

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 111/MP/2014**

**Coram:**

**Shri Greesh B. Pradhan, Chairperson**

**Shri A.K. Singhal, Member**

**Date of Hearing: 22.7.2014**

**Date of Order : 24.8.2015**

**In the matter of**

Petition under Sections 79 and 94 of the Electricity Act, 2003 read with Regulation 24 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 read with Central Electricity Regulatory Commission (Grant of Connectivity, Long term Access and medium term Open Access in inter-State transmission and related matters) Regulations, 2009.

**And**

**In the matter of**

Hindustan Electricity Generation Company Pvt. Limited  
514, EPG Marg, Naiman Point,  
Mumbai-400 021

**.....Petitioner**

Vs

Power Grid Corporation of India Limited  
B-9, Qutub Institutional Area,  
Katwaria Sarai, New Delhi-110 0016

Oriental Bank of Commerce  
B-1 and GL-34, Galleria  
Hirnanadani Gardens,  
Powai, Mumbai-400 076

**....Respondents**

**Parties Present:**

Shri Sudhansu Batra, Sr. Advocate, HEGCL  
Shri P.J. Mehta, Advocate, HEGCL  
Shri Vipul Dubey, Advocate, HEGCL  
Shri Sambhav Gupta, Advocate, HEGCL  
Shri Mukesh Naresh, HEGCL  
Ms. Suparna Srivastava, Advocate, PGCIL  
Shri A.M. Pavgi, PGCIL



## ORDER

The petitioner, Hindustan Electricity Generation Company Private Limited (HEGCPL) has filed the present petition under Section 79(1) (f) of the Electricity Act, 2003 read with the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium term open access and related matters) Regulations, 2009 (hereinafter "Connectivity Regulations") seeking directions to Power Grid Corporation of India Ltd.(hereinafter the "CTU") and Oriental Bank of India to stay the encashment/revocation of the bank guarantee of the petitioner in view of the alleged frustration and impossibility of the purpose of the contract and for exparte and interim order for staying the operation and effect of the letter dated 22.4.2014 issued by PGCIL.

### **Facts of the case:**

2. The petitioner is a developer of 2500 MW combined cycle power plant at village Navlakh Umbre, Yalegaon, Pune, Maharashtra. The petitioner applied for grant of connectivity on 13.1.2010 for an installed capacity of 2500 MW with the commissioning schedule progressively from April, 2012 to July, 2013. CTU carried out the system studies of the power system and decided the connectivity transmission system for evacuation of power from the generating station of the petitioner and circulated the same in the agenda for connectivity/long term access vide its letter dated 12.3.2010.

3. On 15.12.2010, the petitioner applied for long term access to CTU in accordance with the Connectivity Regulations for 1500 MW capacity from its proposed power plant with three target regions (Western Region-375 MW, Northern Region-375 MW, Eastern Region-750 MW) to be effective from December, 2014. The application was accompanied by a bank guarantee of ₹1.5 crore with validity for one year from

15.12.2010 in addition to the application fee of ₹9 lakh. The petitioner vide its application dated 28.2.2011 applied for another LTA for 1000 MW and furnished a Bank Guarantee of ₹1 crore effective from 27.2.2012. The petitioner vide its letter dated 28.2.2011 requested for revision of connectivity from 2500 MW to 2100 MW.

4. CTU carried out the system studies and evolved the transmission system for connectivity as well as transmission system strengthening for LTA and circulated the agenda vide letter dated 4.4.2011 for discussion in the meeting of Western Region Constituents. In the 14<sup>th</sup> meeting of Western Region Constituents regarding connectivity/open access application held on 13.5.2011, the petitioner's applications for grant of connectivity and long term open access were considered. In the said meeting, the petitioner informed that it was reviewing the target beneficiaries/quantum of power in the LTA and requested CTU to put on hold its application for the time being and agreed to come back to CTU at the earliest.

