

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 10/RP/2015
in
Petition Nos. 127/2012, 128/TL/2012 and 156/MP/2012**

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

Date of order: 20th October, 2016

In the matter of

Petition for review of the order dated 6.4.2015 in Petition Nos. 127/2012, 128/TL/2012 and 156/MP/2012.

**And
In the matter of**

Power Grid Corporation of India Limited
B-9, Qutab Institutional Area,
Katwaria Sarai, New Delhi-110 016

....Review Petitioner

Vs

1. Samalkot Power Limited,
Dhirubhai Ambani Knowledge City
Mumbai-400 710

2. Spectrum Power Generation Ltd.
D.No. 8-2-293/A/231, Plot No. 231,
3rd Floor, Road No. 36, Jubilee Hills,
Hyderabad-500 033.

3. REC Transmission Ltd.
Core-4, SCOPE Complex, 7 Lodhi Road,
New Delhi-110 001.

.....Respondents

The following were present:

Shri M.G. Ramachandran, Advocate, PGCIL
Ms. Ranjitha Ramchandran, Advocate, PGCIL
Shri B. Vamsi, PGCIL
Shri S.T. Thomas, PGCIL

Shri N.K.Jain, PGCIL
Ms. Vasudha Gupta, Advocate, SML
Shri Matrugupta Mishra, Advocate, SPGCL
Ms. Roumita Dev, Advocate, SPGL
Shri Ankit Kumar, RECPTCL

ORDER

The Review Petitioner, Power Grid Corporation of India Limited (PGCIL), has filed this Review Petition seeking review of the Commission's order dated 6.4.2015 in Petition Nos. 127/2012, 128/TL/2012 and 156/MP/2012.

Background of the Case

2. The Commission accorded regulatory approval vide order dated 13.12.2011 in Petition No.154/2011 to the Central Transmission Utility (CTU) for development and execution of certain identified transmission systems for evacuation of power from the generation projects planned to be developed by various project developers which included development and execution of the "Transmission System associated with the IPPs of Vemagiri Area Package A" for evacuation of power from the generation projects of Spectrum Power Generation Limited (SPGL) and Samalkot Power Limited (SPL). The regulatory approval was based on the Long Term Access applications made by SPGL and SPL in the absence of any identified beneficiaries. One of the conditions of the regulatory approval was that the transmission systems would be developed in phases matching with the progress of the generation projects. SPGL and SPL entered into Long Term Access Agreement with CTU and submitted bank guarantee of to PGCIL. It was decided by the Empowered Committee on Transmission Planning that Vemagiri Transmission Systems would be developed through competitive bidding in accordance with section 63 of the Electricity Act, 2003 (the Act). Rural Electrification

Corporation Transmission Project Company Limited (RECTPCL) was appointed as the Bid Process Coordinator to carry out the competitive bidding to select a Transmission Service Provider who would execute the project and provide transmission services throughout the period of the Transmission Service Agreement. RECTPCL incorporated Vemagiri Transmission Systems Limited (VTSL) as a Special Purpose Vehicle which was to be acquired by the successful bidder on the basis of the bidding process. A Transmission Service Agreement was entered into by VSTL with SPGL and SPL as the Long Term Transmission Customers on 15.12.2011. Based on the competitive bidding carried out by RECTCL, PGCIL was selected as the successful bidder to execute the transmission system and Lol was issued in favour of PGCIL. As per the requirement of competitive bidding, PGCIL furnished Contract Performance Guarantee to SPGL and SPL and acquired 100% stake in VTSL at a price of Rs.18,27,93,533/-. PGCIL filed Petition Nos. 127/2012 and 128/2012 for grant of transmission licence and adoption of tariff respectively. Petition No.156/MP/2012 was filed by SGPL for cancellation of LTA/TSA on the ground that due to non-availability of gas, it had discontinued implementation of its generation project. PGCIL vide its affidavit dated 27.6.2012 submitted that in view of the SPGL's submission for cancellation of the LTA/TSA, the Commission may decide about the sharing of the transmission charges. SPL submitted that though it was executing its project, it would not bear the transmission charges for the entire system after withdrawal of SPGL. Considering the submission of parties, particularly the difficulties and uncertainties in the execution of the generation projects, the Commission vide order dated 9.5.2013 decided that there was a need to review the requirement of transmission network needed for evacuation of power of the generating stations being developed in the Vemagiri Area and to re-examine the possibility of

