

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 31/MP/2016**

**Coram:**

**Shri Gireesh B. Pradhan, Chairperson**

**Shri A.K Singhal, Member**

**Shri A.S Bakshi, Member**

**Dr. M.K. Iyer, Member**

**Date of Hearing: 08.3.2016**

**Date of Order : 28.3.2016**

**In the matter of**

Petition for appropriate direction under Regulation 32 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 and the provisions of Central Electricity Regulatory Commission (Sharing of inter-State Transmission Charges and Losses) Regulations, 2010.

**And**

**In the matter of**

Ind-Barath Energy (Utkal) Limited  
Plot No. 30-A, Road No. 1  
Film Nagar, Jubilee Hills  
Hyderabad-500096  
Telangana

**....Petitioner**

**Vs**

M/s Power Grid Corporation of India Limited  
B-9, Qutab Industrial Area  
Katwaria Sarai  
New Delhi-110016

**....Respondent**

**Following were present:**

- 1) Shri Sanjay Sen, Senior Advocate for the Petitioner
- 2) Shri Matrugupta Mishra, Advocate for the Petitioner
- 3) Shri Ruth Elwni, UTKAL
- 4) Shri Sitesh Mukherjee, Advocate, PGCIL
- 5) Shri Gautam Chawla, Advocate, PGCIL
- 6) Shri V. Srinivas, PGCIL
- 7) Shri Swapnil Verma, PGCIL
- 8) Ms. Jyoti Prasad, PGCIL
- 9) Shri Pratith Raje, PGCIL

## ORDER

The petitioner Ind-Barath Energy (Utkal) Limited has filed the present petition seeking direction to Power Grid Corporation of India Limited (PGCIL) not to encash the letter of credit dated 11.8.2015 pursuant to the letter of PGCIL dated 2.3.2016. The petitioner has also sought an ad interim ex parte order restraining PGCIL from giving effect to the letter dated 2.3.2016 or to take any coercive action against the petitioner under the Bulk Power Transmission Agreement dated 24.2.2010, Transmission Service Agreement dated 19.8.2014 and Long Term Access Agreement dated 12.8.2015.

2. Brief facts of the case are that the petitioner M/s Ind-Barath Energy (Utkal) Limited has setup a 700 MW (2X350 MW) Thermal Power Plant at Sahajbahal, Jharsuguda, Odisha. The petitioner was granted LTA for 616 MW for which it entered into a Bulk Power Transmission Agreement dated 24.2.2010. As per the BPTA, the LTA of 350 MW was meant for Western Region and 266 MW was meant for Northern Region. The petitioner entered into a Power Purchase Agreement with Tamil Nadu Generation and Distribution Company Limited (TANGEDCO) on 8.8.2013 for supply of 500 MW RTC power. Since there was a change of region, the petitioner made an application to PGCIL on 4.12.2013 for grant of LTA for 500 MW for transfer to Tamil Nadu. PGCIL vide its letter dated 22.7.2015 granted LTA for 500 MW supply of power to the TANGEDCO. The petitioner opened letter of credit with Punjab National Bank on 11.8.2015 for an amount of ₹27.73 crore in favour of PGCIL and executed a Long Term Access Agreement with PGCIL on 12.8.2015.

3. The petitioner has submitted that under the BPTA dated 24.2.2010, the petitioner was required to commission Unit I and Unit II of its project by December,

2011 and February, 2012 respectively. The petitioner has submitted that due to occurrence of series of events beyond the control and contemplation of the petitioner, there has been an inordinate delay in achieving the commissioning of the Units as per the schedule. The events stated to be beyond the control of the petitioner are as under:-

