

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION
SHIMLA**

Petition No: 71 of 2023
Date of Institution: 01.09.2023
Arguments Heard on: 26.02.2024
Decided on: 12.04.2024

Tidong Power Generation Private Ltd.
Grover Cottage, 2nd Floor,
Above HDFC Home Loans,
Chhota Shimla- Kasumpti Road,
Shimla, H.P. 17100.

Petitioner

Versus

1. The HP Power Transmission Corporation Limited through its,
DGM (C&M),
Himfed Bhawan, Near ISBT,
Panjari (Below Old MLA Quarters),
Shimla, HP-171005.

Respondent

Petition under Section 86(1) (c) and (f) and other applicable provisions of the Electricity Act, 2003 read with Regulation 41 of the HPERC (Grant of Connectivity, Long-term and Medium –term Intra-state Open Access and Related Matters) Regulations, 2010 seeking deferment of imposition of Transmission charges by the HP Power Transmission Corporation Private Limited under Long Term Access Agreement dated 03.06.2022.

CORAM

Devendra Kumar Sharma

CHAIRMAN

Yashwant Singh Chogal

MEMBER (Law)

Shashi Kant Joshi

MEMBER

Present:-

For the Petitioner: Sh. Sakya Chaudhary and Ms. Shreevidya,
Ld. Counsels.

For the Respondent: Sh. Vikas Chauhan, Ld. Counsel.

ORDER

This Petition under Section 86 (1) (c) and (f) and other applicable provisions of the Electricity Act, 2003 (Act for short) read with Regulation 41 of the Himachal Pradesh Electricity Regulatory Commission (Grant of Connectivity, Long-term and Medium-term Intra-state Open Access and Related Matters) Regulations, 2010 (HPERC, Open Access Regulations, 2010 for short) has been filed by the Petitioner seeking deferment of imposition of Transmission charges by the HP Power Transmission Corporation Private Limited (HPPTCL/Respondent for short) under Long Term Access Agreement dated 03.06.2022.

FACTS OF THE CASE

2. M/s Nuziveedu Seeds Private Limited (NSL for short) entered into a Memorandum of Understanding on 29.09.2004 with the Government of Himachal Pradesh (GoHP) of execute Tidong-I (100 MW) Hydro Electric Project situated near Village Rispa, Tehsil Moorang, Distt. Kinnaur, Himachal Pradesh (Project/Tidong-I for short). The Implementation Agreement was signed of 28.07.2006. On 16.09.2008, a Special Purpose Vehicle (SPV) Company named M/s NSL Tidong Power Generation was created and a Tripartite Agreement was entered between NSL Govt. of H.P. and Tidong. On

30.07.2011, NSL requested for the grant of connectivity to the Grid vide application dated 30.07.2011 (Annexure P-1). On 18.04.2012 Respondent vide letter No. HPPTCL/Connectivity/2011-12-345-49 (Annexure P-2), granted connectivity to the Petitioner as per the Open Access Regulations at LILO point of 220 kV Kashang-Bhaba Double Circuit (D/C) line, with a condition that an agreement/application for implementation of transmission system has to be signed between the Petitioner, Respondent and Power Grid Corporation of India Limited. On 18.07.2013, the connectivity to the Grid was granted vide letter No. HPPTCL/CONN-Tidong-I/2013-2290 (Annexure P-3). On 11.03.2014 the Petitioner and Respondent signed the connection agreement (Annexure P-5).

3. Vide Letter dated 11.02.2014 (Annexure P-4), the Petitioner intimated the Forest Division of completion of all the formalities for forest clearance and requested the Divisional Forest Officer to complete the formalities of forest clearance expeditiously. On 25.10.2014, the Petitioner vide letter No. NSL/SML/ Tidong-I/2014-15/013 requested the Respondent for the No Objection Certificate (NOC) for Long-Term Open Access (LTOA) which was granted on 14.11.2014 vide letter No. HPPTCL/Tidong-I/2014-5218.

4. On 05.07.2015, NOC was issued by the Gram Panchayat and Development Officer for the use of 0.3995 hectare of land in Leganj forest area for construction of 220 kV Transmission line from the Project to Kashang Bhaba transmission line (Annexure P-6). On 16.07.2015 and agreement between the Petitioner and Gram Sabha, Purbani was executed in respect of felling of 109 Chilgoza Pine trees for the purpose of Transmission Line on payment of compensation. On 17.07.2015 and 31.08.2015, No Objection Certificates were obtained for the use of lands for construction of 220 kV transmission line from the Project. On 10.09.2015 an agreement with Gram Panchayat, Gram Sabha, Rispa for erecting two towers for the Line from the Project to LILO location was signed. On 10.04.2016, NOC was issued by the Gram Panchayat and Development Officer conveying approval for the use of forest land in Akpa DPF 228, Khandra, DPF 229, Rarang, Savaden, DPF 230, Sheelpur, DPF 231 for construction of 220 kV transmission line from power plant to Kashang Bhaba LILO location. A MoU was also executed with Gram Panchayat Rarang on 18.04.2016. On 25.04.2016, an agreement was entered into between the Petitioner and Forest Rights Committee Akpa in respect of felling of Chilgoza Pine trees.