reconfiguring the required network in the Southern Region based on expected generation and load. Since some elements of the transmission systems may be combined with other transmission systems being built or proposed to be built in the region, the Commission directed CEA and CTU to undertake necessary review and re-examination of the entire matter afresh and submit their recommendations/views. CTU in its letter dated 12.9.2013 submitted that on the basis of the joint studies carried out with CEA, CTU, APTRANSCO, KPTCL and TANTRANSCO on 29.6.2013 and discussion during 36th Standing Committee meeting on Power System Planning of Southern Region held on 4.9.2013, Vemagiri Transmission System was not required to be executed in the present form. The Commission in its order dated 27.9.2013 allowed the refund of Bank Guarantee to SPGL and SPL by CTU and also directed SPGL and SPL to refund the Contract Performance Guarantees to PGCIL. CEA in its letter dated 30.9.2013 recommended that Vimagiri-Khammam-Hyderabad 765 kV D/C line already awarded to PGCIL should be implemented as soon as possible. The Commission after taking note of the views of CEA and CTU decided to get clarity on the necessity and utility of the transmission line for taking a decision in the matter and advised CEA vide order dated 9.7.2014 to convene a meeting of the Standing Committee on Power System Planning of Southern Region to consider the necessity and utility of execution of 765 kV D/C Vemagiri-Khammam-Hyderabad transmission line and submit a report. The issue was discussed in the 37th Meeting of the Standing Committee on Power System Planning of Southern Region held on 31.7.2014 in which majority of the constituents opined that Vemagiri-Khammam-Hyderabad 765 kV D/C lines awarded to PGCIL be dropped as of now and based on the availability of gas/requests for LTAs from generating stations/prevaling demand-generation scenario, the necessity and

utility of these lines may be evaluated at that time. However, CEA in its letter dated 17.11.2014 reiterated its views as conveyed vide its letter dated 30.9.2013 that the transmission line should be executed in its present form. After taking all factors into consideration, the Commission through the impugned order dated 6.4.2015 decided Vemagiri-Khammam-Hyderabad 765 kV D/C lines was neither required as an evacuation line nor required as a system strengthening line and disposed of the petitions for grant of transmission licence and adoption of tariff as having being rendered infructuous.

3. PGCIL had filed IA No. 24/2014 seeking refund of the acquisition price and audit cost of the company from the date of Share Purchase Agreement till the winding up of Vimagiri Transmission Company. The Commission vide order dated 6.4.2015 decided the issue of refund of acquisition price as under:

“25. On the basis of the commitment given by SPL and SPGL through the LTA granted to them and the LTA Agreement signed by them, the process for selection of a Transmission Service Provider was undertaken as per the Guidelines. After selection of PGCIL as TSP, PGCIL acquired the Vemagiri Transmission System Limited and paid an amount of Rs.18,27,93,533/-. Though SPGL approached for cancellation of TSA vide its letter dated 30.3.2012, it accepted the Contract Performance Guarantee furnished by PGCIL. SPL did not have any objection to the execution of the transmission system but declined to bear the full transmission charges. Since the process of competitive bidding was undertaken by RECTPCL on the basis of commitment of SPL and SPGL, we are of the view that they are liable to bear the cost of acquiring the Vemagiri Transmission System Limited and the expenditure incurred by PGCIL subsequently. Both PGCIL and RECTPCL have not acted upon the letter of SPGL dated 30.3.2012 in which it was requested not to proceed with the execution of the project based on the LTA granted to SPGL. Accordingly, we direct that 80% of the acquisition price incurred by Vemagiri Transmission Company Ltd. shall be reimbursed by SPL and SPGL to PGCIL in proportion to the LTA granted to them. The balance 20% and the expenditure incurred by VTSL from the date of acquisition till the liquidation of the company shall be borne by PGCIL. In case there is any realization from the assets of VTSL in future, the same shall be apportioned between the LTTCs and PGCIL in the ratio of 80:20.”

4. Aggrieved by the above directions, PGCIL has filed the instant review petition. Both SPL and SGPL have filed appeals in the Appellate Tribunal for Electricity.

