issue force majeure cessation notice. However, while the cessation date of the alleged force majeure due to Covid-19 wave 1 qua both elements of the Project is stated to be 22.08.2020, whereas the alleged commencement of force majeure due to Covid-19 wave 2 qua Element 3 is stated to be 01.04.2021 (i.e., alleged force majeure due to Covid-19 wave 1 and 2 is not a contiguous period), the Petitioner failed to issue force majeure cessation notice for Covid-19 wave 1. Even on this count, Petitioner acted in contravention to the express terms of the TSA.

339. There is no requirement under the TSA for the UPPCL to respond to the Petitioner's allegations of force majeure. In fact, quite contrary to the Petitioner's allegations that the UPPCL has accepted the invocation of force majeure by the Petitioner due to the UPPCL's conduct or silence, Article 18.18 of the TSA stipulates that no waiver by either party regarding performance of provisions of the TSA would be effective unless such waiver is in writing and duly executed by an authorized representative of such party. Even failure by either party to insist, on any occasion, upon performance of terms, conditions and provisions of the TSA, nor time or other indulgence granted by one party

to the other shall act as waiver of such breach or acceptance of any variation or relinquishment of any such right or any other right under the TSA which shall remain in full force and effect. Although there is no requirement in the first place for the LTTCs to object or to provide assistance to the Petitioner when they receive a letter from the Petitioner purporting to be a force majeure notice, the TSA categorically provides that unless given in writing by an authorized representative, there cannot be any acceptance or waiver. Therefore, the Petitioner's contentions deserve to be rejected.

Orders issued to contain Covid-19 pandemic do not amount to change in law under the TSA (Elements 2 & 3) –

340. Petitioner's reliance on the Ministry of Labour & Employment, Government of India letter dated 20.03.2020 is also misplaced. At the outset, it is relevant to highlight that the Petitioner cannot both allege that manpower was unavailable to claim *force majeure* and also claim that manpower was idling, thereby leading to payment of wages/salaries without execution of any work. Such allegations of the Petitioner are self-contradictory and mutually eliminating. Moreover, there are no binding directions which were issued under the aforesaid letter dated 20.03.2020. On humanitarian grounds, the employers were merely appealed not to terminate the services of casual labourers and contract workers. However, any compliance to such appeal is purely out of choice and not a compulsion under "Law" so as to constitute change in law. If the aforesaid letter was intended to issue binding directions, it would not have been qualified as an advisory. In this regard, as held by a Constitutional Bench of the Hon'ble Supreme Court in its judgment in the case of Maharaja Shree Umair Mills v. Union of India, 1963 (Supp) 2 SCR 515, it is a basic characteristic of "Law" that it does not derive authority from mere consensus.

341. Moreover, Article 14.5.1 of the TSA limits the liability of either party. Neither of the parties is liable to the other for any incidental, indirect or consequential damages including claims in the nature of lost revenues, incomes or profits or loss of transmission capacity irrespective of whether such claims arise out of contract or operation of law or otherwise.

342. In view of all the above, there has been no change in law event on account of the Covid-19 pandemic. Even otherwise, the Petitioner is not entitled to relief due to change in law because it has failed to comply with the mandatory terms

of the TSA. Claims of IDC, IEDC and CPV cannot be granted in view of the limitation of liability clauses contained under the TSA read with the settled principles of law.

Apart from extension in SCOD by 68 days due to Covid-19 pandemic wave 1 for Elements 2 & 3, extension being the only named relief qua force majeure, Petitioner is not entitled to any other relief –

343. During the course of rejoinder submissions, the Petitioner orally submitted that UPPCL was not entitled to any liquidated damages because no actual loss has been suffered. A reliance in this regard was placed on the judgment of the Hon'ble Supreme Court in the case of Kailash Nath & Associates vs. Delhi Development Authority, (2015) 4 SCC 136. Such reliance by the Petitioner is misplaced. Under the TSA, being well aware of the law laid down by the aforesaid judgment, the parties have incorporated Article 18.7 which records the acknowledgement of both the parties that breach of any obligations would result in injuries and that liquidated damages are a genuine and reasonable pre-estimate of the damages suffered by the non-defaulting party. Apart from the extensions already granted under STU MOM 1 and STU MOM 2, the Petitioner has been in default of the TSA as Deemed COD or COD has been delayed by it. Therefore, liquidated damages being genuine pre-estimate, are payable as the parties have already acknowledged that any breach by the Petitioner results in injury to UPPCL. The Petitioner has not contended that liquidated damages mentioned under the TSA are not genuine pre-estimates. Therefore, such contention of the Petitioner does not merit any consideration.

344. In fact, under Article 14.5.1 of the TSA, the parties have explicitly agreed that the liability to each other will be limited to what is expressly provided under the TSA. Neither party i.e., the Petitioner nor LTTCs are liable or responsible to the other for incidental, indirect or consequential claims resulting from the non-performance of the TSA or anything done in connection with the TSA including claims such as lost revenues, income or profits and increased expenses irrespective of whether such claims are based on *inter alia* operation of law or otherwise. Therefore, the Petitioner 's consequential claims/reliefs of IDC, IEDC and CPV arising on account of the alleged change in law & force majeure events, are impermissible in terms of the categorical stipulations under the TSA.

345. Petitioner has agreed to such terms under the TSA with open eyes. Therefore, there is no question of delving into whether such claims can or cannot be granted under the exercise of the Commission's regulatory powers which would also run contrary to the law settled by the Hon'ble Supreme Court in the Sasan case (*Supra*). The parties have themselves, of their own volition, agreed not to claim consequential or indirect losses from each other.

The Petitioner is not entitled to loss of tariff or extension of TSA term due to the alleged force majeure or change in law

346. The three events alleged by the Petitioner to be change in law have been denied by the UPPCL. Moreover, apart from Covid-19 wave 1 for Elements 2 & 3 and Covid-19 wave 2 for Element 3, qua which extensions have been granted by virtue of the STU MoM 1 and STU MoM 2 respectively, the Petitioner is not entitled to any further extension due to the alleged force majeure on any count. In fact, regarding Covid-19 wave 2, the Petitioner's failure to comply with mandatory notice terms of the TSA disentitles it from claiming force majeure. It has also been demonstrated that under the TSA, for occurrence of force majeure, the only named relief is extension of SCOD without levy of LD and no other relief can be granted as the parties have contracted under the TSA not to claim any relief which is not named. Therefore, the Petitioner's claims for loss of tariff or extension of the TSA term ought to be disallowed.

347. Specifically, Article 14.5.1 of the TSA bars the Petitioner from claiming lost revenues, income or profits irrespective of whether such claim is premised on contract or operation of law or otherwise. In terms of Article 14.5.1, there is a bar on liability except as provided under the TSA. There is not a single provision that the Petitioner alluded to under the TSA which authorizes it to seek payment of transmission charges even before the Deemed COD i.e., recovery of transmission charges alleged to be lost due to force majeure and change in law. The TSA also does not authorize shifting of tariff stream. Therefore, by virtue of Article 14.5.1, the Petitioner is not entitled to either of the alternative reliefs sought by it.

348. In fact, shifting of tariff stream is also prohibited by Clause 1.1(d) of Schedule 5 of the TSA which stipulates that even if there is extension of SCOD, applicable transmission charges in relation to any Element shall be the transmission charges of the contract year in which COD of the Element occurs or is deemed

to have occurred. Shifting of the tariff stream to commence from the Deemed COD or COD achieved by the Petitioner would run contrary to Clause 1.1(d) of Schedule 5 of the TSA. Therefore, even on this count, the relief sought by the Petitioner cannot be granted.

349. During the course of rejoinder arguments, the Petitioner placed reliance on a judgment dated 13.05.2024 in Petition No. 87/MP/2022 in the case of Fatehgarh -Bhadla Transmission Limited v. Adani Renewable Park Rajasthan Limited & Ors. passed by the CERC to contend that tariff shifting has been permitted by the CERC as well. Be that as it may, the CERC's judgment is not binding on the Commission. In fact, the aforesaid judgment is more in the nature of a consent decree because Fatehgarh-Bhadla Transmission Limited i.e., the Petitioner therein and Adani Renewable Energy Park Rajasthan Limited i.e., the contesting Respondent No. 1 therein are owned by the same group i.e., Adani. Therefore, provisions of the TSA relating to limitation of liability along with principles of law settled in this regard were never highlighted before the Hon'ble CERC and the aforesaid judgment does deal with the contentions advanced by UPPCL against Petitioner in the present Petition. In fact, the Hon'ble CERC's judgment does not analyze the bar contained under Clause 1.1(d) of Schedule 5 of the TSA as the same was not brought to its notice under the aforesaid order. Such an order of a co-ordinate forum, which does not deal with the contentions raised by the UPPCL in the present petition, cannot form the basis for allowing the Petitioner's prayers. In view of the provisions of the TSA highlighted in the present Petition by the UPPCL along with the principles of law settled by the Hon'ble Supreme Court in the Sasan Case (*Supra*) on the impermissibility of exercise of regulatory powers contrary to express terms of the contract, the Commission ought to disallow the Petitioner's prayers.