5. On 25.05.2016, Govt. of India, Ministry of Environment, Forest and Climate change issued letter to Govt. of H.P (Annexure P-6) for grant of Forest Clearance.
6. On 15.05.2018 (Annexure P-7), the GoHP issued notification amending the Hydro Power Policy and permitted 100% equity transfer in respect of stalled under construction Projects. As such, on 04.09.2018, M/s Statkraft IH Holding AS signed a share purchase agreement with NSL for acquisition of Tidong HEP and after acquisition of the Project, the milestones were re-defined and SCOD was fixed for 08.10.2021. On 14.09.2018, soon after acquiring the Project, transmission line works Service Contract was executed between the Petitioner and Tata Projects Limited (Annexure P-8).
7. As per the Petitioner, as per the Geological report prepared by the Petitioner post acquisition of the Project (Annexure P-9), it was discovered that 16 tower locations proposed on the route of the transmission line prepared by the NSL were located on poor geological locations of these towers were required to be shifted to a geologically stable and safer place. In addition, two more towers were necessitated alongwith shifting of some towers to maintain proper ground clearance and alignment of transmission line resulting an increase of towers from 56 to 59. This report was prepared before commencement of the

construction work by the Petitioner to re-confirm the status of the site feasibility as the area is prone to landslides and cloud bursts.

8. On 10.01.2019, Petitioner informed the DFO, Kinnaur of grant of Stage-II clearance for diversion of forest land for the 220 kV D/C transmission line and that there was a need for minor changes to the initial proposed alignment and sought amendment for tower locations, Right of Way (RoW) and sought additional forest land for transmission line.

9. On 23.11.2019, the Directorate of Energy, (DoE) Govt. of H.P. informed of the approval of Govt. of H.P. of redefining the milestones and that the SCOD that the commissioning of the Project was extended upto 08.10.2021 and that a Supplementary Implementation Agreement in respect of Tidong-I HEP (150 MW) with the GoHP is required to be extended.

10. On 20.01.2020, the Petitioner requested the Respondent for the demarcation of the land from a retired Revenue Officer. Vide letter dated 05.09.2020 the Petitioner was intimated by the Respondent of the grant of Long Term Access.

11. It is averred that on 24.03.2020, a nationwide lockdown was imposed owing to the first wave of novel Covid-19 pandemic which was extended upto 31.05.2020 and lasted for a total of 74 days and

was lifted in a phased manner. The last phase, namely 'unlock 7.0' was completed by December, 2020. As on 05.12.2020, transmission line re-alignment approval had been pending for over 1.5 years. On the lockdown being relaxed, the remobilization of site was promptly resumed which took significant time to achieve normal level of operation with lack of workers, which delayed the Project further.

12. On 12.11.2020, the Petitioner informed the Divisional Forest Officer that the realignment route chosen is most feasible which was also approved by the Respondent and requested that the approval be processed within timelines considering the lapse of almost 22 months from the date of the original application. On 05.12.2020 (Annexure P-11), the Petitioner requested Directorate of Energy, Himachal Pradesh, for One Time Amnesty Scheme for implementation of hydel project that the transmission line realignment approval is pending since the last 1.5 years and Covid-19 pandemic had further delayed the construction and the expected date of COD was stated to be 08.10.2023. It was also informed that the LTOA for the Project was granted on 29.10.2019 and had been pending resolution on date before the HPERC.

13. Meanwhile, the second wave of Covid-19 affected the project work between March and July 2021, as a result, the entire Project

suffered a setback. On 20.05.2022 (Annexure P-12), Regional Officer, MoEFCC informed the Forest Secretary, Govt. of H.P. regarding diversion of forest land for realignment of transmission line from the Project to LILO point of 220 KV D/C Kashang Bhaba transmission line at Purbani.

14. On 03.06.2022, an agreement for Long Term Access was signed with the Respondent for 25 years from the scheduled date of generation. Similarly, on 03.06.2022, the second Supplementary Implementation Agreement was also signed with the GoHP amending Clause No. 5.1 of the Implementation Agreement dated 28.07.2006 and redefining milestones and the time period. The COD was decided to be in consonance with the revised construction schedule approved by DoE. Copy of the LTA dated 03.06.2022 and Second Supplementary Implementation Agreement dated 03.06.2022 annexed as Annexure P – 13 Colly.