5. PGCIL has filed the review petition on the ground that there were errors on the face of the record in the impugned order on account of the following:

(a) The Commission has wrongly decided that PGCIL has not acted upon the letter dated 30.3.2012 of Spectrum Power Generation Limited (SPGL) requesting PGCIL not to proceed with the execution of the project based on the long-term access granted to SPGL. PGCIL on receipt of said letter dated 30.3.2012 informed SPGL vide its letter dated 11.4.2012 with copy to REC Transmission Projects Company Limited (RECTPCL) and CEA that in case of SGPL abandoning its generation project, then PGCIL would have no option but to encash the Bank Guarantee in terms of clause 6 of the BPTA and requested SPGL to take up issue regarding cancellation of TSA with RECTPCL as per the terms and conditions of the TSA. It was for RECTPCL to decide on this aspect.

(b) CTU despite having placed on record the developments of the letter dated 30.3.2012, RECTPCL vide its letters dated 16.4.2012 and 18.4.2012 insisted PGCIL to acquire 100% shares of VTSL by 20.4.2014 and intimated the steps to be taken in regard to furnishing of contract performance guarantee and payment of acquisition price. In the circumstances, PGCIL had no option but to proceed with the implementation of the agreement by paying the acquisition price, incur further expenditure on VSTS and apply for adoption of tariff and grant of

transmission licence. The matter is also pending before the Commission till 6.4.2015 and the Commission had been considering various alternatives. However, RECTCL as the BPC did not take any decision either in pursuance to the letter dated 30.3.2012 from SPGL or when the matters were pending before the Commission.

(d) The letter dated 30.3.2012 from SPGL which was on the subject of non-availability of gas with a request not to implement the project was replied promptly on 11.4.2012 by PGCIL with a copy marked to the BPC and CEA. Subsequent to the said letter, no further communication was received from SPGL or CEA. Even after SPV was acquired by PGCIL on 18.4.2012 and subsequent filing of applications on 20.4.2012 for grant of transmission licence and adoption of transmission charges before the Commission with copies marked to respondents, there was no reply from SPGL. It was only after two months from filing of applications, SPGL vide its letter dated 7.6.2012 sought cancellation of TSA.

(e) PGCIL vide affidavit dated 21.6.2012 had placed on record of the Commission SPGL's letter dated 7.6.2012 raising the issue of non-availability of gas and sought directions from the Commission in this regard. However, the Commission in the impugned order held that PGCIL did not bring the issue of the non-availability of the gas raised by SPGL to the notice of the Commission which is contrary to record and an error apparent on the face of the record.

(f) The Commission observation that PGCIL has not even filed its reply to Petition No. 156/MP/2012 is incorrect. Since all three petitions were heard together and information was submitted in one petition which was applicable to all three petitions. The Commission in its order dated 9.5.2013 in Petition No.156/MP/2012 has recognized that though PGCIL and other respondents have not filed separate replies in the present petition, they have placed the necessary facts and their views on record in the collateral proceedings in Petition No.127/2012.

(g) Out of Rs.18,27,93,533/- paid to RECPTCL, a sum of Rs.16,54,50,000/- is claimed as fees by RECPTCL. There is no justification for RECPTCL to appropriate the above amount when the project has not been implemented and further when the Commission has found RECTPCL to have not acted correctly.

(h) PGCIL accordingly has sought review and modification of the order dated 6.4.2015 to the extent of directions contained in para 25 of the impugned order and for a declaration that the long-term beneficiaries and/or RECTPCL shall be jointly or severally liable to compensate PGCIL for the cost incurred namely, Rs. 18,27,93,533/- paid to RECTPCL and additional expenditure of Rs. 8,43,01,424/- incurred by PGCIL from the date of the acquisition of Vemagiri Transmission System Limited.

6. Replies to the Review Petition have been filed by SPL, SPGL and RECTCL. Gists of the replies of the respondents are discussed in brief as under:

(a) SPL has submitted that the Review Petition is not maintainable and is liable to be dismissed as none of the grounds is attracted in the facts and circumstances of the case. Secondly, RECTPCL and PGCIL have not led any evidence to prove that any such cost has actually been incurred. Thirdly, despite acknowledging that both PGCIL and RECTPCL have not acted upon the SPGL's letter dated 30.3.2012, PGCIL cannot shift the liability to SPL and SPGL for the acquisition price of VTSL on the ground that expenses were on RECTPCL's insistence and that the PGCIL was not in any manner responsible for the same. Fourthly, PGCIL by its conduct, representations and submissions before the Commission repudiated the BPTA as well as Transmission Service Agreement. Fifthly, SPL was only required to perform its obligations once the transmission system was completed by PGCIL and since PGCIL itself failed to fulfill its obligations, SPL could not be made to compensate PGCIL. Sixthly, the cost incurred by PGCIL is a matter of dispute between PGCIL and RECPTCL and SPL should not be dragged into it. Finally, SPL has filed an appeal before the Appellate Tribunal for Electricity against the order dated 6.4.2015 seeking a direction that the entire cost shall be borne by PGCIL.