- (a) The severe flood situation in Odisha in 2012 caused damage to the foundation of power project and certain materials leading to the suspension of work on the project.
- (b) Due to certain labour issues at the factory of Cethar Vessels Limited (CVL) which was awarded contract to supply the main boiler and related components to the petitioner, the factory of CVL remained closed from March, 2015, affecting construction works relating to boiler.
- (c) For the purpose of commissioning of the project, the project was granted permission to draw limited start-up power from 400 kV D/C Raigarh-Rourkela line Circuit I through LILO. The petitioner completed the LILO connectivity in November, 2014 and the petitioner started drawing start up power. The project was synchronized with grid on 11.9.2015 on trial basis by transporting coal in trucks in the absence of MGR under construction by the petitioner. However, the construction of MGR suffered a setback when OPGC demanded modification of 400 kV dedicated transmission line.
- (d) The construction of 400 kV D/C Ind-Barath-Jharasuguda dedicated transmission line is facing severe ROW issues in the form of stiff resistance from the land owners and the local population in general.

4. The petitioner has submitted that on account of the above force majeure events which are covered under Clause 9.0 of the BPTA and Clause 14.0 of the TSA, the parties are discharged from the respective liabilities and performance obligations. Though, the petitioner from time to time has brought to the notice of the PGCIL about the existence of such force majeure events and its impact on the commissioning of the project, PGCIL has declared the commercial operation of the concerned transmission lines mentioned in the LTA Agreement and accordingly, raised PoC Bill 1 for the months of December, 2015 dated 6.1.2015 for an amount of ₹3,22,47,286/- and Bill 4 for the month of May to September, 2015 for an amount of ₹22,21,505/-. The petitioner has submitted that on 16.2.2016, the petitioner wrote a letter to PGCIL to bring on record the difficulties suffered by it pursuant to the force majeure events and requested PGCIL to withdraw the invoices. However, PGCIL instead of appreciating and taking further action pertaining to the existence of force majeure events issued a letter on 2.3.2016 asking the petitioner to make payment within the stipulated period of time and in default of such payment on or before 6.3.2016, PGCIL has threatened to encash LC opened by the petitioner. The petitioner has submitted that such conduct of PGCIL has caused grave prejudice to the rights and interest of the petitioner. The petitioner has submitted that it reserved its right to make a substantive petition for the redressal of its grievances pertaining to occurrence of force majeure events and the consequences thereof. The petitioner is stated to have filed the present petition in order to restrain PGCIL from encashing the LC without adjudication of the validity of such force majeure events and its entitlement of the consequential relief. The petitioner has also submitted that it is putting its efforts towards expeditious implementation of the project along with mitigation of the force majeure events. The petitioner has submitted that it has a

prima-facie case and unless the prayer sought by the petitioner is granted, the interest of the petitioner shall be subjected to irreparable loss and injury.

5. The petition was mentioned by the learned counsel for the petitioner on 3.3.2016. The Commission directed the petitioner to make payment of the PoC charges in order to demonstrate its *bonafide* and subject to the payment made by the petitioner. PGCIL was directed to file its reply and the petition was listed for hearing on 8.3.2016.

6. Learned Counsel for the petitioner submitted that 400 kV D/C Ind-Barath-Jharsuguda dedicated transmission line is facing ROW problem on account of stiff resistance from land owners and local population. As the dedicated transmission line could not be commissioned, the petitioner applied for connectivity through LILO which was initially allowed by CTU for drawal of start-up power only. Subsequently, PGCIL allowed injection power only on the condition that the petitioner could achieve its COD only after its dedicated transmission line was constructed. Learned Counsel requested that CTU be directed to allow declaration of COD by injecting power through LILO as its dedicated transmission line would be ready in one month.

7. Learned counsel for PGCIL submitted that the force majeure events cited by the petitioner pertained to the period 2012 whereas the petitioner entered into the LTA Agreement on 12.8.2015. It is a condition of grant of LTA that the petitioner would construct its dedicated transmission line. Learned counsel submitted that if the petitioner succeeds in its claim of force majeure (for which the petitioner has stated to file a fresh petition), then PGCIL will not be entitled to transmission charges and in that event, the petitioner will be refunded the transmission charges. Learned counsel submitted that the amount to be paid by the petitioner upto January, 2016 was ₹2.96

crore and the bill for February, 2015 had been generated for ₹5 crore which would become due in 60 days. Learned counsel requested to reject the present petition and direct the petitioner to pay the transmission charges.