15. It is averred that the construction was in full swing despite the adverse circumstances faced in 2020 and 2021 and the Project was scheduled to be commissioned in March 2023 but the Project got delayed for the reasons not attributable to the Petitioner which have been highlighted as under:

Delay in Forest clearance of Transmission line realignment:

15.1 A transmission line of 23 km length from Tidong-1 HEP to LILO of 220kV DC Kashang Bhaba transmission line was required to be constructed and though stage-II Forest/Environment clearance for the line was granted in December 2018 by MOEF&CC but during the final check survey, after the takeover of the Project, it was found that location of some towers was prone to landslides and some of the towers were located close to households of the local people and keeping in view of the safety aspects, it was proposed to relocate 17 towers and an application to this aspect was submitted to the Forest Department in 2019 but the approval was accorded by the MoEFCC in May 2022 but GoHP issued the final Order on 18.11.2022, (Annexure P-14) in terms of the directions passed under Judgment of CWP 202/1995 titled as Godhaverman v/s. Union of India, however, with several conditions.

15.2 Accordingly, on 23.12.2022 (Annexure P-15) revised construction schedule was submitted to the Chief Engineer, Energy, GoHP. On 24.01.2023 (Annexure P-16) Forest Department, GoHP informed of the permission to start felling, carriage and construction work in terms and conditions of the Agreement. On 04.02.2023 (Annexure P-17) the Deputy Commissioner, Kinnaur intimated of joint

spot inspection to assess the likely damage to trees due to the construction of transmission line in the area of Rarang Panchayat. The Tehsildar Moorang on 15.02.2023 conveyed minutes of meeting held on 13.02.2023 on issues pertaining to installation of pillars, release of first installment of compensation and carrying heavy machinery to the site etc. and on 21.04.2023 (Annexure P-19), a letter was sent by the Deputy Conservator of Forest for stopping all the ongoing tree felling works for the transmission line pending inspection of site on 01.05.2023.

15.3 On 16.05.2023, the Petitioner sent a letter to the Respondent with respect to the Provisional Transmission charges for the period 25.03.2023 to 30.04.2023, intimating that the Project has been delayed on account of uncontrollable conditions (Copy not annexed).

15.4 On 12.06.2023 (Annexure P-20), the Petitioner sent letter to the Respondent seeking extension of SCOD and for deferring the provisional transmission charges for the period 25.03.2023 to 30.04.2023 as the Project was expected to be commissioned in March 2023 and LTOA was finalized w.e.f. 25.03.2023 but for the reasons not attributable to the Petitioner and owing to be unforeseen factors, the completion of the project had been delayed and the new time line

under the Amnesty Scheme is March 2024, likely to be further extended, which is under review with the GoHP.

15.5 The Tree cutting work was awarded on 24.01.2023 and Contractor started the tree felling work but the Rarang Panchayat stopped the work demanding additional compensation for Chilgoza trees which was resumed after negotiations, but when the tree cutting was to start in ROW (Right of Way), the local Panchayat again stopped the work for 100% compensation for the trees to be lopped and pruned. On complaints being made, the Divisional Forest Officer, stopped the tree cutting work 21.04.2023 which was resumed only on 09.07.2023 and by that time, the Petitioner had been left with only 3-4 months of working season in the year 2023 and ultimately, the transmission line is expected to be completed by 3rd Quarter of 2024.

Natural calamities:

15.6 The work was stopped due to lockout conditions on account of Covid-19 pandemic since the beginning of 2020 and upto late 2021 and it proved difficult to mobilize the Project team even after the lockdown, due to various reasons including death of employees or their family members, relocation, etc. Besides, the State has also been witnessing increasing incidences of cloudburst, heavy rainfall and flash floods in the recent years since 2021, causing wanton loss of life,

property and affecting the project work. Resultantly, the work had to be stopped on multiple occasions.

Stoppage of work due to fatal accident in pressure shaft area in May 2022:

15.7 On 07.05.2022, an accident occurred in pressure shaft of the Project resulting in death of two labourers and severely injuring three. The work on the pressure shaft was stopped due to this by the Administration for inspection which could only be resumed after a thorough investigation by Petitioner and after formulation of fresh guidelines keeping the safety of workers as highest priority.

16. It is averred that the Clause 9.0 of the LTA Agreement (LTAA) dated 03.06.2022 covers the delay which has been reproduced as under:-

“The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party.”