(b) Spectrum Power Generation Limited (SPGL) vide its affidavit dated 17.8.2015 has submitted that it has challenged the issue of 80% quantum to be borne by LTTCs. On the contrary, PGCIL has filed the review petition seeking review the 20% quantum to be borne by it. Since such conclusion of 80:20 to be borne by LTTCs and PGCIL is ensuing out of the reasoning and under challenge before ATE, the principle enunciated under order 47 Rule 1 (2) of CPC is squarely

applicable to the facts and circumstances of the present case. SPGL has submitted that it is a settled principle of law that in case of appeal which amounts to continuation of the proceedings, the first appellate authority is seized of the matter and record, therefore, the court of the first instance cannot in the guise of review interfere with or re-adjudicate upon the issues which are already pending for determination before the appellate forum. SPGL has submitted that when it has already preferred an appeal before ATE and raised the grounds questioning the validity of the observations and directions made by the Commission in para 25 of the order dated 6.4.2015, the ground raised by review petitioner in the present petition are also similar in nature, the same can be adjudicated by ATE.

7. REC Transmission Projects Company Limited (RECTPCL) in its reply dated 17.8.2015 has submitted that the Commission in impugned order has taken a correct view considering the overall facts and circumstances of the case while observing that the bid process was undertaken by RECPTCL on the basis of commitment of SPL and SPGL. In so far as RECPTCL is concerned, it has a limited role to play for which it was to be paid a specific amount of fees as per the notification of Government of India, Ministry of Power dated 16.3.2011 and payment of such fees was not subject to the successful implementation of the project. If a direction is given to RECPTCL to refund the fees, it would result in nullifying the notification of the Ministry of Power. Secondly, PGCIL through its wholly owned subsidiary had filed IA 24/2014 in Petition No.127/2012 for refund of the acquisition price in which RECPTCL was made a pro-forma respondent and no relief was sought against RECPTCL. Therefore, the scope of the petition cannot be beyond the said IA and the petitioner cannot expand the scope of the

review by seeking the prayers which were never sought in the original application. Thirdly, Ministry of Power notified RECTPCL as the BPC for the purpose of conducting the bid process and selection of a successful bidder as Transmission Service Provider to implement the project. RECTPCL incorporated a project company, namely VSTL and issued a Request for Proposal. A Transmission Service Agreement dated 15.12.2011 was entered into between VSTL and SPL and SPGL. Upon receipt of the bid, PGCIL was found to be a successful bidder and was issued a Letter of Intent dated 20.3.2012. Clause 2.5 of the RfP provides that RECPTCL shall become *functus officio* after the acquisition of equity shareholding the project company. Upon transfer of shares in the project company by BPC, it had no authority, role, obligation or liability whatsoever of any nature. Therefore, no demand for refund of the amount paid to RECPTCL could be made. Further, the demand of the acquisition price by the petitioner from RECPTCL is in utter breach of the provisions of Article 5 and 6.16 of the Share Purchase Agreement. In any event, the Commission has no such powers to unsettle the transaction which took place two years back in accordance with law and invalidate the SPA under which the amount was paid to SPL. Fourthly, the amount paid to RECTPCL was on account of the consultancy charges fixed by Ministry of Power vide notification dated 4.2.2011 and if the prayer is entertained, it would amount to nullifying and setting aside the said notification of Ministry of Power. Fifthly, in so far as the letter dated 30.3.2012 was concerned, the petitioner had taken the stand that since a lot of ground work having financial implication had already been done, the construction bank guarantee furnished by SPGL could not be returned. At that time, the Commission was considering the return of the Bank Guarantee furnished by SPL and SPGL under their respective agreements with VSTL and the petitioner failed to urge the issue of return of the amount