5. The petitioner vide its letter dated 14.7.2011 again requested CTU to revise its connectivity from 2100 MW to 1110 MW. CTU in its letter dated 29.7.2011 advised the petitioner that on account of material change in the quantum of power to be interchanged with ISTS, filing of fresh application would be required. On 18.8.2011, the petitioner applied for connectivity for 1137 MW. Further, the petitioner vide letter dated 20.9.2011 requested CTU to: (a) consider its LTA application dated 28.2.2011 for 1000 MW and connectivity application for 1137 MW in the meeting of the Western Region Constituents to be held on October, 2011; and (b) keep the LTA application dated 15.12.2010 on hold so as to be considered in the subsequent meeting of the Western

Region Constituents. Keeping in view the request of the petitioner for revision of installed capacity for the purpose of connectivity and the LTA beneficiaries, CTU circulated the agenda vide its letter dated 5.10.2011 for discussion in the meeting of the WR Constituents/Standing Committee meeting on power system planning proposed to be held on 21.10.2011 which included the request of the petitioner for grant of connectivity and long term access. In the 15<sup>th</sup> meeting of WR Constituents held on 21.10.2011 regarding connectivity/open access applications, the petitioner informed that environmental clearance has been granted for one unit of 379 MW but the letter regarding environmental clearance was awaited as the matter was sub-judice due to public interest litigation. It was decided in the meeting to grant connectivity and LTA for 379 MW keeping in view the progress of the generation project. Considering the desired date of connectivity as September 2013, the petitioner agreed to develop the connectivity transmission system including the bays at 400 kV Pune (AIS) and Pune (GIS) S/s. As regards the LTA, it was decided that the petitioner would sign the LTA Agreement/TSA with CTU for sharing of transmission charges corresponding to 379 MW (114 MW for SR and 265 MW for ER). Accordingly, CTU issued the intimation for connectivity and LTA to the petitioner.

6. The petitioner vide its letter dated 28.11.2011 has requested CTU to modify beneficiaries for full LTA quantum of 379 MW to ER since the petitioner had signed PPA with West Bengal. CTU vide its letter dated 30.1.2012 sought confirmation from the constituents of Western Region to the proposed modification. The petitioner vide its letter dated 6.2.2012 has confirmed its request for modification of beneficiary for full quantum of 379 MW to Eastern Region. The petitioner vide its letter dated 22.2.2012

also submitted to CTU the Connectivity Agreement in CON-4 duly filled in. Vide its letter dated 2.4.2012, CTU granted LTA for 379 MW to the petitioner for sale of power in Eastern Region. Subsequently, CTU issued a revised LTA vide its letter dated 13.6.2013 for 379 MW to Eastern Region in line with the discussion held in the 17<sup>th</sup> Meeting of WR constituents regarding Connectivity and Open Access Applications held on 3.1.2013. The petitioner was required to enter into LTA Agreement with CTU within 30 days from the date of receipt of draft LTA Agreement. The petitioner vide letter dated 7.11.2013 requested for substitution of the existing bank guarantee of ₹1 crore by a fresh bank guarantee of ₹37.90 lakh in view of the reduced quantum of LTA granted to it. No action appears to have been taken by CTU on the request of the petitioner. Despite issue of reminders dated 11.11.2013 and 9.12.2013 by CTU, the petitioner has not signed the LTA Agreement.

7. The petitioner vide its letter dated 18.12.2013 intimated CTU that the Environment Clearance for Unit 1 for 379 MW dated 22.2.2012 has been quashed by the Bombay High Court. The Supreme Court directed the authorities to have a fresh look at the EIA report within a stipulated timeframe. The authorities required HPGCL to repeat the process which the petitioner undertook but the process could not be completed as the public hearing could not be held on account of agitation by local villagers and environmental NGOs. In the meantime, based on the report of Dr. K. Kasturirajan, Member (Science) Planning Commission, new or expansion project or activities related to thermal power plant development was prohibited in the Western Ghats where the project was to be located. The petitioner further intimated that WBSEDCL, the long term customer for Unit 1 has also terminated the PPA. The

petitioner has further intimated that on account of developments beyond its control, the petitioner has decided to relocate its project from the existing location. The petitioner requested CTU to refund its Application Bank Guarantee of ₹1.5 crore and ₹1 crore as the LTAs have been frustrated and CTU has not incurred any expenditure towards any grid augmentation pursuant to the applications for LTA. The petitioner vide its letter dated 30.1.2014 reiterated its position with regard to non-signing of LTA Agreement and refund of Application Bank Guarantee.

