

**sCENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. MP/080/2014 with
IA No. 19/2014**

Coram:

**Shri Gireesh B. Pradhan, Chairperson
Shri M. Deena Dayalan, Member
Shri A. K. Singhal, Member**

Date of Hearing : 20.05.2014

Date of Order : 30.05.2014

In the matter of:

Petition under Section 79(1) (f) of the Electricity Act, 2003 for adjudication of disputes arising out of the open access approval granted to the petitioner for evacuation of electricity and the terms and conditions of the bulk power transmission agreement dated

And in the matter of:

Jayaswal Neco Urja Ltd.
Sitara Growth Centre, Sitara
Raipur-493 111

....Petitioner

Vs

Power Grid Corporation of India Ltd.
Soudamini, Plot No. 2
Sector-29, Near IFFCO Chowk
Gurgaon-122 001

.....Respondent

Parties Present:

For petitioner : Shri Pardeep Dahiya, Advocate

For respondent : Shri R. V. M. M. Rao, PGCIL

ORDER

The petitioner Jayaswal Neco Urja Ltd. has filed this petition under Section 79(1) (f) of the Electricity Act, 2003 for adjudication of the disputes arising out of the long term open access granted by Powergrid, the 'Respondent' herein, to the petitioner for



evacuation of electricity from its proposed thermal generating plant in the Raigarh District of Chhattisgarh.

2. The case of the petitioner is that the petitioner's holding company, Jayaswal Neco Industries Ltd. (JNIL) was allocated a captive coal block in the state of Chhattisgarh. JNIL decided to utilize the coal having GCV of 4000 K cal/kg and above in its Sponge Iron plant and the balance coal with GCV below 4000 K cal/kg including coal rejects for generation of power. JNIL proposed to set-up a 2x300 MW Thermal Power Plant at village Hamirpur in the Raigarh District of Chhattisgarh in the name of Raigarh Energy Ltd. which was changed to Jayaswal Neco Urja Ltd., the petitioner in the present petition.

3. The petitioner has submitted that it entered into a Memorandum of Understanding with the Govt. of Chhattisgarh and Chhattisgarh State Electricity Board for setting up of Thermal Power Plant. The petitioner is also stated to have taken several steps for setting up of the Power Plant such as seeking Environment Impact Assessment Clearance, NoC from Airport Authority of India for construction of chimney, site clearance certificate from Forest department, arrangement of water from Water resources Department, Government of Chhattisgarh, arrangement of funds from the financial institutions like Power Finance Corporation and Rural Electrification Corporation, approval from the Ministry of Coal, Govt. of India for utilization of middlings/rejects for use in the generation of power.

4. The petitioner also applied for long term open access to PGCIL on 17.3.2011 for 600 MW in accordance with Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium term Open Access) Regulations, 2009 (hereinafter Connectivity Regulations). The application was accompanied by a demand draft of ₹6,00,000/- as non-refundable application fees and ₹60,00,000 @ ₹10,000/MW as bank guarantee in accordance with the Procedure issued under the Connectivity Regulations. This Bank Guarantee is initially for a period of one year which shall be revalidated till the execution of the long term access agreement in case augmentation of the transmission system is required or till operationalisation of long term access in case augmentation of transmission system is not required. PGCIL in its letter dated 5.8.2011 granted long term access to the petitioner for 300 MW from July 2014 and balance 300 MW from October 2014 with validity till July 2034. PGCIL in its letter dated 22.11.2011 provided draft agreement for long term access with System Strengthening between PGCIL and the petitioner and required the petitioner to sign the long term access agreement and submit bank guarantee of ₹30 crore. The petitioner extended the validity of the bank guarantee on year to year basis and the present bank guarantee is valid till 15.3.2015. The petitioner has submitted that it is not in a position to sign the long term access agreement due to the following reasons:

- (a) The power project of the petitioner is dependent partly on the captive coal allocation. Since the issue of allocation of captive coal blocks by the Government of India is presently *sub-judice* before Hon`ble Supreme Court, the mine

development work cannot take place until a clear decision is available in the matter.

(b) On 11.9.2009, the petitioner applied to Ministry of Coal for grant of long term coal linkage/Letter of Assurance for meeting its balance requirement of coal to the tune of 1.10 MPTA, which is still pending and in the absence of coal linkage, the petitioner is not able to get loan and facing liquidity problem in execution of the project.

(c) The petitioner has achieved most of the milestones. However due to lack of environmental clearance, it is not able to execute the project.

(d) No long term bidding is coming forth in the last three years by any State Electricity Boards/distribution companies and without the same, the project even though achieve financial assistance may not progress as disbursement will not take place.