paid to acquire VSTL. The Commission vide order dated 27.9.2013 directed the PGCIL to return the bank guarantees to SPL and SPGL on the basis that the PGCIL had neither made any investment nor made any progress in the implementation of the transmission system. PGCIL did not contest the said order and allowed the bank guarantees to be cancelled. Sixthly, the TSA dated 15.12.2011 was executed between VTSL, SPL and SPGL, and after acquisition of VSTL by PGCIL vide SPA dated 18.4.2012, there is no question of cancellation of TSA by RECTPCL as contended by PGCIL. After issue of the said letter, RECTPCL had written a letter dated 16.4.2012 to PGCIL wherein it was pointed out that RECTPCL as the BPC had no authority to make changes either in the list of LTTC or cancellation/deletion of any LTTC from the already executed TSA. RECTPCL also informed the same to SPGL vide its letter dated 18.4.2012. Seventhly, upon acquisition of the project by the successful bidder, the role of BPC was over and there was no provision for the refund of the said amount nor the payment of the said amount conditional upon the project being implemented. Further, nowhere in the order dated 6.4.2015 has the Commission held that RECTPCL had not acted correctly. Therefore, the question of compensation by RECTPCL does not arise at all. Finally, under the provisions of the Electricity Act, 2003, this Commission does not have the jurisdiction to adjudicate on the issue of refund of acquisition price.

Analysis and Decision:

8. We have heard learned counsels for the Review Petitioner and the respondents and perused the documents on record. In the present petition, the Review Petitioner has sought review of the Commission's order dated 6.4.2015 on the ground that the

finding recorded in para25 of the impugned order that PGCIL has not acted upon the letter of SPGL dated 30.3.2012 and directing PGCIL to bear 20% of the cost and expenses incurred on the transmission system, is an error apparent on the face of the record.

9. First of all, we shall deal with the preliminary objections raised by the respondents. SPGL has submitted that the present review petition is not maintainable in view of the bar contained in Rule 1(2) of Order 47 of the Civil Procedure Code. The said Rule provides as under:

“(2) A party who is not appealing from a decree or order may apply for a review of the judgement notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for review.”

SPGL has submitted that though it may seem that SPGL has challenged 80% quantum to be borne by the long term users and 20% quantum to be borne by PGCIL, such conclusion of 80:20 to be borne by the long term transmission users and PGCIL is ensuing out of the reasoning and observations recorded by the Commission in para 25 of the order dated 6.4.2015 which is under challenge before the Appellate Tribunal. Since the Appellate Tribunal is seized with the matter, it would be inappropriate for the Commission to delve into the issues which are to be adjudicated by the Appellate Tribunal. We have considered the submission of SPGL. Apart from SPGL, SPL has also filed the appeal before the Appellate Tribunal challenging apportionment of 80% of the acquisition price. The ground for challenge in the appeal is that SPL and SPGL are not liable to pay 80% of the acquisition price as the project has been abandoned and PGCIL has not incurred any expenditure. However, the ground of review is different in

the present review petition. PGCIL has submitted that the main reason recorded in order dated 6.4.2015 for apportioning the 20% of the acquisition cost to PGCIL is that it had not acted on the letter of SPGL dated 30.3.2012 which is not correct. According to PGCIL, it had not only replied to SPGL, it also endorsed the copy of the reply to CEA and RECTPCL and therefore, PGCIL has discharged its part and cannot be saddled with the liability. In our view, the grounds on which appeals have been filed by SPL and SGPL are different from the grounds on which review has been filed by PGCIL. Therefore, the review petition is not hit by the bar of Rule 1(2) of Order 47 of the Civil Procedure Code.

10. SPL has also made a preliminary objection that the impugned order does not suffer from any of the three circumstances enumerated under Rule 1 of Order 47 of the Code of Civil Procedure. The grounds of review under Rule 1 Order 47 of the code of Civil Procedure are as under:

- (a) Discovery of new and important matter or evidence which, after exercise of due diligence, was not within the knowledge or could not be produced by the review applicant at the time when decree was passed or order was made;
- (b) On account of some mistake or error apparent on the face of the record;
- (c) For any other sufficient reason.

SPL has submitted that Hon'ble Supreme Court in Kamalesh Verma Vs. Mayawati & Others {2013(8) SCC 32} has laid down the grounds when review shall not be maintainable. One such ground is "mere possibility of two views on the subject cannot be a ground for review". SPL has submitted that PGCIL has sought review on the

ground that it should not have to pay 20% of the cost or additional expenditure and if review is allowed on this ground, it would amount to review based on mere possibility of two views. We have considered the submission of SPL. PGCIL has sought review on the ground that the finding of the Commission that PGCIL has not acted on the letter of SPGL dated 30.3.2012 and therefore is liable to pay 20% of the acquisition price and subsequent expenditure on the SPV is not based on facts as PGCIL had replied SPGL vide its letter dated 11.4.2012. PGCIL's letter dated 11.4.2012 is on record and perusal of the said letter shows that PGCIL had refused to return the Construction Bank Guarantee and also cautioned SPGL about encashment of the Bank Guarantee in terms of clause 6.0(a) of BPTA dated 24.12.2010. PGCIL had further advised SPGL to take up the matter with RECTPCL for cancellation of TSA in accordance with the terms and conditions of the TSA. Prima facie, this letter has significant implication in deciding the liability of PGCIL in terms of the reasoning recorded in the impugned order which was not produced before the Commission when the impugned order was passed.