8. CTU vide letter dated 22.4.2014 requested the petitioner to extend the bank guarantee expiring on 27.5.2014 failing which the bank guarantee would be encashed as per the Connectivity Regulations. The bank guarantee was extended by the petitioner up to 27.8.2014. Aggrieved by the CTU's letter dated 22.4.2014 to invoke the bank guarantee, the petitioner has filed the present petition seeking the following prayers:

“(a) Direct the Respondent No. 1 and 2 to stay the encashment/invocation of the bank guarantee of the petitioner in view of frustration and impossibility of performance of the contract;

(b) Grant ex-parte ad interim order staying the operation and effect of the letter dated 22.4.2014 addressed to the Respondent No. 2 and direct the Respondent Nos. 1 & 2 to stay the encashment/invocation of the bank guarantee of the petitioner in view of frustration and impossibility of performance of the contract; and

(c) Pass any other order or orders in light of the facts and submissions made herein above which this Hon`ble Commission deems fit and appropriate in favour of the petitioner and against the respondents.”

9. The petitioner has also filed an Interlocutory Application with prayer to grant ex-parte ad-interim order staying the operation and effect of the letter dated 23.6.2014. The petitioner has submitted that PGCIL vide its letter dated 23.6.2014 has requested the petitioner to sign LTOA on 7.7.2014 at its Gurgaon office failing which it would result in

encasement/invocation of BG. The petitioner has submitted that due to the prevailing uncertainties, it is not in a position to sign agreement for LTA.

### **Reply of CTU**

10. PGCIL in its reply dated 1.9.2014 has submitted that the petitioner in connection with its 2500 MW power plant proposed to be developed in District Pune, Maharashtra applied for connectivity on 13.1.2010 and for LTA to ISTS on 15.12.2010 for a capacity of 1500 MW in accordance with the Connectivity Regulations. The petitioner furnished a Bank Guarantee dated 15.12.2010 for ₹1.5 crore @ ₹10,000/MW alongwith the application drawn on Oriental Bank of Commerce (Respondent No.2) which was valid for one year. PGCIL has further submitted that vide another application dated 28.2.2011, the petitioner applied for LTA for 1000 MW and furnished a bank guarantee of ₹1 crore valid for one year. Since the bank guarantees were to be co-extensive with the LTAs, they were extended from time to time by the petitioner. The bank guarantee dated 15.12.2010 for ₹1 crore was extended upto 14.12.2014 and the correspondence on record shows that there was no controversy whatsoever surrounding such extension at any point of time. The bank guarantee dated 28.2.2011 for ₹1 crore was extended upto 27.2.2014 without any contentious issue raised in that behalf and thereafter upto 27.5.2015 under protest. PGCIL has submitted that it was only with respect to last extension upto 31.8.2014 that the petitioner raised completely impermissible issues and ultimately filed the present petition and therefore, the petitioner's alleged grievance is as regards the bank guarantee dated 28.2.2011 (as extended from time to time) only.

11. PGCIL has further submitted that the application for LTA was discussed in the 14<sup>th</sup> Meeting of Western Region constituents held on 13.5.2011 wherein the petitioner informed

that the target beneficiary/quantum was being reviewed and requested to put on hold its applications and agreed to come back to the CTU at the earliest. Subsequently the petitioner gave a proposal for grant of connectivity and modification in LTA in the Western Region and in the said proposal, the petitioner agreed to sign the LTA Agreement/Transmission Service Agreement with CTU and pay the transmission charges. CTU vide its letter dated 2.4.2012, keeping in view the petitioner's request for modification of target beneficiaries, granted LTA to the petitioner subject to signing of the LTA Agreement and fulfilment of other prescribed conditions. Subsequently, vide letter dated 13.6.2013, CTU sent a revised LTA intimation to the petitioner for 379 MW. The petitioner vide its letter dated 7.11.2013 requested for substitution of the bank guarantee of ₹1 crore by a fresh bank guarantee of ₹37.9 lakh. CTU has submitted that all this while and at no stage, the petitioner had sought withdrawal/relinquishment of LTA because the project had become impossibility. CTU has submitted that since the petitioner has failed to sign the LTA Agreement and open the necessary Letter of Credit, the existence of bank guarantee became of utmost importance to secure the financial interest of the CTU. Since Para 23.5(iv) of the Detailed Procedure provides that the bank guarantee may be encashed by CTU if the applicant fails to revalidate the bank guarantee at least 30 days prior to its expiry, CTU by exercising its legal rights available to it under the bank guarantee informed the bank (Respondent No.2) that in the event bank guarantee was not extended on its expiry, the letter was to be treated as a claim letter and the amount under the guarantee was to be remitted to CTU.