8. PGCIL, vide its written submission dated 21.3.2016, has submitted as under:

(a) The Commission vide order dated 16.2.2015 in Petition No. 92/MP/2014 along with related petitions held that in case of change of region, a fresh application has to be filed and clarified that all the LTA applications received during November, 2013 till December 2014 shall be processed afresh sequentially. Accordingly, all the LTA applications of December, 2013 were to be processed, including the one filed by the petitioner on 3.12.2013.

(b) Learned single judge of Hon`ble High Court of Madras vide its judgement dated 24.2.2015 in W.P. No. 28024 of 2014 inter-alia held that the first-come-first-served principle of processing of long-term access applications and Para 24.1.1 of the Detailed Procedure for grant of long term access applications is unconstitutional and directed PGCIL to grant long term access for 500 MW to the petitioner in isolation without any direction with respect to treatment of other LTA applications.

(c) Aggrieved by the said judgment of learned single judge, PGCIL filed Writ Appeal WA No. 923 of 2015. The Division bench of the Madras High Court set aside the judgment of the learned Single Judge dated 24.2.2015, and granted liberty to PGCIL to consider the petitioner`s application dated 3.12.2013 for the month of December, 2013, take appropriate decision on merits and in accordance with law, without being influenced by observation, if any, made by the learned Single Judge.

(d) PGCIL convened a meeting to process the long term access applications received in the months of November, 2013 and December, 2013 in terms of the Commission's order dated 16.2.2015 in Petition No. 92/MP/2015. On 22.7.2015 PGCIL informed the petitioner for grant of long term access notionally from 1.4.2015 as per the Commission's direction and to be operationalized based on the availability of ATC. The petitioner was part of the consultative process for grant of LTA and has never raised the issue that its generation project or the dedicated transmission line shall not be ready by the time of operationalization.

(e) Based on the enhancement of ATC between NEW Grid and SR Grid, the LTA was operationalized w.e.f. 16.12.2015 and the petitioner was requested to take necessary action for establishment of Letter of Credit (LC) as Payment Security mechanism. Corresponding to the above LTA operationalized, POC bills for the transmission charges for the month of December, 2015, and bills for infirm/start up power for May-September 2015 were issued to the petitioner in terms of the Sharing Regulations.

(f) The petitioner vide its letter dated 16.2.2016 to PGCIL claimed occurrence of force majeure events for the first time and sought deferment in payment of transmission charges. However, the force majeure events claimed by the petitioner were for the year 2012 onwards and for vague reasons.

(g) The claim for force majeure was made in February, 2016 as an after-thought only after issuance of bills for December, 2015 and January, 2016 and solely intended to evade payment of transmission charges.

(h) The principal relief sought by the petitioner is to restrain PGCIL from encashing the letter of credit under the guise of force majeure. It is settled principle of law that the beneficiary of a letter of credit is entitled to realize the same irrespective of any pending disputes. Further, the courts should be slow in granting an order of injunction to restrain the realization of a letter of credit, subject to two exceptions i.e. fraud which could vitiate the very foundation of the principal contract and irretrievable injury/injustice. In the present case, since there is no allegation of fraud or irretrievable injury/injustice, the relief claimed by the petitioner cannot be granted. PGCIL has submitted that the present petition is liable to be dismissed *in limine*.