11. RECPTCL has made a preliminary objection that the review filed by PGCIL is an appeal in disguise and PGCIL is urging the Commission to rehear the matter and correct the decision which is not permissible in review. In our view, this objection has no substance as PGCIL is primarily seeking review of the finding that PGCIL did not take any action on the letter of SPGL whereas PGCIL had taken action on the said letter. RECTPL has further submitted that this Commission does not have the jurisdiction under the provisions of the Electricity Act, 2003 to adjudicate on the issue of refund of acquisition price. This is an issue on merit which will be considered if the review is allowed and therefore, we do not want to deal with this objection at this stage.

12. The main ground of PGCIL for seeking review is that immediately after receipt of the letter dated 30.3.2012 from SPGL, it replied in its capacity as CTU vide letter dated 11.4.2012 that a lot of ground work having financial implications has already been undertaken with regard to the transmission systems within its scope of work as well as those to be implemented through tariff based competitive bidding and therefore, construction bank guarantee cannot be returned and in the event SPGL abandoning the project, then CTU would have no option but to encash the bank guarantee as per clause 6.0(a) of the BPTA signed with PGCIL on 24.12.2009. As regards the request of SPGL for cancellation of the TSA, PGCIL advised the following:

“As regards the cancellation of the TSA signed with RECTPCL, you are requested to take up the issue with them to take necessary action as per terms and conditions of the TSA.”

According to PGCIL, it was for RECTPCL to decide on the aspect of the request of SPGL for cancellation of TSA. In so far as PGCIL was concerned, there was a mandate to the amount of Rs.18,27,93,533 on or before 18.4.2012 failing which the Bid Bond in the form of Bank Guarantee given by PGCIL for a sum of Rs.14 crore was liable to be forfeited. PGCIL has submitted that there was no occasion or question of PGCIL not paying the said amount of Rs.18,27,93,533 to RECTPCL and taking steps in regard to filing of an application for adoption of tariff and VSTL applying for grant of transmission licence. PGCIL has submitted that despite its placing the developments on record, RECTPCL insisted on the acquisition of 100% share of VTSL by PGCIL and intimated the steps to be taken in regard to furnishing the corporate performance guarantee and payment of acquisition price vide letters dated 16.4.2012 and 18.4.2012. PGCIL has

submitted that there are no factors attributable to PGCIL with regard to its reply to LTTC and therefore the finding that no action was taken by PGCIL on the letter of SPGL suffers from error apparent on the face of record. RECPTCL has submitted that in its reply to SPGL dated 11.4.2012, RECTPCL has clarified that any change in the list of Long Term Transmission Customers for the transmission project can only be considered by CTU in terms of the relevant regulations of CERC and RECPTCL in its role as Bid Process Coordinator has no authority either to make changes in the list of LTTCs or cancellation/deletion of any LTTC from the already executed TSA.

13. In order to analyse and appreciate the submissions of PGCIL and RECTPCL with regard to the letter of SPGL dated 30.3.2012, it is necessary to understand the process of tariff based competitive bidding carried out to select the Transmission Service Provider for development and operation of the transmission project. In accordance with the provisions of the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access, Medium Term Open Access in inter-State Transmission and related matters) Regulations, 2010 (Connectivity Regulations), Central Transmission Utility is the nodal agency for long term open access. Both SPL and SPGL applied for long term access to CTU accompanied by bank guarantee. After considering their applications, CTU granted LTAs to these generators who were required to accept the LTAs and enter into Bulk Power Transmission Agreement dated 24.10.2010 and furnish bank guarantee for the construction period. Both SPL and SPGL entered into Bulk Power Transmission Agreement dated 24.10.2010 and furnished bank guarantee. CTU obtained the regulatory approval from the Commission for execution of the transmission project. After obtaining the regulatory approval, the