12. PGCIL has submitted that in the Statement of Reasons, the intention of the Commission for having the bank guarantee has been signified which provides that bank guarantee is implemented to bring seriousness to the applications for LTA made by the



applicants. Further para23.5 of the Detailed Procedure specifies that the bank guarantee may be encashed by the CTU if the application is withdrawn by the LTA applicant. PGCIL has submitted that these provisions have been overlooked by the petitioner. PGCIL has further submitted that from the various events pertaining to alteration in the application by the petitioner, it is clear that the petitioner itself has been in a state of uncertainty and chaos since inception and despite several intimations and requests, the petitioner never came up to sign the LTA Agreement and it was only after the letter dated 22.4.2014 demanding encashment of bank guarantee that the petitioner informed CTU about the project being unviable and untenable pursuant to the letters of the CEA dated 19.3.2012. CTU has submitted that there is no merit in the submissions of the petitioner and petition is liable to be dismissed.

### **Pleadings during the hearings**

13. After notice to the respondents, the main petition and the IA were taken up for hearing. Learned senior counsel for the petitioner submitted that on account of CEA advisory regarding non-availability of gas till 2015-16, the report of the High Level Working Group in the Western Region treating the location of the proposed plant in the ecological sensitive areas where there is complete ban on thermal power plant and lack of environment clearance, the petitioner is not in a position to go ahead with the project and accordingly has sought return of bank guarantee. Learned senior counsel further submitted PGCIL has not built any new transmission system due to the generation project of HEGCL. Learned senior counsel submitted that in order to encash the bank guarantee, PGCIL should first determine the stranded capacity on account of the project of the petitioner and calculate the compensation to be paid as per the regulations on account of stranded capacity. Learned counsel for CTU submitted that the bank guarantee provided alongwith

the application is for ensuring sincerity and seriousness among the LTA applicants and discourage abuse of the process of grant of LTA and if an applicant who has been granted LTA fails to enter into LTA Agreement, the bank guarantee is liable to be encashed. In response to the submission regarding stranded capacity, the representative of PGCIL clarified that the planning for evacuation of power is done by taking the entire grid into consideration and also the expected generation and transmission system in the given time-frame in totality.

14. PGCIL was directed to submit a comprehensive report regarding the planning of the transmission system which included the project to be developed by the petitioner. CTU in Annexure R-3 to its affidavit dated 1.9.2014 has submitted a report in this regard. The report of the CTU in brief is discussed as under:

(a) On receipt of the application for connectivity and LTA as per the Connectivity Regulations, CTU besides the document check considers the details like project size, unit size, location and commissioning schedule, nearest sub-stations etc. and depending on the size/ultimate capacity of the generation project, the voltage level, conductor type and bundle are decided. After deciding the voltage level, the generator and transmission lines are modelled in the Power System Simulator for Engineering (PSSE) software as per Manual of Transmission Planning Criteria published by Central Electricity Authority for different timeframes.

(b) The petitioner applied for connectivity in January 2010 for connectivity for an installed capacity of 2500 MW with commissioning schedule progressively from April 2012 to July 2013. Considering the timeframe of March 2012 as indicated by the petitioner, CTU carried out the system studies, decided the connectivity

transmission system (400 kV connectivity to Pune (Existing) through double circuit line and 765 kV transformers) and proposed the same in the Agenda for Connectivity/LTA circulated vide letter dated 12.3.2012.

(c) The petitioner applied for LTA of 1500 MW in December 2010 with target region (WR-375 MW, NR-375 MW and ER-750 MW) with effect from December 2014. In February 2011, the petitioner applied for LTA of additional 1000 MW with target region (WR-700 MW, SR-300 MW) with effect from March 2014. Based on these applications, CTU carried out the system studies by taking power system model for March 2014 and proposed transmission system strengthening in the Agenda dated 4.4.2011 as under:

(d) In the 14<sup>th</sup> Meeting of Western Region Constituents on Open Access held on 13.5.2011, the petitioner requested to keep the application on hold since the petitioner was reviewing the target beneficiaries/quantum. In August 2011, the petitioner applied for grant of connectivity for 1137 MW (3x379 MW) generation project. Vide letter dated 20.9.2011, the petitioner requested to consider its LTA application for 1000 MW in the meeting scheduled to be held in October 2011 and put on hold the LTA application for 1500 MW to be considered in the subsequent meetings of WR constituents.

