

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 117/MP/2015

Subject : Petition under Sections 79(l)(f) and 79(l)(k) of the Electricity Act, 2003 seeking appropriate directions against the Respondent/ CTU for refund of Relinquishment Charges paid by the Petitioner Company to the Respondent for Relinquishment of Medium Term Open Access of 208 MW.

Date of hearing : 26.5.2016

Coram : Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Petitioner : D.B Power Limited

Respondent : Power Grid Corporation of India Limited

Parties present : Shri Sanjay Sen, Senior Advocate, D.B Power
Shri Matrugupta Mishra, Advocate, D.B. Power
Shri Hemant Singh, Advocate, D.B. Power
Shri Tushar Nagar, Advocate, D.B. Power
Shri Vikas Adhia, DB. Power
Shri H. Sharma, DB. Power
Ms. Suparna Srivastava, Advocate, PGCIL
Shri Swapnil Verma, PGCIL
Ms. Jyoti Prasad, PGCIL

Record of Proceedings

Learned senior counsel for the petitioner submitted as under:

(a) On 28.5.2013, the petitioner made an application to CTU for grant of MTOA of 208 MW. CTU vide its letter dated 10.7.2013 granted MTOA to the petitioner and requested to sign the TSA. On 10.8.2013, the petitioner entered into TSA with PGCIL. MTOA was later withdrawn along with payment of relinquishment charges.

(b) The petitioner disagreed with the levy of relinquishment charges by the respondent and the relinquishment charges were made under protest.

(c) Subsequently, the Commission vide order dated 8.8.2014 in Petition No. 92/MP/2014 had held that the MTOA granted to the petitioner was invalid/illegal on account of the fact that it violated the provisions of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (Connectivity Regulations) and the Detailed Procedure.

(d) The only question for determination in the present matter is whether there can be a levy of relinquishment charges if the grant itself was declared invalid. Therefore, the relinquishment charges paid by the petitioner to the respondent have to be refunded on account of the fact that the grant of MTOA by the respondent to the petitioner was held invalid, hence null and void since its very inception, vide the said order of the Commission.

(e) The Hon`ble Andhra Pradesh High Court in the case of Kanuri Sivaramkrishnaiah V Vemuri Venkata Narahari Rao [AIR 1960 AP 186] has held that the question of the illegality of the transaction stand in the way of the plaintiff recovering what he had paid under the illegal agreement or contract, could be answer by referring to the Section 65 of the Contract Act, 1872 which provides that "when an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or make compensation for it to the person from whom he received it".

(f) The Hon`ble Supreme Court in the case of Tarsem Singh V Sukhminder Singh [(1998) 3 Supreme Court Cases 471] has held that Section 65 of the Contract Act is based on equitable doctrine, which provide for the restitution of any benefit received under a void agreement and therefore, the person who has received any advantage under an agreement which is discovered to be void or under a contract which becomes void, has to restore such advantage to the person from whom he received that advantage.

(g) In the present case, the petitioner had entered into long term PPA with TANGEDCO, on 25.11.2013, the petitioner made an application to CTU for grant of Long Term Open Access (LTA) for 208 MW power and requested PGCIL to replace the MTOA granted to it with LTA from the date of commencement of such LTA. In response, PGCIL vide its letter dated 28.11.2013, informed the petitioner that there is no provision in the Connectivity Regulations to replace one type of access with another type of access and each kind of access is to be treated separately. PGCIL advised the petitioner to relinquish the MTOA granted to it so that its application for grant of LTA for the same power may be considered. The petitioner vide its letter dated 2.12.2013 relinquish the MTOA granted to consider the LTA's application made by it. The surrender was made before the power flow started. PGCIL cannot take surrender charge for a grant which does not exist in law.

(h) The MTOA was to be operationalised from 1.6.2014 to 31.10.2016. The petitioner had surrendered much before the date of operationalisation i.e. on 2.12.2013. The question of right of lien does not arise. The date of lien does not arise from the date of intimation i.e 10.7.2013.

2. Learned counsel for PGCIL submitted as under:

(a) The subject matter of the instant petition is a grant of MTOA which works in real time operations and immediately after the grant of MTOA, the nodal agency is required to inform the RLDC and SLDC concerned so that they can consider the same while processing requests for short term open access, as per Regulation 21 (2) of the Connectivity Regulations.

(b) The provision for payment of relinquishment charges while seeking exit from MTOA has a cogent nexus with the operations involved in the inter-State transmission system wherein access for long term, medium term and also short term are granted by the concerned nodal agencies from time to time to various transmission customers.

(c) Grant of MTOA results in availability of corresponding transmission corridor in favour of the grantee, irrespective whether the corridor is actually utilized for transmission of power by such grantee. Thus, while the MTOA is validly subsisting, the MTOA grantee continues to have a statutory lien over the transmission corridor availability and the short term open access transactions are scheduled subject to such lien. Therefore, the grant of other MTOA and STOA was at that time subject to other statutory lien that the petitioner enjoyed.

(d) When there is a lien on the transmission corridor on real time basis in that case STOAs are also in schedule subject to this lien. It can't be subsequently said that now the grant has been declared invalid, therefore all that has happened before also stands cancelled. The operation of Section 65 of the Contract Act has to be seen in the context of operation of the power system where the power flow takes place on real time basis.

(e) The petitioner had retained lien on the corridor when the MTOA has been validly subsisting in its favour and the subsequent finding of invalidity of the MTOA could not have been the reason with which the petitioner had relinquished MTOA. The subsequent invalidity of the MTOA which is declared has no relation back to these transactions which have deemed to have taken place on real time basis.

(f) The relinquishment of MTOA was made on 2.12.2013 whereas the order of the Commission declaring the grant of MTOA as invalid was made on 8.8.2014. Therefore, relinquishment of MTOA had taken place when the said

MTOA was validly subsisting in favour of the petitioner. Thus, there can be no 'relation back' of setting aside of MTOA on real time transmission operations.

(g) The relinquishment charges paid by the petitioner are in compliance of the provisions of the applicable Regulations/ Detailed Procedure. All the rights and obligations of both the parties had existed, were exercised and then surrendered. That being so, there is no question of any restoration of benefits when the grant of MTOA was declared void much after the relinquishment.

(h) When the MTOA was granted it was believed by both the parties that same has been correctly granted under the Regulations till the time it is declared by the Commission to be invalid. The petitioner in the present case is demanding the restoration of benefits accrued to parties under a contract when the contract was discovered to be void.

(i) The restoration in the context of power transmission under real time operations was impossibility. The petitioner had been an MTOA customer if the respondent's transmission system at that time under a grant which had not yet discovered to be void and had also surrendered that grant before the invalidity was discovered under the judgment of the Commission. All the rights and obligations of both parties under the grant had existed were exercised and then surrendered during that period. The question o restoration of benefits could not at all arise when the MTOA grant was declared to be void much after its surrender.

(j) The judgments on Section 65 of the Contract Act relates to a bi-party contract wherein there are mutual rights and obligations. However, in case of grant of MTOA, there are a host of other parties and stakeholders whose priorities, rights and obligations are affected. Therefore, the instant petition is not a fit case for application of Section 65 of the Contract Act.

3. After hearing the learned senior counsel for the petitioner and learned counsel for PGCIL, the Commission reserved order in the petition.

By order of the Commission

**Sd/-
(T. Rout)
Chief (Law)**