17. It is averred that the Petitioner had commenced the project works in an expeditious manner as follows:

Sr. No.	Details of the Project Works	Start Date
	Start-up Activities	01.03.2018
	Contract Management and Procurement	01.01.2018
	Licenses and Permits	07.08.2018
	Engineering and Design	01.04.2018
	Mobilization	08.08.2018
	Mob Activities during construction	16.08.2018
	Preparatory Works – Upstream Structures	11.02.2021
	Storage Reservoir and Gravity Wall - Upstream Structures	15.10.2018
	Desilting Arrangement and Head Regulator - Upstream Structures	02.07.2019
	Diversion, Spillway, Under sluice Channel - Upstream Structures	12.08.2019
	Headrace Tunnel – Underground Works	22.11.2018
	Surge Shaft	12.10.2018
	Pressure Shaft – Unit 1 & 2	17.09.2018
	Pressure Shaft – Unit 3	02.03.2021
	Valve Chamber	19.04.2021
	Downstream Works	19.05.2018
	Management and General Activities	07.08.2018

17.1 However, the Project work has been stalled repeatedly on account of uncontrollable parameters and since the delay is unforeseen and beyond the control of the Petitioner, the Petitioner has sought recourse to Clause 9.0 of the LTA Agreement dated 03.06.2022 and revision of SCOD from 25.03.2023 to 31.12.2024.

18. It is averred that no Petition, suit or Appeal regarding the matter has not been filed/pending.

REPLY OF THE RESPONDENT

19. The Petition has been resisted by filing the reply. It is submitted by way of preliminary objections/ submissions, interalia, that the

Petitioner has not approached the Commission with clean hands and that in Petition No. 12 of 2021, filed on 02.02.2021, the Petitioner had contended that the non-signing of the Long Term Access Agreement by the HPPTCL shall jeopardize the power supply of 75 MW to Uttar Pradesh Power Corporation Limited (UPPCL) and result into huge losses to the Petitioners and that the Petitioner is in the process of finalization of the sale of balance power for which the signing of LTOA agreement is necessary failing which the Petitioner shall not be able to evacuate the energy and honour the agreement signed with UPPCL and that the flow of Power is expected from May, 2023.

20. Further, the Commission vide Order dated 02.05.2022 (Annexure R-I), in Petition No. 12 of 2021 and Petition No. 48 of 2021 has observed in Para 67 as under:

“ In view of our above said discussions and findings on point No. 1 to 3, both the petitions succeed in part and allowed partly. The respondent HPPTCL is directed to reconsider the LTA dated 29.09.2019 granted to the petitioner Tidong-I HEP for a period of 25 years and grant such LTA restricting the same till commissioning of Jangi Pooling Station.”

21. Accordingly, in pursuance of Order dated 02.05.2022, an agreement dated 03.06.2022 was signed by the Petitioner for Long Term Access on 03.06.2022 but now the Petitioner has sought

exemption/deferment in payment of transmission charges on the ground of alleged 'force majeure' events which took place prior to the filing of the earlier Petition (Petition No. 12 of 2021) but said Petition was lacking such detail.

22. Further, the Petition is bad for non-joinder of necessary parties as M/s Himachal Pradesh Power Corporation Limited (HPPCL), Himachal Pradesh State Electricity Board Limited (HPSEBL) and M/s Taranda Hydro Power Private Limited, being the beneficiaries of the same Transmission system are necessary parties because any relief behind their back would lead to adverse financial implications in the form of additional transmission charges from the said entities. Not only this, the proposed relief to the Petitioner would give rise to multiplicity of litigation and will be in violation of the terms and conditions of LTAAAs between HPPTCL and HPPCL and M/s Taranda Hydro Power Private Limited in view of the standard language used in LTAAAs to the effect that *"in the event of default by any developer under Clause 5 and 6 of this Agreement, the transmission charges for the system mentioned at Annexure -3 would be shared by balance developers. However, the damages collected (if any) from the defaulting developer (s) under Clause 5 and 6 of this agreement shall be adjusted for the purpose of claiming transmission charges from the balance*

(remaining) developers [-Annexure 4 of respective LTAA's].” Copy of such LTAA's dated 26.02.2019 and 10.01.2020 are annexed as Annexure R-2 (Colly).

23. Further, the Petition is not maintainable in view of the agreement for Long Term Access dated 03.06.2022 executed by the Petitioner with the Respondent, whereby the Petitioner had been allowed Open Access w.e.f. 25.03.2023 for a period of 25 years or till the commissioning of 400/220 kV Jhangi Pooling Station, whichever is earlier. Clauses E, H, K, 1.0, 2.0 (a), c, 6.0 (a), (d), 9.0 and 11 of the LTA agreement dated 03.06.2022 have been reproduced in the reply in Para 4 of the reply.