(e) CTU based on the revised request of the petitioner for connectivity for 1137 MW and LTA for 1000 MW (SR: 300 MW & ER: 700 MW) carried out the system studies and decided the proposed transmission system and circulated the agenda vide letter dated 5.10.2011. CTU proposed the following transmission system:

(f) In the 15<sup>th</sup> Open Access Meeting held on 21.10.2011, considering the progress of the generation project, connectivity and LTA was granted for one unit of 379 MW only. Accordingly, the intimation for connectivity and LTA (ER: 265 MW & SR: 114 MW) were granted. In the 17<sup>th</sup> Open Access Meeting, the petitioner requested for modification in the LTA beneficiaries based on its PPA with West Bengal. It was agreed in the meeting to change the beneficiaries to ER 379 MW. Since a number of generation projects were envisaged in Eastern Region having target beneficiaries in Western Region, the allocation of the petitioner was proposed to be transferred through displacement. The final transmission system for connectivity and LTA was decided as under:

(a) For Connectivity: HEHL-Pune (PG) 400 kV D/c (HTLS Conductor) line

(b) For LTA: Installation of 2x500 MVA, 400/220 kV transformer at Pune (GIS)

### **Analysis and Decision**

15. We have considered the submission of the parties. The petitioner has made two prayers. Firstly, the petitioner has sought directions to Respondent No.1 and 2 to stay the encashment/invocation of bank guarantee in view of the frustration and impossibility of performance of contract. Secondly, the petitioner has sought an interim order to stay the operation of the letter dated 22.4.2014 addressed to Respondent No.2. As correctly pointed out by the learned counsel for the CTU, the bank guarantee of ₹1 crore in respect of the LTA dated 28.2.2011 was extended till 27.5.2014. Since the petitioner failed to extend the bank guarantee which was expiring on 27.5.2011, CTU issued a notice dated 22.4.2014 to Respondent No.2 to encash the bank guarantee if it is not extended before expiry. Subsequently, the petitioner extended the bank guarantee till 27.8.2014. Accordingly, the letter dated 22.4.2014 stood discharged. Therefore, prayer No (ii) has become infructuous.

As regards the first prayer, the petitioner has sought a direction to the CTU not to encash the bank guarantees on the ground that the execution of generating station of the petitioner has become an impossibility on account of the CEA's advisory to the project developers not to execute the gas based thermal generation project till 2015-16, the proposed plant being declared as in the proximity of Ecological Sensitive Area by the High Power Committee on Western Ghat and lack of environmental clearance. The petitioner has further submitted that the CTU has not incurred any expenditure on account of grant of LTAs and therefore, the bank guarantee cannot be encashed by CTU without demonstrating the stranded transmission capacity.

16. Let us first consider the provisions of the Connectivity Regulations with regard to bank guarantee for LTA. Regulation 12 of Connectivity Regulations provide as under:

“12. Application for long term access

- (1) The application for long term access shall contain details such as name of the entity or entities to whom electricity is proposed to be supplied or from whom electricity is proposed to be procured alongwith the quantum of power and such other details as may be laid down in the Detailed Procedure:

.....  
.....

- (2) The applicant shall submit any other information sought by the nodal agency including the basis for assessment of power to be interchanged using the inter-State transmission system and power to be transmitted to or from various entities or regions to enable the nodal agency to plan the inter-State transmission system in a holistic manner.

- (3) The application shall be accompanied by a bank guarantee of Rs 10,000/- (ten thousand) per MW of the total power to be transmitted. The bank guarantee shall be in favour of the nodal agency, in the manner laid down under the detailed procedure.

- (4) The bank guarantee of ₹10,000 /- (ten thousand) per MW shall be kept valid and subsisting till the execution of the long-term access agreement, in the case when augmentation of transmission system is required, and till

operationalization of long-term access when augmentation of transmission system is not required.

(5) The bank guarantee may be encashed by the nodal agency, if the application is withdrawn by the applicant or the long-term access rights are relinquished prior to the operationalisation of such rights when augmentation of transmission system is not required.