### **Analysis and Decision**

9. We have considered the submissions of the petitioner and PGCIL. The petitioner sought and was granted Long Term Open Access for transmission of 500 MW power with target regions as Western Region and Northern Region. The petitioner entered into a Bulk Power Transmission Agreement on 24.2.2010. Subsequently, the petitioner entered into a PPA dated 8.8.2013 with TANGEDCO for supply of 500 MW of power from 1.10.2013 to 30.9.2018. Since there is change of region, the petitioner made a fresh application dated 4.12.2013 for LTA for transfer of power to TANGDEDCO. In accordance with the direction of the Commission in order dated 16.2.2015 in Petition No. 92/MP/2013, PGCIL conducted a meeting to process the LTA applications in which the petitioner participated and during the consultative process, the petitioner has not raised the issue of non-readiness of its generating station and dedicated transmission line. PGCIL granted LTA vide its letter dated 22.7.2015 to the petitioner with the condition that the petitioner would abide by the relinquishment charges for 500 MW (350 MW from WR and 150 MW from NR) as



may be decided by the Commission in Petition No. 92/MP/2015. In compliance with the requirement of LTA approval, the petitioner opened an LC dated 11.8.2015 with Punjab National Bank for an amount of ₹27,73,00,000 (twenty seven crore seventy three thousand only) and entered into an LTA Agreement on 12.8.2015.

10. After enhancement of ATC between NEW Grid and SR Grid, LTA was operationalised with effect from 16.12.2015. PGCIL raised bills for transmission charges for the month of December 2015 corresponding to the LTA operationalized and for infirm/start-up power for the months of May 2015 to September 2015. After receipt of the bills, the petitioner wrote a letter dated 16.2.2016 to PGCIL for deferment of the PoC charges till such time the force majeure events affecting the commissioning of the project were subsisting. PGCIL vide its letter dated 2.3.2016 intimated the petitioner that outstanding dues against the petitioner was ₹9.36 crore out of which ₹3.45 crore would cross more than 60 days on 6.3.2016 and if the charges were not paid by that date, PGCIL would be compelled to realise the payment by encashment of LC. In this background, the petitioner has approached the Commission for deferment of payment of transmission charges.

11. Learned counsel for the petitioner submitted that the petitioner is affected by force majeure events. However, in para 11 of the petition, it has been submitted that the petitioner reserves its right to make a substantial petition for redressal of its grievances pertaining to occurrence of force majeure events and its consequences thereof. In the absence of a substantive petition setting out the events of force majeure which has affected the generating station, it would not be possible for taking a view in the matter. Therefore, we are not going into the merit of the claim of the petitioner regarding occurrence of force majeure events. This petition is confined to

consideration of the prayer of the petitioner seeking direction to PGCIL not to encash the LC. In our view, the petitioner is liable to pay the transmission charges as per the provisions of the LTA Agreement and TSA signed by it with PGCIL. If the petitioner fails to pay the transmission charges, then the natural consequence i.e encashment of LC will follow. As per the judgment of the Hon`ble Supreme Court in Himadri Chemicals Industries Ltd. Vs. Coal Tea of Refining Company [(2007) 8 SCC 110], injunction for restraining realization of LC can be issued only in case of fraud or irretrievable injury/injustice. The petitioner has not made any allegation of fraud against PGCIL nor has made out a case of irretrievable injury/injustice if the LC is encashed on account of non-payment of transmission charges. The petitioner intends to file a substantive petition for invoking the clauses of force majeure in BPTA, LTA Agreement and TSA. If the petitioner files such a petition and the issue is decided in its favour, it will be entitled for refund of the transmission charges for the relevant period. As the matter stands as on date, PGCIL is entitled to recover the transmission charges for injection of infirm power and drawal of start-up power apart from the transmission charges since the date of operationalized of LTA. Therefore, balance of convenience lies in favour of CTU. In view of the above discussion, we do not find any reason to defer payment of transmission charges by the petitioner. Consequently, the prayer of the petitioner for restraining PGCIL to encash the LC in the event of petitioner's failure to pay the transmission charges is rejected.

12. Petition No. 31/MP/2016 is disposed of in terms of the above.

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

sd/-  
**(A.S. Bakshi)**  
Member

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

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