24. It is averred that the LTA agreement dated 03.06.2022 was operational w.e.f. 25.03.2023 but the Petitioner has raised the alleged force majeure events, which occurred or existed prior to the signing and the validity of the LTAA. Not in only this, before filing application for LTAA and signing the same and filing Petition No. 12 of 2021, the Petitioner was aware of Forest Clearance status, realignment of transmission line and other local issues and, therefore, cannot take shelter under the garb of the force majeure clause in the LTAA dated 30.06.2022 for its own inefficiencies etc. It is also averred that by way of clever drafting, the Petitioner is seeking the amendment of the LTAA

dated 03.06.2023 (Annexure R-3) so as to make it effective w.e.f. 31.12.2024. It is also averred that the Petitioner is not entitled for the reliefs claimed in the Petition. Not only this, the Petitioner has failed to issue mandatory written notice of 30 days in terms of Clause 9.0 of the LTAA dated 03.06.2022 to the Respondent for claiming the benefit of the Force Majeure Clause, if any, highlighting any force majeure event having taken place post execution of the LTAA. Moreover, the Force Majeure clause only relieves the parties from being liable for any claim for any loss or damage and not otherwise and the Petitioner without specifying any existing force majeure event, intends to seek a relief for a further period uptill 31.12.2024 and the Petition being against the agreed terms, the same is not maintainable.

25. Replying on the contents of the Petition on merits, the Respondent reiterating the averments made by way of preliminary submissions has denied that the delay in completion of the Project and the commencement of use of Long Term Access is due to reasons beyond the control of the Petitioner and the events leading to the delay should be considered as force majeure under Clause 9 of LTAA in view of the reasons illustrated in the Petition. It is reiterated that the alleged Force Majeure events were existing prior to the execution of LTAA dated 03.06.2022. Also averred that the Petitioner has failed to

place on record the approved COD granted by the DoE or the revised construction schedule approved by the DoE in terms of SIA dated 03.06.2022. The contents regarding correspondence dated 16.05.2023 are denied.

26. It is averred that any delay on the part of Petitioner to Commission the Project on any reason, whatsoever, vaguely referring to the delays predetermined to continue till 31.12.2024, cannot be considered as Force Majeure and absolve the Petitioner from the transmission charges as agreed in LTAA dated 03.06.2022. It is averred that any extension of the COD by the State Government shall not be binding upon the Respondent in violation to the terms of LTAA.

REJOINDER

27. In rejoinder, the contents of the reply have been denied and those of the Petition have been reaffirmed.

Submissions of the Ld. Counsel for the Parties

28. We have heard Sh. Sakya Chaudhary, Ld. Counsel for the Petitioner and Sh. Vikas Chauhan, Ld. Counsel for the Respondent and have also taken into consideration the written submissions made by the Petitioner. We have also gone through the record of the case carefully.

29. Sh. Sakya Chaudhary Ld. Counsel for the Petitioner has submitted that ever since the Project was taken over by M/s Statkraft, in the year 2018, the Project has suffered significant interruptions on account of lockdown imposed on account of COVID-19 pandemic which halted the construction work for about 1½ years, which has been relaxed by the MNRE vide Office Memorandums dated 17.04.2020, 30.06.2020 and 13.08.2020. He has also submitted that there had been incidences of cloudburst, heavy rainfall and flash floods in the area. According to him, the Project also suffered delay due to delay in grant of forest clearances for realigned transmission line and location of 16 Towers in geologically unsafe area. According to him, the Forest Department granted felling permission of trees, carriage and construction works only on 24.01.2023 and the Forest Department also directed stoppage of felling of trees on different dates and work could finally be resumed after 01.05.2023. According to him, the Hon'ble APTEL and the Hon'ble CERC have considered delay in grant of Government approvals as force majeure events in the following decisions:

- a) *North Karanpura Transmission Co. Ltd. versus Secretary, Central Electricity Regulatory Commission –(2013) APTEL 142.*
- b) *Gujrat Urja Vikas Nigam Lrd. Versus Gujrat Electricity Regulatory Commission – 123 of 2012*

- c) *Kohima-Mariani Transmission Ltd. versus Chief General Manager & Ors. – 164/MP/2021*
- d) *Rajgarh Transmission Lrd. Versus Rewa Ultra Mega Solar Ltd. – 280/MP/2023.*