Petitioner's Written Submission dated 04.06.2024

350. The averments made in the initial submission are not being repeated herein for the sake of brevity and repetition is avoided to such extent.

351. At the time of filing of Petition No. 1850 of 2022, liquidated damages had not even been imposed on the Petitioner. Therefore, the cause of action qua extension of time without levy of liquidated damages had not arisen at the time of filing the earlier Petition (i.e. Petition 1850 of 2022). Liquidated damages were imposed only after the passing of the judgement/order dated 14.02.2023

in Petition No. 1850 of 2022, and, therefore, extension of SCOD without levy of liquidated damages is a subject of the present Petition.

Any levy of liquidated damages would be contrary to law

352. In any case, liquidated damages cannot be imposed in the present case. It is submitted that for levying liquidated damages, a party has to prove that it suffered actual loss as held by the Hon'ble Supreme Court in Kailash Nath Associates vs. DDA, (2015) 4 SCC 136. If actual loss is not suffered, liquidated damages cannot be imposed. The sum named in the contract as payable towards liquidated damages is thus only an upper limit. Subject to the said upper limit, an amount is payable if the party claiming liquidated damages can prove actual loss, which the LTTCs have failed to prove in the present case.

Grant of IDC, IEDC & CPV on account of force majeure & change in law

353. In view of the delay suffered due to the revocation of working permission by the DFO Agra and Covid 19, the Petitioner is entitled to claim appropriate relief on account of its obligations being negatively impacted under the TSA, which, inter alia, include the obligation to be responsible for financing the project in terms of Article 4.1(b) and other obligations as mentioned under Article 4.1 of the TSA.

354. Furthermore, the term '*relief*' has been widely interpreted by the courts to mean the remedy which the adjudicatory forum may afford "in regard to some actual or apprehended wrong or injury" or something which a party may claim as of right, or making the affected party ease out the hardships faced by it.

355. Article 11.7(b) of the TSA entitles to seek 'relief' on account of force majeure. The 'relief' under Article 11.7(b) is in addition to the extension of time on account of force majeure as provided under Article 4.4.2 of the TSA. Extension of time cannot be the sole remedy for an affected party under the TSA as Article 4.4.2 of the TSA anyway provides for the extension of SCOD on account of any force majeure events. Hence, 'relief' of extension of SCOD is already granted to the TSP under Article 4.4.2 of the TSA in case the TSP is affected by the force majeure events. Additionally, it is submitted that Article 11.7 (b) separately provides for 'relief' for a force majeure event which should be seen distinct from the relief of extension of SCOD allowed under Article 4.4.2. Article 11.7 (b) says that the Petitioner is entitled to seek 'relief' on account of force majeure events.

'Relief' is a wide term as interpreted by the Hon'ble APTEL in Parampujya (supra).

356. Article 11.7(b) of the TSA is neither superfluous nor otiose. As it provides for 'relief' over and above Article 4.4.2, the Petitioner is entitled to reliefs in the form of IDC, IEDC, CPV and other consequential reliefs. Any other interpretation would render Article 11.7 (b) totally otiose.

357. Therefore, for any delay caused due to force majeure and change in law events, the Commission has powers under Section 86(1)(a) and 86(1)(c) of the Act to compensate the Petitioner qua IDC, IEDC, Commodity Price Variation and any other incidental costs. The above costs, which were not envisaged at the bid deadline, are required to be allowed as per the principles contained under Sections 61 and 62 read with Section 86(1)(a) of the Act.

358. UPERC MYT Regulations, 2019 specify that the Transmission Licensees are eligible to recover IDC and IEDC in case the delay in achieving the SCOD is not attributable to such transmission licensees, i.e., the delay in achieving the SCOD is due to uncontrollable factors like force majeure and change in law events. The same principle should apply to the transmission projects conceived under Section 63 of the Act, since the transmission licensees, whether covered under Section 62 or 63, are equally affected by force majeure and change in law events by incurring additional expenditure in terms of IDC, IEDC and CPV. In this context, it is important to mention that the Petitioner had claimed certain force majeure and change in law events which have delayed the implementation of the project due to reasons not attributable to it and beyond its control, whereas the claim for IDC & IEDC is a consequential relief claimed for such events. It would be manifestly arbitrary and opposed to Article 14 of the Indian Constitution if the transmission projects under Section 63 of the Act are not allowed this relief.

359. Moreover, reliance is placed upon the order dated 29.09.2022 in Petition No. 685/TT/2022, titled as Power Grid Corporation of India Limited vs Tamil Nadu Generation and Distribution Corporation Limited & Ors., wherein the Hon'ble CERC has allowed IDC, IEDC and CPV.

360. Additionally, reliance is also placed on order dated 20.02.2014 in Petition No. 160/GT/2012, titled as Udupi Power Corporation Ltd vs. Power Company of Karnataka Ltd & Ors., wherein the Hon'ble CERC allowed IDC and IEDC.

361. Further, reliance is also placed upon an order dated 11.03.2023 in Petition No.333/MP/2019, titled as POWERGRID NM Transmission Limited vs. IL&FS Tamil Nadu Power Company Limited & Ors., wherein the Hon'ble CERC allowed IDC, IEDC and price variation to a Section 63 project.

362. The Petitioner also refers to certain additional judgments of the Hon'ble Supreme Court where the word 'and' has been interpreted as 'or'. The said judgments are as under:

i. Samee Khan vs. Bindu Khan, (1998) 7 SCC 59 (para 14);

ii. Ishwar Singh Bindra vs. State of U.P., AIR 1968 SC 1450 and

iii. Maharishi Mahesh Yogi Vedic Vishwavidyalaya vs. State of M.P., (2013) 15 SCC 677

363. The Petitioner also relies on the Guidance on PPP Contractual Provisions (2019 Edition) as issued by the World Bank, which also recognizes that an affected party may incur additional interest and commitment fees and the costs of rescheduling its repayment obligations due to the delay caused by a force majeure event. The aforementioned Guidance also suggests grant of compensation on account of the delay to make up for increased pre-finance costs during the construction phase which is in addition to the extension of time.

364. Accordingly, an amount of Rs. 99.08 Crore is sought towards IDC, IEDC and CPV and the same is reproduced below:

Elements	IDC (Rs. Cr)	IEDC (Rs. Cr)	CPV (Rs. Cr)	Total (Rs. Cr)
Element-2	11.60	18.88	5.54	36.02
Element-3	25.22	16.28	21.55	63.05
Total	**36.83**	**35.16**	**27.09**	**99.08**

Petitioner's entitlement for loss of tariff or, alternatively, for extension of TSA term

365. The bidding guidelines issued under Section 63 of the Act do not envisage or provide for a mechanism/ situation whereby the TSP/Transmission Licensee is able to seek recovery of loss of tariff on account of delay in the implementation of the transmission system. As a result of the same, the Transmission Service Agreements executed for Section 63 projects do not envisage such a recovery mechanism on account of the wording of Schedule 5 [Clause 1.1(d)] of TSA,

and the year-wise transmission charges as reflected under Schedule 6, for each of the 35 years of the TSA. Clause 1.1(d) of Schedule 5 of TSA.

366. Further, Clause 1.1 (d) of Schedule 5 is also not aligned with the definition of the term "Expiry Date" under Article 1.1.1 which stipulates that the term of the project shall be 35 years from the SCOD. Further, Clause 1.1 (d) of Schedule 5 is applicable when the delay is attributable to licensees as Clause 1.1 (d) of Schedule 5 does not refer to an extension of the time period under Articles 4.4, 11 & 12 of the TSA. Therefore, when the delay is not attributable to the licensees, but, the project is delayed due to force majeure or change in law, then Clause 1.1(d) of Schedule 5 is not applicable.

367. As per the standard PPA issued by the Ministry of Power for TBCB generation projects, the tariff applicable is always the tariff quoted for the first year even if the commissioning of the power project gets delayed. Thus, the power projects under Section 63 are assured recovery for the full contract period of 25 years even in cases of delay in the commencement of supply from the SCOD. All other Agreements such as Road/Ports etc. have provided for such an eventuality in their Agreements. In fact, the MOP has itself recognized the above anomaly and revised the 2008 Standard Bidding Document (SBD) vide its notification dated 06.08.2021. The TBCB projects awarded under the new SBDs have ensured "tariff-shift" by aligning the COD with the first year of tariff, thus ensuring full recovery of transmission charges as per the bid.