(e) The State Government of Chhattisgarh is withdrawing/modifying the commitments made to the private parties by not executing any PPA as agreed upon at the time signing of MoU. However, as per the financial tie up, the petitioner will have to execute a valid PPA for a quantum of 420 MW (70% of capacity) for getting disbursement of loan, which is also not happening.

5. The petitioner has submitted that PGCIL has given a notice dated 11.3.2014 asking the petitioner to sign the long term access agreement by 30.4.2014 failing which the long term access would be cancelled as per the Connectivity Regulations. The

petitioner has submitted that it is not in a position to sign the agreement for long term access at present as it would be required to give another bank guarantee of ₹30 crore which the petitioner is not in a position to arrange due to prevailing uncertainties. The petitioner has submitted that the bank guarantee was for the purpose of bringing seriousness to the application made by the applicant and securing damages payable to PGCIL to compensate for the loss suffered by PGCIL in case of any default on the part of the petitioner. The petitioner has submitted that PGCIL has not suffered any loss as no system has been developed by PGCIL for the petitioner nor the petitioner is blocking the existing transmission system of PGCIL from being utilized by other persons. The petitioner has submitted that the question of PGCIL being entitled to retain the bank guarantee or encash the bank guarantee would arise only if all or any of the following conditions are satisfied. Firstly, there is no force majeure condition which prevents the parties from performing the obligations. Secondly, PGCIL has altered its position to its detriment and incurred substantial cost and expenditure on account of the obligations towards the petitioner. Thirdly, there is no avenue for PGCIL to mitigate the loss or utilize the system created for the petitioner. The petitioner has submitted that none of the above exigencies exist for PGCIL to encash or retain the bank guarantee. Aggrieved by the notice of PGCIL to cancel the long term access, the petitioner has filed the present petition seeking the following prayers:

“(a) Hold and declare that the rights and obligations of the parties under the letter dated 5.8.2011 issued by PGCIL granting approval for long term access to the petitioner have been frustrated on account of the existence of the force majeure condition in the non-development of the generating station by the petitioner;

(b) Hold and declare that the respondent is not entitled to invoke or otherwise retain the bank guarantee of ₹60 lakhs provided by the petitioner to the respondent;

(c) Direct the respondent to return the bank guarantee of ₹60 lakhs provided by the

petitioner in view of prevailing force majeure conditions; in view of prevailing force majeure conditions;

(d) Pass such other further order(s) as the Hon'ble Commission may deem fit in the facts of the present case.”

The petitioner has filed the IA along with the petition for an interim relief that pending adjudication of the dispute, PGCIL may be restrained not to encash the bank guarantee.

6. After notice to the respondent, the main petition and the I.A. were taken up for hearing. Learned Counsel for the petitioner submitted that as per the provisions of the Connectivity Regulations, PGCIL can encash the bank guarantee only if the application is withdrawn by the petitioner or the long term access rights are relinquished prior to the operationalization of such right when augmentation of transmission system is not required. Learned counsel submitted that none of these contingencies exist in this case as the petitioner is still willing to complete the project but due to the prevailing uncertainties which are in the nature of force majeure events, the petitioner is not in a position to sign long term access agreement and give further bank guarantee. In this connection, the learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court in *Satyabrata Ghose Vs. Mugneeram Bangur & Co. and another* (1954 SCR 310) and submitted that under Section 56 of the Indian Contract Act, 1876, a contract is frustrated if it is impracticable for the parties to do an act which is required under the contract. Learned counsel submitted that in this case, the petitioner is merely asking not to encash the bank guarantee which is valid till 15.3.2015 as the petitioner is not in a position to sign the long term access due to force majeure conditions.

7. The representative of the respondent submitted that as per 23.5 (iii) of the “Procedure for making application for grant of long term access to ISTS” issued under the Connectivity Regulations with the approval of the Commission, the bank guarantee may be encashed by the nodal agency, “if the applicant fails to sign the Long Term Access Agreement with CTU or a tripartite agreement with CTU and transmission licensee, as the case may be, and fails to submit appropriate BG for construction phase, within stipulated time as indicated in the intimation letter.” The representative of the respondent submitted that the time for signing the Long Term Access Agreement is being extended from time to time at the request of the petitioner. However, the petitioner was given a final notice on 11.3.2014 to sign the LTA by 30.4.2014. The representative of the petitioner submitted that the time for signing of the LTA cannot be further extended without affecting the transmission system planning. The representative of the petitioner relied upon the order of this Commission dated 16.10.2013 in Petition No.153/MP/2012 and submitted that the case of the petitioner is covered under decision in the said order and may be accordingly dealt with.