30. He has further submitted that on 07.05.2022 an unexpected accident occurred in pressure shaft area of the Project leading to death of two workers and seriously injuring 3 other workers which resulted in reinvestigation, scaling work, rework on ferrules and delay in execution. Not only this, a period of about 8 months was consumed in importing new and customized winches from Austria to ensure higher safety standards for the workers, as a result, the Project work resumed only on 15.09.2023 after a delay of 16 months. According to him, the Petitioner has sent force majeure condition notice vide letter dated 12.06.2023 and that the SCOD of the Project had been granted upto 31.10.2024 and the Petitioner has sought further extension of SCOD upto 31.12.2024 and the SCOD as specified in LTAA dated 03.06.2022 has to be read in juxtaposition to the implementation agreement where the SCOD has been defined. In nutshell, it is submitted that the delay in construction of the Project was beyond the control of the Petitioner and the transmission charges, if applicable, would be from the revised SCOD.

31. Sh. Vikas Chauhan, Ld. Counsel for the Petitioner on the other hand has submitted that the Petition is bad for non joinder of necessary parties as the HPPTCL, the HPSEBL and M/s Tranda Hydro Power Pvt. Ltd., being beneficiaries of the same transmission system, any relief behind their back would lead to adverse financial implications in the form of additional transmission charges and multiplicity of litigation. According to him, the Petitioner is seeking exemption of force majeure conditions occurred prior to signing of LTAA and filing of Petition No. 12 of 2021 i.e. delay in Forest Clearance, realignment of transmission line and other local issues which can't be construed as Force Majeure events and the Petitioner cannot take the shelter under the garb of the force majeure Clause in LTA dated 30.06.2022. As per him, Petitioner has signed the LTAA knowing all the details and none of the incidents pointed out in the Petition fall within the ambit of the Force Majeure events and cannot claim any exemption/waiver.

POINTS FOR DETERMINATION

32. Out of pleadings and submissions of the Ld. Counsel for the parties, the following points arise for determination as under:-

Point No. 1. Whether consequent upon the extension of SCOD upto 31.10.2024, the effective date of LTAA is also required to be made effective from the revised SCOD?

Point No. 2. Whether the Petitioner has been prevented from implementing the LTAA dated 03.06.2022 due to the force majeure events and entitled for the deferment of transmission charges as per Clause 9 of the LTAA?

Final Order

33. For the reasons to be recorded hereinafter in writing, our points wise findings are as under:-

Point No. 1 : No

Point No. 2 : No

Final Order: The Petition dismissed per operative part of the order.

REASONS FOR FINDINGS

Points No. 1 and 2

34. Both these points being interlinked and interconnected are being taken up together for adjudication.

35. Before adverting to the force majeure events as detailed in the Petition, it is relevant to mention here that pursuant to the order dated 02.05.2022 in Petition No. 12 of 2021 and Petition No. 48 of 2021, the parties entered into and signed the LTAA on 03.06.2022, which was to come into force and effective w.e.f. 25.03.2023 i.e. the date of SCOD. The Force Majeure events which may considered for deferring any claim for any loss and damage, arising out of failure to carry out the

terms of the agreement have been mentioned in the Force Majeure events Clause 9 of the LTAA, which is reproduced as under:-

“The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party.”

36. A plain reading of Clause 9 aforesaid shows that no party shall be liable for any claim for any loss or damage, whatsoever, arising out of failure to carry out the terms and conditions of the agreement in case the failure is due to the force majeure events, mentioned in Clause 9. However, in order to claim the benefit of Clause 9 the party claiming the benefit shall have to satisfy the other party of the existence of such event(s) by giving written notice of 30 days to the other party to said effect.

37. It is averred in the Petition that on 16.05.2023, the Petitioner sent a letter/notice to the Respondent with respect to the provisional transmission charges for the period w.e.f. 25.03.2023 to 30.04.2023 intimating that the Project has been delayed due to uncontrollable

conditions but the Respondent has categorically denied the receipt of said letter. The Petitioner has failed to place on record copy of said letter/notice, therefore, there is nothing on record to believe that such a letter/notice in compliance of Clause 9 (Nine) above had been sent.

38. It is relevant to refer here that Petition No. 12 of 2021 was filed by the Petitioner before the Commission that though the application was filed with the Respondent for Long Term Open Access during the month of October, 2019 but despite considering the application, the agreement is not being signed. Annexure A/1 to the LTA agreement dated 03.06.2022 shows that the agreement was to be effective from 25.03.2023, which appears to be in commensuration with the SCOD of the Project.

39. It is claimed that the Petitioner was under bonafide belief to achieve the SCOD of the Project and implement the LTAA. In the Petition, the Petitioner has given chronology of the events and the steps taken ever since signing of the Memorandum on 29.09.2004 but the detail prior to signing of the LTAA on 03.06.2022 is not relevant for adjudicating the controversy in hand and only the circumstances which have been highlighted post the signing of LTAA are relevant.