Non-applicability of Order II Rule 2 of CPC

368. The earlier Petition, i.e., Petition No. 1850 of 2022 was decided vide a detailed judgement/order on 14.02.2023, and the Petitioner was only foisted with liquidated damages vide a letter dated 24.03.2023. Therefore, the cause of action for condonation of delay arose much later.

369. The term "cause of action" has been explained by the Hon'ble Supreme Court in Church of Christ Charitable Trust & Educational Charitable Society vs. Ponniamman Educational Trust, (2012) 8 SCC 706 to mean a bundle of facts which, taken with the law applicable to them, gives the plaintiff the right to relief against the defendant. It is submitted that the bundle of facts for change in law, force majeure, etc., giving the cause of action to the present Petition are totally different from Petition No. 1850 of 2022, and that there is no correlation with the cause of action in Petition No. 1850 of 2022.

Commission's View

370. The Commission heard the matter at length and upon careful perusal of the oral arguments presented during the hearing and the submissions made by the parties during the proceeding, frames following issues for consideration and determination:

(1) Whether reliefs sought by the Petitioner in respect of Element-2 and Element-3 are barred by Order II Rule 2 of CPC and/or res-judicata/ constructive res-judicata?

(2) Whether the event(s) claimed by the Petitioner as force majeure qualify as force majeure event(s) as per Article 11 of the TSA for Petitioner to get consequential relief in the form of extension of SCOD, IDC, IEDC, Commodity Price Variation and carrying cost?

(3) Whether following events are qualified as Change in Law events under Article 12 of the TSA for Petitioner to get consequential reliefs in the form of IDC, IEDC, Commodity Price Variation and carrying cost?

a. Outbreak of Covid 19 and various notifications to that effect

b. Imposition of condition by the Indian Air Force to install Day Visual Aids outside 20 km radius of the defence aerodromes.

c. Payment of supervision charges to WUPPTCL.

(4) Whether Petitioner is entitled for compensation on account of loss of tariff or for shifting of tariff stream?

(5) Whether the Petitioner is liable to pay liquidated damages in case of delay in commissioning of Element(s) of the Project?

371. Let us consider all above issues for deliberation sequentially-

Issue No. 1: Whether reliefs sought by the Petitioner in respect of Element-2 and Element-3 are barred by Order II Rule 2 of CPC and/or res-judicata/constructive res-judicata?

372. The Respondents have argued that claims in respect of Element 2 and Element 3 are barred by the principles of constructive res judicata/provisions of Order II Rule 2(2) and Order II Rule 2(3) as the Petitioner has already exhausted its opportunity of approaching the Commission qua delay in achieving deemed COD of Element 2 and 3 under Petition No. 1850 of 20222, which was filed by

Petitioner while seeking declaration of deemed Commissioning for Element 2 and 3. According to Respondents, the cause of action is same in both the Petitions (1850 of 2022 and the present Petition), and the Petitioner did not crave leave of the Commission to omit the prayers pertaining to alleged force majeure and change in law. Having done that Petitioner has voluntarily relinquished its claim. Further levy of liquidated damages due to delay in commissioning was an issue brought to GTL's notice even under dated 11.04.2022 and Petitioner vide letter dated 18.04.2022 responded to the same, which is pre-date the filing of Petition No.1850 of 2022 o 17.05.2022.

373. On the contrary, the Petitioner has argued that the cause of action for filing the Petition No. 1850 of 2022 before the Commission was the declaration of deemed COD of Elements 2 and 3 and the payment of transmission charges by the LTTCs to the Petitioner. Whereas the cause of action for filing the present Petition pertains to revocation of working permission by DFO Agra, Covid-19 Pandemic and nationwide lockdown on account of Covid-19 Pandemic as force majeure and imposition of requirement to install day visual aids, notifications for Covid 19 and levy of supervision charges by WUPPTCL as 'Change in Law' under Article 12 of the TSA. Furthermore, the claim with regard to the IDC, IEDC, CPV, carrying cost and Loss of Tariff is sought on account of the delay caused by the associated force majeure and change in law event.

374. In order to deal with above issues, let us first examine relief sought under Order dated 14.02.2023 passed in Petition No. 1850 of 2022 and pertinent legal framework. The Petitioner in Petition No. 1850 of 2022 had prayed as follows:

(a) Admit the Petition;

(b) Hold and Declare that the Petitioner achieved Deemed Commissioning of Element 2 of the Project on 26.03.2021 in terms of Article 6.1 of the TSA;

(c) Hold and Declare that the Petitioner is entitled to payment of Monthly Transmission Charges equal to 52.05% of Tariff towards Element 2 in terms of Article 6.2.2 of the TSA from 26.03.2021 onwards;

(d) Hold and Declare that the Petitioner achieved Deemed Commissioning of Element 3 of the Project on 25.12.2021 in terms of Article 6.1 of the TSA;

(e) Hold and Declare that the Petitioner is entitled to payment of Monthly Transmission Charges equal to 43.96% of Tariff towards Element 3 in terms of Article 6.2.2 of the TSA from 25.12.2021 onwards;

(f) *Direct the LTTCs to pay the Monthly Transmission Charges to the Petitioner; OR*

Apply Defaulter's Liability Principle to give effect to prayers (c) and (e) hereinabove;

(g) *Direct that the Petitioner be paid LPS on the monthly transmission charges to the Petitioner in terms of Article 10.8.1 of the TSA;*

(h) *Pass such other order(s) and / or direction(s) as this Commission may deem fit and proper in the facts and circumstances of the case."*

375. From above and on perusal of Order dated 14.02.2023, it is observed that the Petitioner, in the earlier Petition No. 1850 of 2022, approached the Commission for declaration of deemed COD of Element 2 and Element 3. The Petitioner sought this declaration because they were not receiving payment for transmission charges despite completing their work. It was necessary for the Petitioner to approach the Commission as there was dispute regarding date of deemed Commissioning and the responsibility for paying transmission charges once the deemed commissioning was upheld by the Commission. Therefore, the cause of action in the earlier Petition No. 1850 of 2022 was primarily about upholding the deemed commissioning and identifying the entity responsible for paying the transmission charges from the date of deemed commissioning.

In contrast, the present petition concerns declaring reliefs due to delays in commissioning caused by force majeure/change in law events. The relief sought in the present petition involves compensation/other relief in terms of TSA for delay in commissioning, non-imposition of liquidate damages, seeking IDC, IEDC, CPV, carrying cost and loss of tariff or change in tariff stream. Therefore, the cause of action in this case is the non-recognition of alleged force majeure/ change in law events by the Respondents, the imposition of liquidated damages, and associated reliefs.

376. Order II Rule 2 stipulates that if a Petitioner is entitled to several reliefs against the Respondents based on the same cause of action, he cannot split the claim to omit one part of the claim and sue for the other. If the cause of action is the same, the Petitioner must present all his claims in one suit, as Order II Rule 2 is premised on the cardinal principle that the defendant should not be vexed twice for the same cause. One of the objects of Order II Rule 2 is also to prevent multiplicity of litigations. However, Order II Rule 2 does not mandate that when multiple causes of action arise from one transaction, the Petitioner must sue for

all of them in a single suit. The rule states that when there is one cause of action, the Petitioner cannot split it into parts to bring separate suits for each part. Therefore, Order II Rule 2 of the Code of Civil Procedure does not bar a second suit on a different cause of action.

377. The test for applicability of Constructive Res- Judicata or Order II Rule 2 of CPC has been laid down by Hon'ble Supreme Court in Gurbax Singh v. Bhooralal, (1964) 7 SCR 831, wherein it has been held that the bar on account of Constructive Res-Judicata or Order II Rule 2 of CPC would operate only if the identity of the 'cause of action' in previous proceeding and subsequent proceeding is similar and the plaintiff was entitled to seek more than one relief in respect of such 'cause of action'. The relevant portion of the Judgment is quoted below:

> *"6. In order that a plea of a Bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises plea must make out; (i) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit has been filed....."*

The term 'cause of action' has been further explained by the Hon'ble Supreme Court in Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust, (2012) 8 SCC 706, wherein it was held that the 'cause of action' is a bundle of facts which are taken with the law applicable to them and gives the plaintiff the right to relief against the defendant. Further, for putting the issue in perspective, we may suitably refer to judgement of the Hon'ble Supreme Court in Deva Ram & Anr. v. Ishwar Chand & Anr. (1996 6 SCC 733), wherein it was held that:

> *"15. In Sidramappa v. Rajashetty, it was laid down that if the cause of action on the basis of which the previous suit was brought, does not form the foundation of the subsequent suit and in the earlier suit the plaintiff could not have claimed the relief which he sought in the subsequent suit, the latter namely, the subsequent suit, will not be barred by the rule contained in Order 2 Rule 2, CPC."*

378. Further, it is a matter of fact that the Petition No. 1850 of 2022 was filed on 17.05.2022 and on perusal of the contents of UPPCL letter dated 21.02.2022 and 11.04.2022 through which Respondents have claimed that Petitioner was

informed about imposition of liquidated damages, cannot be said to be imposition of liquidated damages as letter dated 21.02.2022 is an internal communication held between two wings of UPPCL with a copy to Petitioner and letter dated 11.04.2022 only requires the details of MVA capacity, circuit KM and procedure for calculation transmission charges of Sub elements of Element 2. Further, these letters also do not specify any amount of liquidated damages and cannot be treated as imposition of liquidated damages on the Petitioner. The liquidated damages of approximately Rs. 44.40/- Crore were only imposed on the Petitioner on 24.03.2023, which is after the filing of Petition and even after passing of Order dated 14.02.2023 in Petition No. 1850 of 2022.