matter was placed before the Empowered Committee on Transmission for a decision whether the transmission project was to be executed through competitive bidding or on cost plus basis by PGCIL. After it was decided by the Empowered Committee on Transmission that the project would be implemented through tariff based competitive bidding, Ministry of Power appointed RECPTCL as the Bid Process Coordinator. RECPTCL incorporated VSTL as an SPV to carry out the process of bidding and after selection of the successful bidder, the SPV was to be transferred to the successful bidder who was to acquire 100% equity share holding in VSTL by paying the acquisition price fixed by BPC. In the present case, PGCIL was selected as the successful bidder and was issued Letter of Intent dated 20.3.2012. As per the condition of the Lol, the successful bidder is required to complete the various activities in the final RfP including clauses 2.4, 2.5 and 2.6. Clause 2.4 of the RfP requires the successful bidder to do the following within 30 days of issue of LOI:

- (a) Provide Contract Performance Guarantee in favour of Long Term Transmission Customers as per the provisions of clause 2.21;
- (b) Execute the Share Purchase Agreement and all other project documents as per Annexure 3 (Transmission Service Agreement and Share Purchase Agreement);
- (c) Acquire for the execution price one hundred percent equity shareholding of VSTL from RECTPCL alongwith its related assets and liabilities;
- (d) Make application to the Commission for adoption of tariff under section 63 of the Act.

However, the proviso under clause 2.4 of the RfP provides that if for any reason attributable to the BPC, the above activities are not completed by the selected bidder

within 30 days, such period shall be extended on a day for day basis till the Bid validity period. Clause 2.5 of the RfP provides that after acquisition of the equity shareholdings of VSTL, the authority of the BPC shall cease and any actions to be taken thereafter shall be undertaken by LTTCs. Further, the said clause says that all rights and obligations of VSTL shall be of the TSP and contractual obligations undertaken by the BPC shall continue to be fulfilled by the TSP. Clause 2.6 of the RfP says that the selected bidder shall apply for transmission licence within 30 days of issue of Lol. Clause 2.7 of the RfP says that if the selected bidder or TSP fails or refuses to comply with any of its obligations under clauses 2.4, 2.5 and 2.6 of the RfP, then such failure or refusal shall constitute sufficient ground for cancellation of the Lol and the BPC shall be entitled to invoked the bid bond of the selected bidder.

14. At this stage, it is necessary to distinguish between the responsibilities of PGCIL as CTU and its obligations as the successful bidder to perform the functions of TSP. As the CTU, PGCIL is responsible for granting LTA, execution of the Bulk Power Transmission Agreement/LTA Agreement, maintenance of the bank guarantee of the LTTCs till the project is successfully completed and LTA is operationalized. During the bidding process, PGCIL as CTU has no role to play and it is the BPC which has to carry out the bidding and undertake all responsibilities till the SPV is transferred to the successful bidder. PGCIL as a bidder is bound by the provisions of the RfP and after the issue of Lol, it has to perform its obligations in terms of clauses 2.4, 2.5 and 2.6 of the RfP failing which its bid bond is liable to be forfeited in terms of clause 2.7 of the RfP.

15. SPGL wrote a letter dated 30.3.2012 to PGCIL with copy to PGCIL, RECTPCL, CEA and MoP that on account of non-availability of gas, it is not possible to go ahead with the implementation of the generation project. Relevant portion of the said letter is extracted as under:

“It is therefore requested that no action may please be taken for implementing the execution of the transmission projects in the scope of PGCIL based on the Long Term Open Access and BPTA signed with PGCIL. The CEA/MoP have undertaken vide notification dated 19.3.2012 that the Project Developers shall be intimated when MOP&NG indicates the availability of Gas. On receipt of such intimation about the Gas availability, SPGL shall intimate to PGCIL about the new dates for commissioning of the project. Hence PGCIL can take up the execution of the transmission system thereafter. Since no project is likely to be commissioned before 2017-18, there is no purpose to block the Bank Guarantee for such long period. Accordingly, it is requested that the Bank Guarantee deposited by us for Rs.67.50 crores issued by ICICI Bank Limited submitted on 15th June, 2011 may kindly be returned.

Similar request is being made to REC Transmission Project Company Limited for cancellation of the Transmission Service Agreement and you may also write to them not to proceed ahead with the execution of the transmission work.”