8. We have considered the submission of the parties. The main issue involved in the petition is whether PGCIL is entitled to encash the bank guarantee on account of the failure of the petitioner to sign the long term access agreement. In our order dated 16.10.2013 in Petition No. 153/MP/2012, we examined the provisions of Regulation 12 to 15 of the Connectivity Regulations and provisions of Clause 23(5) of the Detailed Procedure approved by the Commission in terms of Regulation 27 of the Connectivity

Regulations and came to the conclusion that the nodal agency (PGCIL) is entitled to encash the bank guarantee under certain circumstances such as non-signing of LTA or non-furnishing of Bank Guarantee for construction phase. Relevant portion of the said order is extracted as under:

“10. In accordance with Regulation 12, the application made for LTA is to be accompanied by a Bank Guarantee of ₹10, 000 per MW in favour of the nodal agency, which shall be kept valid and subsisting till the execution of the LTA Agreement where augmentation of transmission system is required or till the operationalisation of the LTA where augmentation of transmission system is not required. The regulation further provides that Bank Guarantee may be encashed in case the applicant withdraws the application for LTA or LTA rights are relinquished prior to the operationalisation of such rights when augmentation of transmission system is not required. The Bank Guarantee stands discharged with the submission of fresh Bank Guarantee given by the applicant to the Central Transmission Utility, the nodal agency, during construction phase where augmentation of transmission capacity is required. Regulation 13 provides that the nodal agency on receipt of the application for LTA shall carry out the necessary system studies and based on these studies, shall identify the inter-State transmission system required to give LTA to the applicant. Regulation 14 requires the nodal agency to communicate to the applicant, the date from which long-term access shall be granted and an estimate of the transmission charges likely to be payable based on the prevailing costs, prices and methodology of sharing of transmission charges specified by this Commission. Regulation 15 mandates the applicant to sign an agreement for LTA with the Central Transmission Utility, which shall contain the date of commencement of LTA, the point of injection of power into the grid and point of drawal from the grid and the details of dedicated transmission lines, if any, required. Where augmentation of the transmission system is necessary, long term access agreement shall contain the time line for construction of the facilities of the applicant and the transmission licensee, Bank Guarantee required to be given by the applicant, and other details in accordance with the Detailed Procedure.

11. From the above provisions of the Connectivity Regulations it emerges that there are two types of Bank Guarantees that an LTA applicant is required to furnish to the nodal agency. The first Bank guarantee is required to be given alongwith the application for the LTA @ ₹10, 000 per MW. If as a result of system studies, it is found that no further augmentation of the transmission system is required, the applicant will be required to sign an LTA Agreement and the Bank guarantee already paid will remain valid till operationalisation of the LTA. If it is found that augmentation of transmission system is required, then the applicant will be required to enter into LTA Agreement, submit a fresh Bank Guarantee for construction period calculated as per Detailed Procedure and the bank Guarantee given earlier alongwith the application for LTA shall stand discharged. Under two circumstances, the Bank Guarantee can be encashed by the nodal agency: firstly, if the applicant withdraws the LTA application; secondly, the long term access rights are relinquished prior to operationalisation of such rights when augmentation of transmission system is not required.

12. By virtue of Regulation 27 of the Connectivity Regulations, this Commission has approved the Detailed Procedure submitted by the Central Transmission Utility on

procedural aspects not adequately covered under these regulations. Clause 23 (5) of the Detailed Procedure makes following provisions on encashment of the Bank Guarantee, with an object identical with the object of clause (5) of Regulation 12:

“The bank Guarantee may be encashed by the nodal agency

(i) if the application is withdrawn by the applicant or

(ii)

(iii) If the applicant fails to sign the Long Term Access Agreement with CTU or a tripartite agreement with CTU and transmission licensee, as the case may be, and fails to furnish appropriate BG for construction phase, within stipulated time as indicated in the intimation letter.”

13. Thus in accordance with the Detailed Procedure also, the nodal agency is permitted to encash the Bank Guarantee under certain circumstances such as no signing of LTA or non-furnishing of Bank Guarantee for construction phase.”