379. Considering above facts and circumstances of the case, it is observed that cause of action in earlier Petition was different as neither the liquidated damages were imposed on the Petitioner at the time filing of Petition No. 1850 of 2022 nor the date of deemed COD was confirmed. Whereas, in the present case, cause of action is levy of liquidated damages and certain other reliefs on the premise that SCOD is allowed. It is pertinent to mention that the confirmation of deemed COD was important for getting the payment of transmission charges as the Petitioner was not getting paid for transmission charges despite it had completed its scope of work under the TSA. The payment of transmission charges was essential for survival of the project including regular debt payments etc. Accordingly, the Commission is of the view that the cause of action in earlier Petition was different than the cause of action, which instigated present filing of Petition/reliefs. Accordingly, in our considered view, the bar under Order II Rule 2 of the Code of Civil Procedure, res judicata/constructive res judicata is not attracted. Hence, arguments of Respondents to this effect are rejected.

Issue No. 2: Whether the event(s) claimed by the Petitioner as force majeure qualify as force majeure event(s) as per Article 11 of the TSA for Petitioner to get consequential relief in the form of extension of SCOD, IDC, IEDC, Commodity Price Variation and carrying cost?

380. To deal with force majeure issues in detail, it would be imperative to first highlight the relevant provisions of the TSA. The relevant extract of Article 11.3 of the TSA is reproduced as below:

"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

- *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

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As per above, for an event, circumstance or combination of events and circumstances to qualify as force majeure, certain conditions must be met. These conditions are that such events or circumstances are not within the reasonable control, directly or indirectly, of the affected party and could not

have been avoided even if the affected party had taken reasonable care or complied with prudent utility practices. To qualify as a force majeure event, it is necessary to establish that the event/circumstance was beyond the reasonable control of the party and could not have been avoided even with the exercise of reasonable care.

381. 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 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.*
>
> ----------"

From the above provision of the TSA, it is concluded that a force majeure notice must be issued by the affected party as soon as reasonably practicable, but not later than seven days after the affected party knew or should have reasonably known of the commencement of force majeure event. The use of the terms 'such notice' being a pre-condition for entitlement to claim force majeure relief denotes that Article 11.5.1 of the TSA must be interpreted strictly. Further, the force majeure notice must include full particulars of the alleged event of force majeure, its effects on the party claiming relief and the remedial measures proposed. Additionally, the affected party must give the other party regular reports on the progress of those remedial measures. Further, any notice under the TSA should have been addressed to the LTTCs in terms of Article 18.21.3 of the TSA.

382. Article 4.4 of the TSA provides as under:

"4.4 Extension of time:

.....

4.4.2 In the event that an Element or the Project cannot be commissioned by its Scheduled COD on account of any Force Majeure Event as per Article 11, the Scheduled COD shall be extended, by a 'day for day' basis, for a maximum period of one hundred and eighty (180) days. In case the Force Majeure Event continues even after the maximum period of one hundred and eighty (180) days, the TSP or the Majority Long Term Transmission Customers may choose to terminate the Agreement as per the provisions of Article 13.5.

4.4.3 If the parties have not agreed, within thirty (30) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on how long the Scheduled COD should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 16."

The above provision of TSA is relevant to discuss here as it has been argued by the Respondents that the SCOD on account of any force majeure event, as stipulated under Article 11 of TSA, can be extended for a maximum of 180 days only. In this regard, it would be appropriate to discuss the same subsequently.

From perusal of Article 4.4 of the TSA, it is observed that the SCOD on account of force majeure event shall be extended for a maximum of 180 days. However, in case force majeure event continues beyond 180 days, the LTTCs have an option to terminate the agreement. Further, it is observed that only after a time period of 180 days, either the TSP or the LTTCs can terminate the TSA. Since the TSA has not been terminated and the transmission Project has been implemented, the said time limit loses its relevance. It is a cardinal principal of law that in any statue/document, if any, activity is expected to be done in a certain manner then the same can be done in only that manner and no other. Accordingly, the maximum time limit of 180 days is only for the purpose of termination of agreement and nothing else. Accordingly, if no termination has been effected after 180 days, then this clause cannot be invoked for the purposes of limiting any other legal right/obligation emanating from TSA. The interpretation of 180 days limit is for the purpose of invoking termination provisions of the TSA, if any, and not a limiting provision for providing time extension in case of force majeure events. Further, if parties have not agreed

within 30 days that how long the Schedule COD should be deferred then any party may raise the dispute to be resolved in accordance with Article 16, which relates to dispute resolution, under which present matter is before the Commission.

383. It is pertinent to note that the Petitioner has not pressed the protest against Citizenship Amendment Bill as a force majeure event, as the Commission did not allow the same in its Order dated 03.10.2022 in Petition No.1824 of 2022, involving another transmission licensee, OBCTL. Therefore, as submitted before us, the issues remaining for our consideration are the delays caused by the outbreak of Covid-19 first & second waves and delay in issuance of working permission by the DFO Agra. Accordingly, these two issues are examined to adjudge whether they qualify as force majeure events in light of the provisions of the TSA.

Outbreak of Covid-19 (First wave & Second wave)

384. The Petitioner, vide notice dated 26.03.2020, issued notice to UPPTCL and LTTCs regarding force majeure on account of outbreak of Covid-19 in the Country. It was informed that as a precautionary measure to restrict the spread of Covid-19, a nationwide lockdown was imposed for 21 days starting from 25.03.2020. Due to the imposition of lockdown and restriction in movement, the Petitioner faced various issues related to non-availability of goods and material, disruption of supply and execution schedule, less administrative support from the Government, problems arising out of transportation and accessibility issues, delay in compensation payment to landowners, availability of manpower, unworkable condition, etc. Subsequently, various notices vide dated 15.04.2020, 04.05.2020, 18.05.2020, 06.06.2020, 04.07.2020, 20.08.2020, 14.09.2020, 20.10.2020 and 29.04.2021 were sent to LTTC's to update them regarding the prevailing situation with respect to Covid-19 and how the same were affecting the Petitioner in completion of the project. It has been averred by the Petitioner that his activities of transmission line came to a halt with effect from 25.03.2020.

385. It is pertinent to mention that National Disaster Management Authority issued order dated 24.03.2020 directing Ministries/Departments of Government of India (GOI), State Governments and State Authorities to take measures to prevent the spread of Covid-19 in the country. In pursuance of the same,

Ministry of Home Affairs issued order dated 24.03.2020 and various subsequent guidelines from time to time for their strict implementation. The Government of Uttar Pradesh also issued guidelines from time to time.

386. The Commission has observed that the Petitioner had issued various force majeure notices to LTTCs and UPPTCL on various occasions informing them of the force majeure situation caused by the outbreak of Covid-19 pandemic. The GOI and various authorities acknowledged the impact of Covid-19 and allowed extensions of SCOD. For instance, MOP vide notification dated 27.07.2020, allowed a five-month extension to all inter-state transmission projects that were under construction as on date of lockdown, i.e. 25.03.2020. Further, MOP vide notification dated 12.06.2021 provided another three-month extension to inter-state transmission projects, that were under construction with SCOD after 01.04.2021. Further, MNRE, vide its Office Memorandum dated 17.04.2020, recognized Covid-19 as a force majeure event and granted similar extensions for SCOD. Considering the extraordinary circumstances brought about by the Covid-19 pandemic and nationwide lockdown, and in compliance with the Ministry of Home Affairs' order dated 30.05.2020, UPPTCL also granted a three-months extension for its turnkey projects/supply contracts/work contracts on 25.03.2020 with provision to consider relaxation on case-to-case basis or as a whole depending on the evolving situation. Further by way of the Minutes of Meeting dated 13.10.2021, UPPTCL further granted extension for transmission projects affected by second wave of Covid-19 for three months.

387. Though Petitioner has heavily relied on two notifications dated 27.07.2020 and 12.06.2021 issued by MOP, it needs to be stated upfront that the Commission vide its Order dated 03.10.2022 in Petition No. 1824 of 2022 had categorically held that these notifications specifically apply to inter-state transmission projects only. Therefore, the same would not be applicable on intra state transmission projects mutatis mutandis. However, in the said order the Commission opined that Covid-19 was an extraordinary situation, therefore, the Commission would decide force majeure, on case-to-case basis, considering scope of project, extent and duration of impact and its effects etc.