40. The Petitioner while highlighting the delay has mainly referred to the approvals by the competent authority/ Govt. i.e. forest clearances

and clearances from local bodies. However, such forest clearances and objections/ NOC's from the Govt. of Himachal Pradesh or the local bodies (Panchayat), as mentioned by the Petitioner, were pertaining to the construction of transmission towers and 220 kV transmission line from the Project to the LILO points of Kashang-Bhaba transmission line. Such clearances have nothing to do with the SCOD of the Project nor such clearances affected the construction work of the Project in any manner.

41. Therefore, the detail in respect of letters dated 30.07.2011, 18.04.2012, 18.07.2013, 11.02.2014, 11.03.2014 (Annexure P-1 to Annexure P-5) , Letters dated 25.10.2014, 14.11.2014, 05.07.2015 (Annexure P-6), NOC vide letters dated 16.07.2015, 17.07.2015, 31.08.2015, 10.09.2015, 10.04.2016, MoU dated 18.04.2016, Agreement dated 25.04.2016, Letter dated 25.05.2016 (Annexure P-6), notification dated 15.05.2018 (Annexure P-7), share purchase agreement dated 04.09.2018 (Annexure P-8), Letters dated 10.01.2019 and 23.11.2019 (Annexure P-10), Geological report (Annexure P-9), Letters dated 20.01.2020, 05.09.2020, 12.11.2020, 05.12.2020 (Annexure P-11), 20.05.2020 (Annexure P-12), pertaining to the period prior to LTAA are of no consequence, in so far as the controversy in the present Petition is concerned.

42. The Petitioner has claimed that the impact of COVID-19 in the beginning of 2020 and upto the late, 2021 and the increasing incidents of cloudbursts, heavy rainfall and flash flood have hampered the Project work. The impact of COVID-19 was very well within the knowledge of the Petitioner before signing the LTAA on 03.06.2022 and the Petitioner signed the LTAA dated 03.06.2022 after taking into account the delay on this count. Therefore, the office Memorandums dated 17.04.2020, 30.06.2020 and 13.08.2020 of the MNRE, as submitted by the Ld. Counsel for the Petitioner do not in any manner advance the cause of the Petitioner.

43. The Petitioner has not produced any record that any major cloudburst had happened in the area post signing the LTAA dated 03.06.2022 causing major disruption in the construction work of the Project. Therefore, this detail is also of no consequence and do not fall within the ambit of force majeure as described in Clause 9 of the LTAA dated 03.06.2022.

44. It is the case of the Petitioner that on 07.05.2022, a major accident occurred in pressure shaft of the Project in which the two workers lost their life and 3 (three) were seriously injured and the work had to be stopped immediately by the Administration, which could only be resumed after thorough investigation. Sh. Sakya Chaudhary, Ld.

Counsel in the written submissions has elaborated that the built alignment of the pressure shaft of the Project that was constructed by the erstwhile developer mainly along the inclined sections, was significantly in deviation from the original design. Also, the parts of the cross sections of the shaft at various locations were also not in line with the design requiring scaling works. The checks and the modifications of existing steel liner ferrules as well as the installation of the ferrules were causing extra costs and time to the project. The defects in the alignment and the cross sections had not been disclosed by erstwhile sellers during the due diligence phase. While there was technical due diligence at the time of taking over of the project, some of the defects could only be discovered during construction time. Moreover, despite all precautions, the occurrence of the accident resulted in reinvestigation, scaling work, reworks on ferrules and delay in execution. According to him, a period of 8 months was consumed for importing two new and customized winches from Austria to ensure higher safety standards for the workers. The works could be resumed thereafter after all inspections and checks on 15.09.2023 and that a delay of sixteen months was caused on account of the accident. Evidently, the implications of the accident which occurred on 07.05.2022 in terms of safety and its overall impact on the SCOD of

the Project were known to the Petitioner at the time of signing of the LTAA on 03.06.2022 but strangely, neither the complete detail thereof was mentioned in notice dated 12.06.2023 Annexure P-20 nor the record thereof has been produced.