PGCIL in its letter dated 11.4.2012 with copy to CEA and RECTPCL replied as under:

“Regarding the implementation of the above mentioned transmission system, it may be mentioned that the Investment Approval for the POWERGRID scope has been obtained and POWERGRID has already completed preliminary activities like the land acquisition at Vemagiri, Khammam & Hyderabad, preliminary survey, tendering activities etc. Similarly for the transmission system to be implemented through Tariff Based Competitive Bidding, the bidding process has been completed and Lol to successful bidder has been issued.

Therefore, it would be seen that a lot of groundwork having financial implication has already been done. Accordingly, Construction Bank Guarantee furnished by Spectrum cannot be returned. In the event of Spectrum Power abandoning its generation project, then POWERGRID shall have no option but to encash the Bank Guarantee as per clause 6.0 (a) of BPTA signed with POWERGRID on 24.12.2010.

As regards cancellation of TSA signed with RECTPCL, you are requested to take up the issue with them to take necessary action as per the terms of the TSA.”

PGCIL took up the matter with RECTPCL about furnishing the Contract Performance Guarantee in the light of the request of SPGL not to execute the transmission project. RECTPCL in its reply dated 16.4.2012 replied to PGCIL that RECTPCL in its role as the Bid Process Coordinator has no authority either to make changes in the list of LTTCs or cancellation/deletion of any LTTC from the already executed TSA, SPGL remains as one of the LTTCs. Further, in response to the PGCIL's letter dated 18.4.2012 intimating that SPGL is not eligible to receive Contract Performance Guarantee, RECTPL has replied as under:

“This is in reference your letter No. TBCB/VM/A/2 dated 18.4.2012 regarding uncertainties, as contained in the letter, for furnishing of Contract Performance Guarantee in favour of Long Term Transmission Customers for the aforesaid project. We are also in receipt of letter C/ENG.SEF/S/OA/Spectrum dated 18.4.2012 from Central Transmission Utility (CTU) informing us that M/s Spectrum Power Generating Limited is not eligible to receive Contract Performance Guarantee in the light of their request, addressed to CTU and RECTPCL separately, for not taking up the implementation of transmission system associated with Vemagiri Area.

In view of the position explained in above mentioned letters, we would request you to provide us the Contract Performance Guarantee of requisite amount and validity in favour of M/s Samalkot power Limited and Spectrum Power Generating Limited shall be kept in our custody, **however, the matter will be referred to Empowered Committee on Transmission and any further action in this regard will be taken based on directions from Empowered Committee/CTU.**”

It is observed that RECTPL had advised PGCIL to give contract performance guarantee in favour of SPL and SPGL which would be kept in the custody of RECTPCL. Further, RECTPCL had undertaken that the matter would be referred to Empowered Committee on Transmission and based on the directions of Empowered Committee/CTU, further action in this regard would be taken. Subsequent to this letter, PGCIL has given contract performance guarantee and acquired VSTL by paying the acquisition price. There is nothing on record which shows that RECTPCL had taken up the matter with

Empowered Committee on Transmission. It is pertinent to observe that while on the one hand, RECTPCL maintained that it had no role in the deletion/cancellation of any LTTCs from the already concluded TSA, it insisted on PGCIL to give contract performance guarantee on the assurance that the matter would be taken up with Empowered Committee on Transmission. Accordingly, PGCIL has given the contract performance guarantee, paid the acquisition price and acquired the SPVs. Both PGCIL and RECPTCL have not placed all these documents on record in Petition No.127/2012 and related matters which could have enabled the Commission to take a view in the matter. In our view, PGCIL has paid the acquisition price and acquired the VSTL in view of the provisions of clause 2.7 of the TSA which would have resulted in the encashment of Bid Bond by RECTPCL. Further, CTU could not take any action in terms of the BPTA since the matter was under consideration of RECTPCL. In our view, there are sufficient reasons to review the liability of PGCIL to pay 20% of the acquisition price. Accordingly, we allow the review and direct that the liability of payment of 20% of the acquisition price shall be decided afresh by taking a holistic view in the matter after disposal of appeals of Samalkot Power Limited and Spectrum Power Generation Ltd. by the Appellate Tribunal for Electricity. Accordingly, PGCIL is directed to move an appropriate application with all relevant documents and concerned parties for the purpose of determining the liability for payment of 20% of the acquisition price.

16. Review Petition is disposed of in terms of the above.

Sd/-
(Dr. M.K.Iyer)
Member

sd/-
(A. S.Bakshi)
Member

sd/-
(A.K. Singhal)
Member

ssd/-
(Gireesh B.Pradhan)
Chairperson