It is pertinent to mention that construction activity at various transmission project sites were severely affected by the first and second waves of Covid-19 pandemic and various measures had been taken by the Central and State

Governments to contain the pandemic. Upon examining the facts and circumstances of the case regarding Elements 2 and 3, the Commission observes that the Petitioner had given proper notices of force majeure event as per Article 11.5.1 and had also demonstrated that it was affected by the events, circumstances, which qualify as force majeure event under Article 11 of the TSA. Thus, the Petitioner can be permitted to seek extension of time on account of Covid-19 pandemic. Therefore, the Commission is of the view that the spread of Covid-19 is to be considered as a case of natural calamity and force majeure can be invoked in the instant case.

Although, above mentioned MOP notifications regarding extension of SCOD specifically apply to inter-state transmission projects only, however, the Commission, in order to grant relief on case-to-case basis for allowing time duration for extension of SCOD on account of force majeure due to Covid-19, had decided to rely on these MOP notifications so that relief of similar nature are extended to affected intra state transmission projects. Therefore, keeping in view the extension of SCOD allowed by the Commission on account of the order of the Ministry of Power dated 27.07.2020 (5 months), the SCOD of Element 3 would fall after the cut-off date of 01.04.2021. As a result, Element 3 of the Petitioner, being under construction as on 01.04.2021, will squarely be covered by the subsequent Ministry of Power order dated 12.06.2021, which makes it eligible for further extension of 3 months. However, in case of Element 2, it is observed that after giving 5 months of extension on account of Covid-19 first wave, the SCOD would fall before the cut-off date of 01.04.2021. Therefore, Element 2 is not eligible for subsequent three-month extension as extended SCOD falls short of cut-off date of 01.04.2021.

388. It is observed that the SCOD (Scheduled Commercial Operation Date) of Element 2 and Element 3 under the TSA (Transmission Service Agreement) were 26.09.2020 and 26.03.2021, respectively. With a five-month extension granted due to the first wave of Covid-19, the SCOD of Element 3 falls after the cut-off date of 01.04.2021. Consequently, Element 3, being under construction as of 01.04.2021, is covered by the subsequent Ministry of Power order dated 12.06.2021. However, for Element 2, the SCOD falls before the cut-off date, specifically on 26.02.2021. Therefore, Element 2 is not covered by the Ministry of Power order dated 12.06.2021.

The Commission acknowledges the delays caused by force majeure events due to the Covid-19 pandemic, specifically from 25.03.2020 to 24.08.2020 (five months) for both Element 2 and Element 3, and from 01.04.2021 to 30.06.2021 (three months) for Element 3 only. Accordingly, the Commission allows delays of five months for Element 2 and eight months for Element 3 due to the Covid-19 pandemic.

Working permission by Divisional Forest Officer, Agra

389. The Petitioner argued that DFO Agra granted working permission for 5.9191 Ha forest land on 05.08.2020, i.e. after a delay of 189 days. However, this permission was revoked vide letter dated 14.10.2020 on the ground that the Petitioner has not paid the lease rent. The Petitioner contends that DFOs in other districts had granted working permission without requiring the lease rent. The DFO Agra should not have demanded payment of lease rent, as this stipulation was not included in the Stage-I Forest clearance on 06.01.2020.

Further it is argued that the State of Uttar Pradesh did not mention any condition for execution of lease deed viz payment of lease rent, while forwarding the proposal for seeking prior approval of Central Government. Therefore, additional conditions have been imposed by DFO Agra after in-principle approval of Stage-I clearance, which is violative of guidelines. Such a condition is not mentioned in the in-principle approval as well as final approval letter issued by MoEF&CC.

390. The Respondents have argued that Article 11.3(b)(i) of the TSA stipulates that the unlawful, unreasonable or discriminatory refusal for grant of any "Consents, Clearances and Permits" required for development of the project amounts to force majeure, provided that a Competent Court of Law declares the same to be unlawful, unreasonable or discriminatory and strikes the same down. Therefore, if Petitioner felt that the timeline stipulated under MoEF&CC guidelines was not being adhered by the authorities in an unlawful, unreasonable or discriminatory manner, it ought to have approached a "Competent Court of Law", which would have heard both Petitioner as well as the aforesaid authorities. The definition of "Competent Court of Law" under TSA, employed by Article 11.3(b), does not exclusively mean the Commission. Further, Respondents have stated that letter dated 08.12.2020 does not qualify as a valid force majeure notice in terms of the TSA as notice came to be issued only on 08.12.2020, which is much later than the 7-day deadline prescribed by Article 11.5.1 of the TSA.

391. At the outset, it would be pertinent to address whether the Commission is a competent court of law to decide alleged force majeure event on account of delay/revocation in working permission by DFO Agra. In this regard, it is observed that the Competent Court of Law is already defined under TSA as the Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the project. Section 86(1)(f) of the Electricity Act 2003 clearly casts obligation upon the Commission to adjudicate upon the disputes between the licensees and generating companies. Hence, there is no doubt that the Commission being a quasi-judicial body has inherent jurisdiction to adjudicate the issues relating with the project under Section 86(1)(f) and in terms of TSA. Further, it is pertinent to mention that the Commission is not addressing the dispute between DFO Agra and the Petitioner, but it is merely deciding whether the force majeure event has taken place or not, which is the area of dispute between entities falling under Section 86 (1)(f) of the Act, based upon the facts and circumstances reflected though various documents placed before it. Considering above, it is established that the Commission is a competent court of law to decide the alleged force majeure event regarding delay due to alleged revocation of working permission by Divisional Forest Officer, Agra.

392. Having established that the Commission is competed court of law to decide the issue, we will now look at the facts and records placed before us by the parties and decide upon the issue. The Commission has observed that the Petitioner had approached DFO Agra for grant of working permission in respect of 5.9191 Ha Forest land on 29.01.2020 and working permission was granted to it on 05.08.2020. However, the working permission was revoked on 14.10.2020. Therefore, the Petitioner issued the force majeure notice on 08.12.2020 intimating LTTC's regarding revocation of working permission and subsequently cessation notice was given on 01.02.2021. The Commission has perused various communications held between forest department & Petitioner and force majeure notice dated 08.12.2020 issued by the Petitioner. On perusal of the same, it is observed that the Petitioner has not able to produce any documentary evidence that the lease rent was not required to be submitted earlier whereas, it is found that the condition of lease rent was the state government's condition for processing and forwarding the proposal arising out of Uttar Pradesh Forest Department Order dated 19.07.1999. Therefore, the Commission is of the view

that revocation of working permission due to nonpayment of lease rent was not unlawful or unreasonable accordingly, it does not fall under Article 11(b) third bullet of TSA, which stipulates occurrence of force majeure due to unlawful, unreasonable or discriminatory action on part of an Indian Governmental Instrumentality. Thus, the contention of the Petitioner that delay on account of force majeure due to revocation of working permission by DFO Agra is rejected.

393. In view of above, the Petitioner is entitled for extension of SCOD only on account of Covid-19 pandemic as force majeure event. Thus, the revised SCOD after extension allowed by the Commission comes out to be 26.02.2021 of Element 2 from earlier SCOD of 26.09.2020, after an extension of five months and 26.11.2021 for Element 3 from earlier SCOD of 26.03.2021, after an extension of eight months as discussed in para 387.

394. Further, with respect to other consequential relief on account of force majeure event, the Commission is of the view that as per the TSA, there is no compensation specified for the force majeure event except for relief in the form of an extension of SCOD and protection from levy of liquidated damages.

Issue No. 3: Whether following events are qualified as Change in Law events under Article 12 of the TSA for Petitioner to get consequential reliefs in the form of IDC, IEDC, Commodity Price Variation and carrying cost?

(a) Outbreak of Covid 19 and various notifications to that effect

(b) Imposition of condition by the Indian Air Force to install Day Visual Aids outside 20 km radius of the defence aerodromes.

(c) Payment of supervision charges to WUPPTCL

395. There are three events for which Petitioner has raised claim for Change in Law event(s). Let us take each one by one

Outbreak of Covid 19 and various notifications to that effect

396. The Petitioner has relied upon various notifications issued by Ministry of Home Affairs and National Disaster Management Authority imposing lockdown under the National Disaster Management Act, 2005, which according to him would qualify as 'Law' under Article 12 of the TSA. These notifications were issued after the submission of the bid by Petitioner and thus, according to Petitioner, would

qualify as a Change in Law event under Article 12 of the TSA. We find that the Petitioner has relied upon NDMA order dated 24.03.2020, MHA guidelines dated 24.03.2020 and subsequent guidelines issued thereof, Ministry of Labour & Employment, Government of India directives and Uttar Pradesh Epidemic Disease Covid-19 Regulation, 2020 for seeking "change in law" claims.