(6) The aforesaid bank guarantee will stand discharged with the submission of bank guarantee required to be given by the applicant to the Central Transmission Utility during construction phase when augmentation of transmission system is required, in accordance with the provisions in the detailed procedure.”

17. 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.

18. Clause 23 (5) of the Detailed Procedure makes following provisions on encashment of the Bank Guarantee:

“(5) The bank Guarantee may be encashed by the nodal agency:

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

(ii) The long-term access rights are relinquished prior to the operationalization of such long-term access when augmentation of transmission system is not required.

(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.”

19. From the above provisions, it is clear that the application bank guarantee can be invoked if the LTA applicant either withdraws the application or does not sign the LTA agreement or does not furnish the appropriate bank guarantee for the construction phase. In the present case, the petitioner applied for LTA for 1500 MW on 15.12.2010 accompanied by a bank guarantee of ₹1.5 crore and LTA for 1000 MW on 28.2.2011 accompanied by a bank guarantee of ₹1 crore in accordance with the Connectivity Regulations. The petitioner on receipt of the applications undertook system studies and based on the results proposed the connectivity and system strengthening required for the long term access. CTU proposed the system strengthening scheme to be

discussed in the next meeting of WR constituents through the Agenda dated 4.4.2011. In the meeting, held on 13.5.2011, the petitioner requested the CTU to keep its application on hold as it was revising its target beneficiaries. In its letter dated 20.9.2011, the petitioner requested CTU to consider the LTA application for 1000 MW with modified target beneficiaries and to put its application for LTA of 1500 MW on hold to be taken up in subsequent meetings. Based on its modified target beneficiaries, CTU again carried out the system studies and included the same in the agenda dated 5.10.2011. In the 15<sup>th</sup> Open Access meeting held on 21.10.2011, connectivity and LTA was granted for 379 MW (ER: 265 MW and SR;114 MW) and intimation for LTA was issued. Subsequently, in the 17<sup>th</sup> Open Access Meeting held on 3.1.2013, on the request of the petitioner, LTA granted to the petitioner was modified to 379 MW for ER without any system strengthening. Intimation letter was issued on 13.6.2013 to the petitioner for signing the LTA Agreement for 379 MW within one month. The petitioner was issued reminder on 11.11.2013 and 9.12.2013 to enter into LTA Agreement but the petitioner has not signed the same.

20. From the above, it emerges that out of the 2500 MW for which the petitioner had applied for LTA, the petitioner has been granted LTA for 379 MW in due consideration of the petitioner's request and the progress of its generating station. The following discussions and decisions taken in the 17<sup>th</sup> Meeting of the WR constituents regarding Connectivity and Open Access held on 3.1.2013 are relevant and are extracted as under:

“COO(CTU) asked about the status of balance units of the generation project. M/s HEGCPL stated that the matter of environmental clearance for these units is sub-judice. COO (CTU) stated that if considerable progress for these units is submitted by April'13, LTA for these units shall be processed. Otherwise, this application shall be closed with grant of 379 MW and for the balance units, HEGCPL shall apply for fresh LTA.

M/s HEGCPL requested to modify beneficiary for full LTA quantum of 379 MW power to ER, since they have signed the PPA with West Bengal. After detailed deliberations, it was agreed in the meeting to change the beneficiaries of M/s HEGCPL to ER-379 MW for full



quantum of LTA (379 MW) in place of (SR-114 MW, ER-265 MW) agreed during 15<sup>th</sup> WR Constituent Meeting regarding Connectivity/Open Access applications held on 21<sup>st</sup> October, 2011.

Further, since the beneficiary has changed to ER, and there is no beneficiary in SR, system strengthening in WR-SR corridor is not required. Hence, LTA granted to HEGCPL was modified to 379 MW (ER-379 MW) without any system strengthening.”