45. As per Clause 9 of the LTAA dated 03.06.2022, a written notice of 30 days to the other party of the existence of the force majeure events is required to be served to claim the benefit of such force majeure events. A notice dated 12.06.2023 (Annexure P-20) was issued to the Respondent in term of Clause 9 of LTAA for claiming the benefit of force majeure events but a careful perusal of said notice dated 12.06.2023, does not mention much about such accident occurred on 07.05.2022 and only a passing reference has been made that Statkraft follows the highest level of safety standards across its projects worldwide. However, sometimes, untoward incidents/accidents happen like the one in Tidong surge shaft area wherein the Petitioner worked with the District Administration and reviewed the safety norms thoroughly at the cost of delay of 2 to 3 months in project, which overlapped the above mentioned forest clearance and the cutting issue. The rest of the notice focuses on the delay in getting the clearances from Forest and Local bodies. No record pertaining to accident occurred on 07.05.2022 has been produced which was

material to ascertain the magnitude of damage and as to how much impact said accident had caused on the ongoing work and till how long the work remain stopped. The record pertaining to the same was certainly available with the Petitioner and the non-production thereof clearly shows that such accident has not impacted the construction work in the manner projected nor the same falls within the ambit of Force Majeure event. Moreover, accident has occurred on 07.05.2022, prior to signing of LTAA on 03.06.2022. It is pertinent to mention here that an experienced developer like the Petitioner will fully well understand implication of the events which occurred prior to signing of the LTAA on 03.06.2022.

46. In the entire Petition, the Petitioner has not been able to substantiate that any approval/sanction from the government or local bodies was required for the completion of the Project or the government at any point in time had stopped the construction work of the Project for a considerable long time after signing of the LTAA on 03.06.2022. The alleged incident of 07.05.2022, as observed above, has also not been substantiated on record. So much so, there is no mention in the Petition that the work had remained stopped at the Project site for a considerable long period. In the circumstances, the Petitioner has not been able to substantiate that there were any force

majeure events within the ambit of Clause 9 of the LTAA dated 03.06.2022.

47. Even otherwise, the alleged incidents of 07.05.2022, had occurred well before signing of the LTAA, however, despite such knowledge, the LTAA was signed on 03.06.2022 without mentioning even a gist of the same in LTAA dated 03.06.2022 that the SCOD may be delayed. This give rise to a strong inference that the correct picture has not been depicted and the Petitioner has come up with such a version in order to claim the benefit of Clause 9 of the LTAA dated 03.06.2022 to defer the liability which has become due w.e.f. 25.03.2023.

48. Now the question arises whether the Petitioner becomes entitled ipsofacto for the extension of the operation of LTAA dated 03.06.2022 in line with the extended SCOD dated 31.10.2024. The plain answer is in negative for the reason that no satisfactory record, much less record of the incident occurred on 07.05.2022 has been placed on record. Petitioner might have produced some valid and relevant record before the GoHP seeking extension of SCOD but as per LTAA, but no such record has been produced alongwith the Petition. In order to claim the benefit as per Clause 9 of LTAA, the Petitioner was required to

substantiate the existence of such 'Force Majeure' events as mentioned in Clause 9 of the LTAA.

49. The Ld. Counsel for the Petitioner has submitted that the delay in government approval has been construed as Force Majeure events by the Hon'ble APTEL and Ld. CERC and has relied upon in the law laid down in, North Karanpura Transmission Co. Ltd. versus Secretary, Central Electricity Regulatory Commission –(2013) APTEL 142, Gujrat Urja Vikas Nigam Lrd. Versus Gujrat Electricity Regulatory Commission – 123 of 2012, Kohima-Mariani Transmission Ltd. versus Chief General Manager & Ors. – 164/MP/2021 and Rajgarh Transmission Lrd. Versus Rewa Ultra Mega Solar Ltd. – 280/MP/2023 in this regard.

50. As observed above, the none of the clearances from the Government/Local bodies pertain to the construction of the Project. Rather, the approvals/NOCs etc. required from the government or the local bodies were only in respect of the construction of transmission line. Therefore, the law laid down in the aforesaid judgments has no application to the facts and circumstances of the present case.

51. In view of the aforesaid the Petitioner has miserably failed to establish on record that consequent upon the extension of SCOD by the government upto 31.02.2024, the effective date of LTAA is also

required to be made effective to the date of revised SCOD. Similarly, the Petitioner has miserably failed to establish on record that it had been prevented from implementing the LTAA dated 03.06.2022 due to the Force Majeure events and entitled for the deferment of transmission charges as per Clause 9 of the LTAA dated 03.06.2022. Points No. 1 and 2 are accordingly answered against the Petitioner and in favour of the Respondent.

Final Order

52. In view of aforesaid discussion and findings, the Petition fails and is accordingly dismissed. The pending applications, if any, are also deemed to have been dismissed.

The file after needful be consigned to records.

Announced
12.04.2024

(Shashi Kant Joshi)
Member

(Yashwant Singh Chogal)
Member (Law)

(Devendra Kumar Sharma)
Chairman