397. The Commission has perused NDMA order dated 24.03.2020 along with MHA order dated 24.03.2020. It is observed that the NDMA order provided National Executive Committee to issue necessary guidelines under Section 10(2)(i) of the Disaster Management Act 2005 and ministries/State governments to take measures for ensuring social distancing so as to prevent the spread of Covid 19 in the Country. Thereafter, Ministry of Home affairs vide order 24.03.2020 issued guidelines on the measures to be taken by Ministries/Departments of Government of India, State/UT Governments and State/UT Authorities for containment of Covid-19 in the country. Firstly, it is observed that these are guidelines issued under Disaster Management Act 2005, which merely provided various protocols to be followed by the authorized persons defined therein. Moreover, exception was carved out for electricity companies/corporations etc. in the said guidelines which permitted them to operate and accordingly electricity companies/corporations were excluded to that extent. Further, MHA vide order dated 16.04.2020 made it unambiguously clear that laying/erection of power transmission lines will be allowed to continue and were excluded thereunder for the said purpose, which thus does not constitute change in law under the provisions of the TSA. Furthermore, the Petitioner has not produced any material before us to substantiate as to how this has led to incremental expenditure, as claimed in the Petition, in furtherance to his change in law claim. To substantiate a Change in Law claim, the one must provide detailed explanations of how each notification affected operations, with examples of disruptions, and it must include due effect of Commodity Price Variation. **Financial records demonstrating incremental expenditure attributable to Commodity Price Variation, with a breakdown of costs such as increased labour and compliance expenses, are essential. It is necessary to substantiate that these costs were incurred due to compliance with guidelines, supported by a clear timeline correlating the issuance of guidelines with their operational impacts.** Furthermore, a comparative analysis of operational costs before and after the guidelines, due

to **Commodity Price Variation**, should be presented. This analysis should be backed by independent audits that verify the accuracy of these claims. Additionally, supporting correspondence with stakeholders and internal communications in response to the notifications should be included to provide holistic context. However, the Petitioner has not provided any such documentation to support his case before us.

398. The Commission also observed that the communication dated 20.03.2020 issued by Ministry of Labour & Employment, Government of India was also in the nature of advisory to all the employers to extend their coordination by not taking any adverse action in terms of termination of employees, reduction of wages, etc. Therefore, this letter of the Ministry of Labour & Employment cannot be considered as "Change in Law", as claimed by the Petitioner.

399. Further on perusal of Uttar Pradesh Epidemic Disease Covid 19 Regulations 2020 dated 14.03.2020, it is observed that it also merely provided various protocols to be followed by the authorized persons defined therein and Petitioner has not been able to establish how this notification affected the Petitioner and its impact thereon. The Petitioner has also not produced any material before us to substantiate as to how these Regulations have led to the incremental expenditure, as claimed in the Petition, as a change in law claim.

400. It is also noteworthy that CERC has also held Covid-19 Pandemic as a Force Majeure event and not a Change in Law in its order dated 19.05.2024 in Petition No. 134/MP/2021.

401. In view of above, the Commission finds that guidelines/regulations issued under Disaster Management Act 2005 are not a change in law event under Article 12 of TSA qua the Petitioner. Hence the Petitioner is not entitled for any consequential relief in the form of IDC, IEDC, Commodity Price Variation, carrying cost on alleged additional expenditure, which have been claimed by the Petitioner considering outbreak of Covid-19 and various notifications as change in law event.

Imposition of condition by the Indian Air Force to install Day Visual Aids outside 20 km radius of the defence aerodromes.

402. The Petitioner has submitted that 765 kV S/C Ghatampur-Agra transmission line of the Petitioner was not passing within the radius of 20 kilometres from

aerodrome field of Agra, Hindan, Kanpur and Gwalior. There was no requirement of NOC however, despite the same, the Petitioner had approached for aviation clearance on 08.08.2019 and accordingly, NOC was provided on 05.02.2020. At that point in time there was no requirement of installing day visual aid if the transmission line was not passing within the radius of 20 kilometres of the aerodrome and this condition was introduced as late as on 03.02.2022. Accordingly, the imposition of this fresh condition constitutes a change in law event under the TSA. As a result of the same, the Petitioner incurred additional expenditure to the tune of Rs. 7 crores.

403. Respondents have argued that there has been no enactment coming into effect, adoption, promulgation, amendment, modification of any law or repeal of a law in the case of petitioner. There has been no change in the interpretation or application of any law or imposition of a requirement for obtaining any consents, clearances or permits which not required earlier or the change in its terms & conditions or introduction of new terms and conditions in the present case. Further, day visual aids and obstruction lights, being one and the same, were required to be installed in terms of the NOC dated 05.02.2020. Moreover, the change in law notice is issued as a complete afterthought on 13.05.2022 i.e. after more than 2 years.

404. In order to deal with the issue, let us fist examine Clause 4.2 of the IS 5613 (Part 3/Sec 1): 1989 Code of Practice for Design, Installation and Maintenance of Overhead Power Lines (the Code), which is as follows:

"***ANNX B***

(Clause 4.2)

VISUAL AIDS FOR DENOTING TRANSMISSION LINES AND TRANSMISSION LINE STRUCTURES – REQUIREMENT OF DIRECTORATE OF FLIGHT SAFETY

All the Power Utilities shall comply with the following:

a)- The transmission lines and transmission line structures of height 45 m and above shall be notified to the Directorate of Flights Safety (DFS) Air Headquarters (Air HQ), New Delhi.

b)- For construction of any transmission line/ structure or a portion thereof falling within a radius of 20 km around the Defence aerodromes and air to ground firing ranges provisions of the Aircraft Act 1934 Section 9 A as amplified by the associated Gazette Notification SO 988 Part II, Section 3, Subsection (ii) dated

1988-03-26 shall complied with Towards this, a No Objection Certificate (NOC) shall be obtained from the concerned aerodrome authorities.

c)- Within a radius of 10 km around aerodromes and air to ground firing ranges, all transmission lines and structures of height 45 meters or more shall be provided with day and night visual aids.

d)- In all other areas, outside a radius of 10 km from aerodromes, only those portions of transmission lines and structures of any height identified to pose a hazard to aircraft by the Directorate of Flight Safety shall be provided with day visual aids.

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From above, it is observed that there are two mandatory requirements for all the power utilities under the law, firstly, Clause 4.2(b) provides that construction of any transmission line/structure or a portion thereof falling within a radius of 20 km around the defence aerodromes and air to ground firing ranges, a No Objection Certificate (NOC) is required to be obtained. Secondly, Clause 4.2(c) provides that all transmission lines and structures of height 45 meters or more and within a radius of 10 km around aerodromes and air to ground firing ranges are required to install day and night visual aids. Further, in addition to above mandatory requirements, as per Clause 4.2(d), there is another requirement of providing day visual aids in all other areas outside a radius of 10 km from aerodromes on transmission lines/structures of any height, identified to pose hazard to aircraft by the concerned authority.

405. On perusal of facts and circumstances, it is observed that Petitioner's transmission line/structure or a portion thereof was not passing within the radius of 20 km from aerodrome field however, NOC was obtained for construction of transmission line/structure by the Petitioner vide letter dated 05.02.2020 of Head Quarters, Central Air Command, Indian Air Force. Further, it is also clear that for outside a radius of 10 km from aerodromes, as and when requirement of installation of day visual aids are identified by the concerned authority for those portions of transmission lines and structures of any height to pose a hazard to aircraft, day visual aids would have to be provided. On perusal of NOC dated 05.02.2020, it is observed that obstruction lights, were required to be installed as per specifications given in IS 5613 (Part-3/Section-1):1989, and subsequent amendments and ICAO Annex-14, Chapter-6. Further subsequent IAF communication dated 03.02.2022 merely reiterated earlier

requirement to comply with the provisions of IS 5613 (Part-3/Section-1): 1989 Annex 'B' (Clause 4.2) (d). Further, para 2 of IAF communication dated 03.02.2022 makes it clear that visual aids and obstruction lights are one and the same. Therefore, as the requirement of installation of obstruction lights was existing in the NOC dated 05.02.2020, now the Petitioner cannot quarrel that this requirement of installation of day visual light was not existing earlier. The relevant extract of letter dated 05.02.2020 and 03.02.2022 is reproduced as below:

Relevant contents of Indian Air Force letter dated 05.02.2020:

"2 The application has been examined within provisions mentioned under section 5(2) of Gazette of India GSR 751 (R) read in conjunction with sub section (1) clause (o) & clause (R) of sub section 2 of section 5 read with section 9A of Aircraft Act 1934, Works of Defence act 1903 and other relevant orders on the subject. Headquarters Central Air Command, Indian Air Force has no objection for construction of 765 KV S/C Quad Ghatampur to Agra Transmission Line under TBCB Scheme by Ghatampur Transmission Limited, Kanpur subject to the following conditions: -

...

(f) The company shall make arrangement for provision of placing cable markers on all cables. Medium intensity Type 'B' obstruction lights in combination with Low intensity Type 'B' light shall be installed on all towers. The ***obstruction lights*** *shall be kept 'ON' at all times during day & night as per specifications given IS 5613 (Part-3/Section-1, and subsequent amendments) and ICAO Annex-14, Chapter-6. Company shall maintain all the markers and obstacle lights in fully serviceable and visible conditions"*

Relevant contents of Indian Air Force letter dated 03.02.2022:

"2 No Objection Certificate (NOC) for the subject transmission line was issued by this HQ vide our letter CAC/S 5372/3/ATC dated 05 Feb 20. In response to your query dated 12 Feb 20, it was communicated vide our ibid referred letter dated 20 Feb 20 that installation of day visual aids on the transmission lines was required in view of the Flight Safety hazards to aircraft operating in IAF Local Flying Areas (LFA). However, the project was erroneously referred as 765 KVA S/C Agra-Greater Noida transmission line by Ghatampur Transmission Limited instead of 765 KVA S/C Ghatampur to Agra Transmission line under TBCB by Ghatampur Transmission Limited. ***It is reiterated that the requirement projected for***

installation of day visual aids (Obstruction lights) vide our letter dated 20 Feb 20 was for the subject transmission line.

...

"6. Provision of day visual aids on the transmission lines and structures as per provisions of IS 5613 (Part 3/Sec 1):1989, Annex 'B' (Clause 4.2) (d) and ICAO Annex 14, Chapter 6 would also align with the conditions of Para 2(f) of the NOC accorded vide our referred letter dated 05 Feb 20. Structures requiring the ***visual aids*** *are annexed as Annexure 'A' to this letter for reference, please."*

406. Considering above, the Commission is of the view that the obligation to install day visual aviation lights/obstruction lights was already in existence and even when the No-Objection certificate dated 05.02.2020 was granted by the aviation authorities. Hence it is not a new requirement cast upon the Petitioner making it a change in law event. Moreover, the Petitioner is not able to establish that there is any occurrence of change in law which would fall within the purview of Article 12 of the TSA. Accordingly, change in law claim is rejected on this account.

Payment of supervision charges to WUPPTCL

407. The Petitioner has submitted that it was required to construct one no. of 765 kV bay at Greater Noida sub-station and one no. of 765 kV bay at Hapur sub-station of WUPPTCL. WUPPTCL demanded supervision charges for the same. As per provisions in RFP and TSA, only Operations and Maintenance charges as per the Regulations of the CERC are required to be paid and there is no provision of supervision charges in RFP, TSA or in the Regulations of the CERC. Thus, imposition of the aforesaid requirement has resulted in additional non-recurring expenditures of Rs. 0.90 crores to the Petitioner. It is the case of the Petitioner that since, the supervision charges are being paid pursuant to the orders issued by Respondent No. 6, i.e. an Indian Government Instrumentality and same is being issued after the cut-off date i.e. 24.04.2018, resulting in an additional expenditure to the Petitioner, it qualifies for compensation under change in law in terms of Article 12 of the TSA.

408. The Respondents have submitted that it was clarified by the RECTPCL (BPC) that there is no provision in the regulations of the CERC for payment of supervision charges for TBCB projects. However, to somehow substantiate its claim for change in law, Petitioner alleges that such supervision charges were paid by it

to WUPPTCL at the behest of UPPTCL. In fact, as admitted by Petitioner itself, no law compels it to pay supervision charges. UPPTCL being the STU merely acts as a facilitator between various transmission licensees to facilitate the dialogue between the parties. As far as Petitioner and WUPPTCL are concerned, both these licensees are corporate entities and are independent decision makers and UPPTCL has no role in the same.

409. The Commission has observed that the Petitioner has failed to produce any such document, which would reveal that any change in law has taken place as there has been no enactment coming into effect, adoption, promulgation, amendment, modification of any law or repeal of a law in case of Petitioner. There has been no change in the interpretation or application of any law or imposition of a requirement for obtaining any consents, clearances or permits which were not required earlier or the change in its terms & conditions or introduction of new terms and conditions in the present case. Therefore, the claim of Petitioner that payment of supervision charges made to WUPPTCL is a "change in law" is accordingly rejected.

410. In view of above, the Commission rejects the change in law claims under Article 12 of the TSA on account of outbreak of Covid-19 and various notifications to that effect, imposition of condition by the Indian Air Force to install day visual aids and payment of supervision charges to WUPPTCL. Accordingly, it is held that the Petitioner is not entitled to get consequential reliefs in the form of carrying cost, IDC, IEDC or Commodity Price Variation.

Issue No. 4: Whether Petitioner is entitled for compensation on account of loss of tariff or shifting of tariff stream?

411. The Petitioner has claimed for compensation on account of loss of tariff due to delay in achieving deemed COD for Element 2 and Element 3 of the Project due to force majeure and associated change in law events. It has been argued that tariff has been provided for thirty-five years commencing from SCOD and the tariff stream in the bid was such that a cash flow from SCOD was assumed. Since the term of TSA is for thirty-five years from SCOD, there is an under-recovery of tariff. The issue of mismatch in tariff, cash flow and tariff schedule for the term of the TSA is neither addressed by the Competitive Bidding Guidelines nor any commensurate treatment to this situation has been provided in the TSA.

412. The Commission on perusal of provisions of the TSA has found that there is no provision in the TSA, where transmission charges can be levied when transmission element is not commissioned/not deemed commissioned. In fact, the transmission tariff can be charged against the transmission service actually provided or deemed to have been provided. This has been held by the Hon'ble APTEL in judgement dated 03.12.2021 in Appeal No. 129 of 2020 & Appeal No. 276 of 2021. Thus, arguments placed by the Petitioner, regarding compensation on account of loss of tariff due to delay in achieving deemed COD for Element 2 and Element 3 of the Project, is accordingly, rejected.

413. The Petitioner, in the instant Petition, has alternatively prayed for shifting of tariff in terms of extension of the terms of the TSA to enable recovery of the transmission charges for thirty-five years. After denying IDC, IEDC, CPV and carrying cost in form of consequential relief and also denying loss of tariff due to delay in achieving deemed COD for Element 2 and Element 3 of the Project, it would be worthwhile to look at the tariff shifting issue both from legal standpoint as well as from the perspective of equity. Before dwelling on the legal provisions contained in TSA or otherwise, it will be imperative to examine the issue from the angle of equity. It is a cardinal principle of any jurisprudence, civil or criminal, that where law ends, equity starts. In fact, while law is the sunset or the vanishing point of jurisprudence, equity is its sunrise point. That is why, while law has had its origins only in the third century Roman texts, equity is as old as the Himalayas.

At this juncture, one could only recall with horror and dread the frequent lock-downs, often at short notice, mass exodus of migrant and inter-State labours, scramble for medical facilities and lifesaving medicines and devices, untold miseries and plight of unorganized sector workers and gig workers, that of self-employed persons, businessmen, traders and merchants and total breakdown of production and distribution of goods and services, absolute interruption of supply-chain management, acute shortage of things of daily necessity. Entire country was put on a moratorium. Hence, any limited or narrow interpretation of law, detrimental to the principle of equity or common good may not be ethical and may not satisfy the Principles of Natural Justice under above critical and abnormal circumstances. Accordingly, after denying IDC, IEDC, CPV and carrying cost in form of consequential relief and also denying loss of tariff due to delay in achieving deemed COD, if we don't allow the shifting of tariff also

then it will amount to "double jeopardy". Therefore, it may not be conscientious to deny his all claims and also not grant the stipulated tariff stream, as per bid, in above extraordinary circumstances on which he had no control.

414. Further, while examining from legal standpoint, it would be appropriate to examine the relevant provisions of TSA as below:

> ***"Contract Year"**, for the purpose of payment of Transmission Charges, shall mean the period beginning on the COD, and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31 provided that the last Contract Year shall end on the last day of the term of the TSA."*
>
> *"**Expiry Date**" shall be the date which is 35 (thirty five) years from the Scheduled COD of the Project.*
>
> *"**Scheduled COD**" in relation to an Element(s) shall mean the date(s) as mentioned in Schedule 3 as against such Element(s) and in relation to the Project, shall mean the date as mentioned in Schedule 3 as against such Project, subject to the provisions of Article 4.4 of this Agreement, or such date as may be mutually agreed among the Parties;*
>
> *"**Term of Agreement**" for the purposes of this Agreement shall have the meaning ascribed thereto in Article 2.2 of this Agreement;*
>
> *..... **2.2 Term and Termination**: 2.2.1 Subject to Article 2.2.2 and Article 2.4, this Agreement shall continue to be effective in relation to the Project until the Expiry Date, when it shall automatically terminate unless extended by the Appropriate Commission for such period and on such terms and conditions as the Appropriate Commission may specify in this regard in terms of the procedures laid down by the Appropriate Commission for such matters.*
>
> ***"4.4 Extension of time***
>
> *.....*
>
> *4.4.2 In the event that an Element or the Project cannot be commissioned by its Scheduled COD on account of any Force Majeure Event as per Article 11, the Scheduled COD shall be extended, by a 'day for day' basis, for a maximum period of one hundred and eighty (180) days. In case the Force Majeure Event continues even after the maximum period of one hundred and eighty (180) days, the TSP or the Majority Long Term Transmission Customers may choose to terminate the Agreement as per the provisions of Article 13.5."*

415. From perusal of definition of SCOD, it is observed that SCOD can be extended mutually by the parties or in terms of provisions stipulated in Article 4.4.

Further, Article 4.4 provides for extension of SCOD in event an element or project could not be commissioned by its SCOD on account of any force majeure event. The Commission in this case has allowed the extension of Scheduled COD of Element 2 as on 26.02.2021 and Element 3 as on 26.11.2021 under Article 4.4 of the TSA. Further, the expiry date of the TSA, is the date which is thirty-five years from the Scheduled COD of the Project. As per definition of Contract Year the contract will be effective till the 'Term of the TSA' from the date of COD for the purpose of payment of Transmission Charges. Whereas, Article 2.2 of the TSA provides that the agreement will be effective until the expiry date unless the Commission extends for such period and on such terms and conditions as the Appropriate Commission may specify.

416. In this context, it will be worthwhile to apposite to refer recent order of CERC in Petition No. 87/MP/2022 dated 13.05.2024, wherein tariff shifting under TBCB scheme has been allowed.

417. In view of the above and on conjoint reading of the provisions of the TSA, the expiry date of TSA is to be fixed taking into consideration thirty-five years from the revised SCODs approved by the Commission. Thus, the Commission allows shifting of the tariff stream and the same shall start from the date of revised SCOD and the term of TSA shall be 35 years accordingly. The date of revised SCOD of the respective year shall be the first Contract year however, Petitioner will be entitled to receive the quoted tariff from the date of deemed COD.

Issue No. 5: Whether the Petitioner is liable to pay liquidated damages in case of delay in commissioning of Element(s) of the Project?

418. The Petitioner has argued that, in any case, liquidated damages cannot be imposed in the present case. For levying liquidated damages, a party has to prove that it suffered actual loss as held by the Hon'ble Supreme Court in Kailash Nath Associates vs. DDA, (2015) 4 SCC 136. If actual loss is not suffered, liquidated damages cannot be imposed. The sum named in the contract as payable towards liquidated damages is thus only an upper limit. Subject to the said upper limit, an amount is payable if the party claiming liquidated damages can prove actual loss, which the LTTCs have failed to prove in present case.

419. Respondents have argued that the parties have incorporated Article 18.7 which records the acknowledgement of both parties that breach of any obligations would result in injuries. Further, liquidated damages are a genulne and

reasonable pre-estimate of the damages suffered by the non-defaulting party that are payable as the parties have already acknowledged that any breach by Petitioner would result in injury to LTTCs.

420. In order to arrive at any conclusion regarding the applicability of liquidated damages, it would be important to first look at the law laid down by Hon'ble Supreme Court and then examine the relevant provisions of liquidated damages under the TSA.

421. The Commission has observed that the Petitioner has argued that liquidated damages cannot be imposed as actual loss is not suffered by LTTCs. In support of this argument, Hon'ble Supreme Court judgment of Kailash Nath Associates-v- Delhi Development Authority (2015) 4 SCC 136 has been relied upon. However, the manner in which the Petitioner relies on this judgment is deemed inappropriate. In the said judgment, the Hon'ble Supreme Court has held as under:

"43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.6. ***The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded****.*

From the above, it is observed that if it is possible to prove that there is no actual loss or if the computation of loss is possible, then a genuine pre-estimate

of damage or loss in the form of liquidated damages should not be awarded. Further, it is abundantly clear from 43.6 of the above order that if it is possible to prove the actual status of damage or loss, then such proof must not be dispensed with.

422. Having stated above, let us examine the factual matrix of Element 2 and Element 3 of the Petitioner –

Particulars	Element 2	Element 3
SCOD	26.09.2020	26.03.2021
Revised SCOD	26.02.2021	26.11.2021
Deemed COD	26.03.2021	28.01.2022

Clearly, Respondents are seeking liquidated damages for Element 2 for the period between 26.02.2021 and for Element 3 for the period between 26.11.2021 and 28.01.2022. The same can be awarded to them if there is no proof of actual damage or loss caused to them. However, in the present case the generation from Ghatampur Thermal Power Station has yet not begun, even on the date of this order, therefore, it is cast in iron that the delay caused by the Petitioner could not have caused any loss, whatsoever, to the Respondents as the delay of the Petitioner does not alter any status of power flow. Accordingly, liquidated damages cannot be fastened upon the Petitioner.

423. It is well settled that a person who has not suffered any loss or damage cannot be compensated. The philosophy underlying is that in case of a breach, the aggrieved party must be compensated and restored to a position it would have been in, had the contract been performed. But if there is no loss caused to the party, then no question of restoration or compensation arises. Thus, the existence of a legal injury i.e. the sustenance of a loss or damage on account of breach seems absolutely essential for a party to claim compensation. Even in Fatehchand case, AIR 1963 SC 1405, the court had clarified that the aim of awarding compensation is to make good the loss or damage that naturally arose in the usual course of things or which was so contemplated by the parties at the time of making the contract. Thus, there can be no award of any compensation if there is no legal injury to the party. This view of the court was subsequently upheld in various other judgments by courts across the country (State of Kerala v. United Shippers and Dredgers Ltd., 1982: AIR 1982 Ker 281, Maula Bux v. Union of India, (1969) 2 SCC 554: AIR 1970 SC 1955; ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705). For instance, in Haryana Telecom Ltd. v. Union of India

case, 2006 Del 575: AIR 2006 Del 339, when a contractor delayed in supplying cables and the Government had to purchase the same from other sources and subsequently got it at cheaper rates, the award of the arbitrator awarding damages for breach was set aside as no loss was caused. The proof of some loss thus seems indispensable (Pure Pharma Ltd. v. Union of India, 2008 Del 739: ILR (2009) 1 Del 272) though it does not seem necessary to prove the extent of it. Loss therefore is a prerequisite for an award for damages.

424. Juxtaposing the conclusion of the above para that loss is a pre-requisite for award of damages with the factual matrix of para 422, it is obvious that there is no change in the status of LTTCs with respect to supply of power even if Petitioner exceeded the timeline and its deemed COD went beyond the revised COD approved by the Commission. Hence, in above situation, no liquidated damages can be imposed upon the Petitioner.

425. **The summary of decisions in view of above deliberations are as below:**

(a) The reliefs sought for Element 2 and Element 3 of the Project is found maintainable as the bar under Order II Rule 2 of the Code of Civil Procedure, res judicata/constructive res judicata is not attracted in terms of para 379.

(b) The Commission has observed Covid-19 pandemic as force majeure event and has allowed delay of five months for Element 2 and delay of eight months for Element 3 on this account in terms of para 387.

(c) The Commission has observed that delay due to revocation of working permission by DFO Agra is not a force majeure event and has not allowed delay on this account in terms of para 392.

(d) The Commission has not allowed any compensation on account of force majeure events except for relief in the form of an extension of SCOD in terms of para 394.

(e) The Commission has observed that the change in law claims sought on account of outbreak of Covid-19 pandemic and various notifications in this regard, imposition of condition by the Indian Air Force to install day visual aids and payment of supervision charges to WUPPTCL does not qualify as Change in Law in terms of Article 12 of TSA and the Petitioner is not entitled to get consequential reliefs in terms of para 410.

(f) The Commission has observed that Petitioner is not entitled for loss of tariff, however, has allowed tariff shifting in terms of para 412 and para 417 respectively.

(g) The Commission has observed that the Petitioner is not liable to pay liquidated damages in terms of para 424.

426. Considering above set of findings, if any issue related with tariff for any period which has not been deliberated during the proceedings or has no finding to that extent, arising pursuant to this order, parties may first agree under Article 16 for amicable settlement and obtain Commission's approval on the same. However, if consensus is not arrived among the parties, the Petitioner shall have the liberty to raise the dispute to be resolved before the Commission by way of a Petition.

427. With above directions, the Petition is disposed of.

(Sanjay Kumar Singh)	(Vinod Kumar Srivastava)	(Arvind Kumar)
Member	**Member (Law)**	**Chairman**

Place: Lucknow
Dated: 24 .06.2024