It is therefore evident from the above that CTU has granted LTA for 379 MW in due consideration of the request of the petitioner. The LTA application for balance capacity of 2121 MW has been put on hold on the request of the petitioner. The petitioner is now pleading that execution of the project has become impossibility and has accordingly sought refund of bank guarantee. The request of the petitioner amounts to withdrawal of its applications for LTA. The question therefore arises as to whether the alleged impossibility of performance furnishes a good ground to the petitioner to contend that the Bank Guarantee ought not to be cashed. The Connectivity Regulations do not anywhere state that if the applicant is able to prove the existence of any circumstances beyond its control or existence of any force majeure conditions, which prevented it from performing the contract, its bank guarantee should not be encashed. The Connectivity Regulations do not prohibit the applicant to withdraw its LTA application. The Connectivity Regulations and the Detailed Procedure provide that if an applicant withdraws its application or does not sign the LTA Agreement, then its bank guarantee shall be encashed by CTU. The rationale for encashment of bank guarantee has been explained in the Statement of Reasons to the Connectivity Regulations as under:

“68. We are of the view that furnishing of Bank Guarantee is required to bring seriousness to the applications made by the applicants. However, a provision has been made requiring the bank guarantee to stand discharged with the submission of bank guarantee required to be given by the applicant to the Central Transmission Utility during the construction phase when augmentation of transmission system is required, in accordance with the provisions in the detailed procedure. Furthermore, the amount of Bank Guarantee has been reduced from the originally proposed ₹1 lakh per MW to ₹10,000 per MW.

69. It has been requested by MSEDCL that in the detailed procedure to be laid down by the nodal agency, the applicant may be allowed a time limit within which he may withdraw the application, when the Bank Guarantee will be returned to the applicants.

70. We are not in agreement with the suggestion made. In fact, the revised regulation specifies that the bank guarantee may be encashed by the nodal agency, if the application is withdrawn by the applicant or the long term access rights are relinquished prior to operationalization of such rights when augmentation of transmission system is not required.”

Therefore, the provision of bank guarantee has been made to ensure seriousness among the LTA applicants. In this connection, observations of the Appellate Tribunal for Electricity in Appeal No. 197 of 2014 (Jayaswal Neco Urja Limited Vs Power Grid Corporation of India Ltd. & Another) are relevant which are extracted as under:

“32. ....The purpose behind the requirement of furnishing Bank Guarantee and the provisions for its encashment if the LTAA is not signed is to ensure commitment of the project developer to use the transmission line for which LTA has been sought. It gives assurance to Respondent No.1 that the transmission line would not be stranded after it is built. If the LTA applicants are allowed to withdraw the LTA applications without any deterrent like encashment of Bank Guarantee, then the purpose behind the scheme of grant of LTOA will be frustrated. We, therefore, find encashment of the Appellant’s Bank Guarantee to be perfectly legal.”

21. The petitioner has vehemently argued that since execution of the project has become impossibility, the contract has been frustrated. This argument cannot be accepted as the CTU has in no way contributed to the impossibility of performance of contract. This issue has also been dealt with by Appellate Tribunal in Appeal No. 197 of 2014 as under:

“33. Assuming that the Appellant’s contention about the existence of force majeure conditions is correct, so long as Respondent No.1 by its acts of omission or commission has not contributed to the Appellant’s being unable to commence operation of its power plant, Respondent No.1 cannot be held responsible for it and encashment of Bank Guarantee cannot be faulted on that count.”

In view of the above finding of the Appellate Tribunal, it can be said that since CTU by its acts of commission or omission has not contributed to the abandonment of the project by

the petitioner, CTU cannot be held responsible for it and no direction can be issued prohibiting CTU to encash the bank guarantee.

22. In view of the above discussion, we reject the prayer of the petitioner and accordingly, the petition is dismissed.

23. The petitioner during the pendency of the petition had filed Writ Petition(C) No.3080 of 2015 in the High Court of Delhi. Hon'ble High Court in its order dated 25.3.2015 had granted stay on the encashment of bank guarantee and had issued notice to the respondents including this Commission. Since the Hon'ble High Court was seized with the matter, this Commission awaited the decision of the High Court before disposing the present petition. Hon'ble High Court vide its order dated 7.8.2015 after noting the submission of the counsel for the Commission has disposed of the writ petition allowing the interim order to continue till the order is passed in the petition.

24. With the issue of this order, the interim order dated 25.3.2015 will cease to have effect in terms of the directions of the Hon'ble High Court. CTU is at liberty to take appropriate action with regard to the bank guarantee in accordance with the Connectivity Regulations and the Detailed Procedure.

sd/-  
**(A.K.Singhal)**  
Member

sd/-  
**(Gireesh B. Pradhan)**  
Chairperson