9. In the present case, the petitioner made an application to PGCIL for grant of long term open access on 17.3.2011 for 600 MW accompanied by a demand draft for ₹6 lakh as non-refundable application fee and bank guarantee of ₹60 lakh in accordance with the provisions of the Connectivity Regulations and the procedure issued thereunder. PGCIL after carrying out the necessary system studies decided to grant long term access to the petitioner subject to certain system strengthening. PGCIL vide its letter dated 5.8.2011 granted long term access to PGCIL for 300 MW from July 2014 and another 300 MW from October, 2014 valid till July 2034. In the said letter it was intimated that transmission system strengthening is required in connection with the long term access granted to the petitioner for which the petitioner has to submit a bank guarantee of ₹30 crore at the rate of ₹5 lakh/MW for 600 MW. Subsequently, PGCIL vide its letter dated 22.11.2011 supplied draft agreement for long term access to the petitioner for signing and for submitting the bank guarantee of ₹30 crore. PGCIL while conveying the grant of LTA also informed that the petitioner shall enter into long term access agreement within 30 days of receipt of the draft agreement. The petitioner has been requesting for extension of time for signing of the long term access agreement

which has been granted by the respondent. PGCIL in the 7th JCC meeting of IPPs granted/applied LTOA/LTA in Western Region held on 25.2.2014 has intimated the petitioner that the LTA shall be cancelled, if the LTA agreement is not signed by 30.4.2014. Subsequently, PGCIL vide its letter dated 11.3.2014 has also given a final notice for cancellation of the LTA unless it is signed by 30.4.2014. The said letter is extracted as under:

“This is with reference to LTA granted to you vide intimation no. C/SEF/TA/11/04 dated 5.8.2011 (subsequently revised vide intimation No.C/SEF/TA/L/W/11/04 dated 13.6.2013) and letter dated 04.09.2013, 15.10.2013, 18.11.2013, 9.12.2013 and 21.02.2014 from our Commercial Department, requesting you to sign LTA Agreement as per provisions of CERC Regulations. It may please be noted that grant of LTA was subjected to signing of LTA Agreement within the time period specified in the LTA grant intimation letter. The signing of the said agreement is long pending despite various reminders from our side.

In this regard please note that during 7th JCC meeting held on 25.02.2014 in POWERGRID office at Gurgaon, it was decided that if the LTA Agreement is not signed by you by 30.04.2014, the LTA shall be cancelled as per the provisions of CERC Regulations for which M/s Jayaswal Neco shall be solely responsible and for the same, no further notice shall be given.

In view of the above, it is once again requested to depute your representative for signing the LTA Agreement within time, so as to avoid action for cancellation of LTA.”

It is clear from the above letter that PGCIL has been pursuing the matter with the petitioner for signing of the long term access agreement and has given the petitioner the last opportunity to sign the agreement by 30.4.2014 failing which LTA will be cancelled. The petitioner has submitted that it is committed to execute the project but due to force majeure conditions on account of non-availability of coal linkage from Ministry of Coal for 1.10 MTPA, lack of environmental clearance, allocation of captive coal block being sub-judice before the Supreme Court, non-materialisation of long term bidding and lack

of support from the Govt. of Chhattisgarh for purchase of power from the proposed power plant, the petitioner is not in a position to go ahead with the project and has sought return of the bank guarantee. It is not necessary for us to go into the question whether these events are in the nature of force majeure or not as we are not concerned in this petition about the progress of the generating station of the petitioner. The judgment relied upon by the learned counsel for the petitioner is not of much help as the letter dated 5.8.2011 does not provide that the long term access granted to the petitioner will stand cancelled if the generation project is delayed or abandoned. The Connectivity Regulations does not prohibit an LTA applicant to withdraw its application in case the long term access is not required in the light of the subsequent developments. In that event, the LTA applicant will not be required to sign the long term access agreement and will not be required to pay the Performance Bank guarantee. However, in terms of the Connectivity Regulations and the Procedure issued thereunder, the concerned LTA applicant will be required to forego the application bank guarantee which will be encashed by the nodal agency i.e. PGCIL. It needs to be emphasized that the purpose of application bank guarantee is to ensure commitment of the project developers to use the transmission line for which LTA has been sought and to give comfort to PGCIL that the transmission line would not be stranded after it is built. If the LTA applicants are allowed to withdraw their LTA applications without any deterrent in the form of encashment of application bank guarantee, then the LTA applicants will withdraw or cancel their LTA applications at their sweet will at slightest pretext which will severely affect and undermine the transmission planning by PGCIL. The very purpose and spirit of providing for application bank guarantee will be frustrated

if the petitioner is allowed refund of the application bank guarantee as prayed for in the petition.

10. In our view, the petitioner is not entitled for refund of the bank guarantee and PGCIL is at liberty to deal with the bank guarantee in accordance with the Connectivity Regulations and Procedure issued thereunder.

11. The petition and the IA are disposed of in terms of the above.

sd/-
(A. K. Singhal)
Member

sd/-
(M. Deena Dayalan)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson