

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.92/MP/2015

- Subject : Petition seeking directions with regard to difficulties in implementing some of the directions given in the Order dated 16.2.2015 in Petition No. 92/MP/2014 along with IA Nos. 43/2014, 51/2014, 52/2014, 54/2014, 56/2014 and 59/2014, Petition No. 376/MP/2014, Petition No. 382/MP/2014, Petition No. 393/MP/2014 and Review Petition No. 25/RP/2014.
- Date of hearing : 21.11.2017
- Coram : Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member
- Petitioner : Power Grid Corporation of India Ltd. (PGCIL)
- Respondents : Karnataka State Electricity Board and Others
- Parties present : Ms. Suparna Srivastava, Advocate, PGCIL
Shri Tushar Mathur, Advocate, PGCIL
Shri R. Verma, PGCIL
Shri Pratyush Singh, PGCIL
Shri Manish Ranjan, PGCIL
Shri Dilip Rozekar, PGCIL
Ms. Jyoti Prasad, PGCIL
Shri Swapnil Verma, PGCIL
Shri Sanjay Sen, Senior Advocate, JITPL & Vedanta
Shri Matrugupta Mishra, Advocate, JITPL & 7 others
Shri Nishant Kumar, Advocate, JITPL & 7 others
Shri M.G. Ramachandran, Advocate, GUVNL
Ms. Anushree Bardhan, Advocate, GUVNL
Shri S.K. Nair, GUVNL
Shri Amit Kapur, Advocate, WBSEDCL
Shri Janmali M., Advocate, WBSEDCL
Shri Tabrez Malawat, Advocate, WBSEDCL
Ms. Divya Chaturvedi, Advocate, JPL & DIL
Shri Prateek Gupta, Advocate, JPL & DIL
Shri Ravi Shankar, JPL
Shri Ravi Kishore, Advocate, PTC India
Shri Deepak Khurana, Advocate, DB Power
Shri Vikas Adhia, DB Power
Shri Hemant Sahai, Advocate, EPMP & MB Power
Shri Aniket Prasoon, Advocate, EPMP & MB Power
Shri Abhishek Kumar, Advocate, EPMP & MB Power
Ms. Shruti Verma, EPMP
Shri Abhishek Gupta, MB Power
Ms. Swapna Seshadri, Advocate, KSK Mahanadi
Shri S. Vallinayagam, Advocate, TANGEDCO
Shri Aveek Chatterjee, DIL

Shri Anil R. Sah, ILFSTNPL
Shri Sanjiv K. Goel, JPVL
Shri G.M. Gupta, GMR
Shri Manoj Rastogi, TRN Energy & MCCPL
Shri Praveen Kataria, TRN Energy & MCCPL
Shri Mohit Shinghal, Coastal Energen

Record of Proceedings

At the outset, learned counsel for the Petitioner submitted that in response to the Terms of Reference framed by the Commission vide RoP for the hearing dated 2.5.2017 a caveat needs to be added to the effect that there is no dispute regarding the payment of relinquishment charges as it is a statutory mandate under Regulation 18 of the Connectivity Regulations which cannot be challenged. As per Regulation 18 of the Connectivity Regulations, relinquishment charges are levied by the CTU based on capacity which remains stranded in the transmission system in the event of relinquishment of LTA quantum by a LTA customer. Learned counsel for the Petitioner further submitted as under:

(a) In terms of Section 2(47) of the Electricity Act, 2003, open access means the non-discriminatory provision for the use of transmission lines comprising inter-State/intra-State transmission system as per the Regulations framed by the Commission. As per Section 38(d) of the Electricity Act, 2003, CTU must provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of transmission charges. Therefore, it is the duty of CTU to ensure that its transmission lines are available in a non-discriminatory manner for use by any licensee or generating company through open access on payment of transmission charges and to comply with the Regulations framed by the Commission. However, as per Section 10(3) of the Electricity Act, 2003 there is a corresponding obligation on the generators to co-ordinate with the CTU for transmission of electricity generated by it.

(b) Under Section 178 of the Electricity Act, 2003, the Commission, by notifications, is empowered to make Regulations consistent with the Act and the rules to carry out the provisions of the Act and in exercise of said powers, the Commission has framed various Regulations including the non-discriminatory grant of Open Access. It is a matter of common knowledge that "Regulations" are a form of subordinate legislation permitted by the enabling Act to carry out the intent of the Act. As the Regulations are framed on matters permitted by the Act to supplement the provisions of the Act, they cannot be said to be in violation of the Act or in excess of the mandate of the Act. Therefore, the Regulations framed by the Commission governing grant of Open Access do not suffer from excessive delegation and are also not in violation of the provisions of the Electricity Act, 2003.

(c) Rules, Regulations, schemes, bye-laws, orders made under statutory power are all comprised in delegated legislation as delegated legislation permits utilization of experience and consultation with interests affected by the practical operation of statutes. If an instrument made in the exercise of delegated powers directs or forbids the doing of a particular thing, the result of breach thereof is, in the absence of provision to the contrary, the same as if the command or prohibition had been contained in the enabling statute itself. Therefore, relinquishment charges are part of Transmission Charges and if Regulation says that one must pay the Relinquishment Charges, it is the command of the Parent Act. In support of its contention, learned

counsel relied upon Hon'ble Supreme Court judgements in Sukhdev Singh & Others V. Bhagatram Sardar Singh Raghuvanshi &Anr. [(1975) SCC 421], St.Johns Teachers Training Institute V. Regional Director, National Council for Teacher Education & Other [(2003) 3 SCC 321].

(d) The Hon'ble Supreme Court in Ramesh Mehta V. Sanwal Chand Singhvi & Others [(2004) 5 SCC 409], had observed that a subordinate or delegated legislation must be read in a meaningful manner so as to give effect to the provisions of the statute. However, if two constructions are possible to adopt, a meaning which would make the provision workable and in consonance with the statutory scheme should be preferred. Therefore, if the Regulations are in conformity with the provisions of the Parent Act, then they have the same effect as if of the Parent Act itself which have to be followed.

(e) In the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2004 (2004 Open Access Regulations), transmission customers were divided into two categories, namely, (i) long-term customers, those who are availing access to the ISTS for the period of 25 years or more and (ii) short-term customers, all transmission customers other than long-term customers. The criteria for allowing transmission access was laid down in Regulation 5 of 2004 Regulations which provides that ISTS was to be utilized primarily for transmission of power through long-term access, while short term access could be availed on the available margins. Therefore, allotment priority of long-term customers was higher than the reservation priority of short-term customers.

(f) The procedure for grant of long-term access under 2004 Regulations provides that the grant of application is based on system studies conducted in consultation with other agencies and if required there would be an augmentation of transmission system and on the augmented system the transmission capacity would be allotted. Regulation 12 of 2004 Regulations provides for an "exit option" to a long-term customer wherein long-term customer can relinquish its rights and obligations subject to the payment of compensation as whenever long-term access rights were relinquished it resulted in a loss of transmission charges. However, under 2004 Regulations, there was no quantification of the compensation to be paid.

(g) In terms of Regulation 55 of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (2004 Tariff Regulations), the tariff for transmission of electricity on ISTS comprised of the recovery of annual transmission charges consisting of interest on loan capital, depreciation, etc. Therefore, the mechanism for computation of annual transmission charges was thus that the meshed network of each regional transmission system and inter-regional transmission system was to be considered and transmission charges for intra-regional and inter-regional systems were to be computed and shared amongst the long-term customers in the regions on monthly basis. The principle underlying the regulatory regime notified by the Commission in 2004 was to ensure that all transmission assets, whether inter-region or intra-region, were duly serviced by the long-term customers of ISTS through payment and sharing of transmission charges. However, the meaning of compensation is changed since 2004 Regulations and under 2009 Regulations, compensation is now related to stranded capacity which means that the compensation which was earlier being decided by the Commission on case to case basis, now it has been decided in the context of the stranded capacity under the Connectivity Regulations.

(h) Before notifying the Connectivity Regulations, the Commission had issued a Staff Paper on 17.7.2008, on “Arranging Transmission for New Generating Stations, Captive Power Plants and Buyers of Electricity” wherein Para 5.3.2 provides that the network expansion should be planned and implemented keeping in view the anticipated transmission needs, that would be incidental on the system in the Open Access regime and prior agreement with the beneficiaries would not be a pre-condition for network expansion. As per Discussion Paper published in February, 2007, if the system was to be built due to the capacity addition, then that system was also required to be serviced by all those who were now joining the system.

(i) Under the Connectivity Regulations, the Commission had created a new category of Open Access namely, “Medium-term access” wherein the use of ISTS was to be for a period exceeding three months but not exceeding three years and planning for augmentation of transmission system for transmission access had been linked to long-term access applications only and not medium-term and short-term access. Therefore, transmission system planning was envisaged primarily for transmission of electricity on long-term basis. Accordingly, transmission system augmentation was to take place to meet the transmission requirements of long-term customers only. Regulation 9 of the Connectivity Regulations provides that power flow under the medium-term open access was to be accommodated in the available margins only.

(j) In the present petition, relinquishment involves three issues, namely, (i) what could be the relinquishment compensation in terms of the Regulations; (ii) what is the rationale behind the segregation of periods under Regulation 18; and (iii) how to calculate the actual quantum where the interest of all licensees and DICs are balanced. As per Regulation 18 of 2009 Regulations, a long-term customer may relinquish the long-term access rights fully or partly before the expiry of the full term of long-term access, by making payment of compensation for stranded capacity. Therefore, the recipient of the relinquishment compensation were the other long-term customers and medium-term customers of ISTS, whose burden of additional transmission charges on account of relinquishment was required to be lessened.

(k) “Compensation” is neither a penalty nor damage whereas relinquishment compensation can be interpreted as the transmission charges which the relinquishing long-term customer would have paid had he continued to remain such long-term customer of ISTS under the access rights availed by it. Therefore, the relinquishment compensation was not a “charge” separate and distinct from transmission charges for open access but an accelerated payment of its share of transmission charges by the exiting long-term customer to service the transmission assets comprised in ISTS. Relinquishment compensation is a species of transmission charges as enumerated under Section 38(2)(d)(i) of the Electricity Act, 2003. In support of his contention, learned counsel relied upon the Hon’ble Supreme Court’s judgement in Reserve Bank of India V. Peerless General Finance & Investment Co. Ltd. & Others [(1987) 1 SCC 424].

(l) As per Regulation 2(1)(v), a compensation was payable for stranded capacity in ISTS which was likely to remain unutilized due to relinquishment of access rights by a long-term customer. Whenever a long-term customer relinquished its access rights, it resulted in an unutilized capacity under long-term access till the same was subsequently allocated to another long-term customer, it was this capacity in ISTS which was “likely” to remain unutilized for long-term power flow which was to be considered as “Stranded capacity”.

(m) With regard to rationale behind the segregation of periods, the Commission in the Statement of Reasons to the Connectivity Regulations dated 30.11.2009 issued by the Commission on 30.11.2009 had observed that as per PGCIL, the normal transmission tariff stream is for 25-30 years, so for reduced period, a special tariff stream is required. However, the net present value (NPV) of the tariff stream for the first 12 years is about 85% of the NPV of tariff stream of 25 years and it is unlikely that the assets will remain unutilized thereafter. Therefore, a special tariff stream may not be necessary. The Penalty provisions for premature withdrawal of long-term open access take care of recovery of tariff in the event of termination of any long-term access and the balance charges shall be borne by the other long-term customers of the line or other open access customers granted open access subsequently. The Commission linked the component of depreciation to the repayment of loan to ensure cash flow to the utility to meet its loan repayment obligations wherein a period of 12 years was considered as a reasonable time for loan repayment as per power market experience. Therefore, the loan component of the transmission asset was to be substantially serviced over a period of 12 years through payment of transmission charges.

(n) With regard to quantum, the Commission in Statement of Reasons to the Connectivity Regulations agreed that there should be an incentive for the long-term customer to surrender transmission capacity. However, Regulation 18 provides for an amount equal to 66% of the estimated transmission charges i.e. NPV for the stranded capacity for the period falling short of notice period of one year in addition to period falling short of 12 years of access rights as being payable. The provision for levy of 66% of the NPV of the estimated charges of the period falling short by 12 years creates adequate balance of equity in favour of the relinquishing long-term customer. Therefore, the said incentive was aimed at striking a balance as between the interests of all users and stakeholders of ISTS- the generators, the transmission licensees, the beneficiaries and any further incentivization would disturb this balance. The concession of 33% of NPV should not be lost sight of while deciding the quantum of relinquishment charges as this provision actually reduces the transmission charges period from 12 years to approx. 5 years.

(o) There is a correlation between the operationalization of HCPTC corridors and relinquishment of LTAs. Subsequent to the operationalization of LTA and issuance of letter for opening of LC, most of the IPPs relinquished their entire LTAs by stating number of reasons. The incidence of relinquishment is both sudden and at a high rate in those transmission corridors nearing to be completed. Learned counsel submitted that out of 40607.95 of LTA only 17556.3 of LTA has been effective on HCPTC Corridor and about 56.8% of LTA is relinquished by the long-term customers which cannot be serviced without the recovery of the relinquishment charges.

2. Learned counsel for GUVNL submitted that on account of non-payment of surrender charges, there has been and there will be unintended and unjust financial burden on GUVNL which needs to be avoided. Learned counsel for GUVNL further submitted as under:

(a) There are four categories of LTOA namely, (i) Dedicated transmission line i.e. the radial line from the generating station to inter-connection point, which if surrendered there is no use of it, (ii) when new line is constructed as a part of ISTS, (iii) when existing transmission system is upgraded and (iv) when in the existing system open access is given. In all these categories, the surrender charges are

must and in terms of Regulation 18, long-term customers are required to pay the surrender charges in the event of relinquishment of long-term open access.

(b) As per the Connectivity Regulations, surrender charges are a quantum of compensation to be paid by the applicant who has taken a long-term access and seeking for relinquishment of the same. Accordingly, the amount is payable *ipso facto* without requiring any proof in regard to the extent of the adverse financial impact or otherwise the quantum of loss or damages that may be suffered on account of such surrender. If as a result of the relinquishment of the capacity by any long-term access user without payment of surrender charges, there is an increase in the charges payable by remaining other entities of long-term access, such increased charges payable by remaining other entities is a direct consequence of the relinquishment. Therefore, there is a stranded capacity to the extent of such increased charges.

(c) If there is no transmission constraint on the day on which the relinquishment is made and as on that date the entire capacity including the capacity contracted by the person relinquishing is being fully transmitted, the act of relinquishment should be taken to result in “stranded capacity” within the meaning of Regulation 18(a) read with the definition in Regulation 2(1)(v). With regard to the payment of surrender charges, the long-term customers relinquishing the long-term access should be directed to pay the same in terms of Regulation 18 of Connectivity Regulations along with the interest and PGCIL should be directed to give adjustment for such amount to the other continuing long-term access entities (DICs) without utilizing the amount for other purposes.

3. Learned counsel for TANGEDCO supported the submissions made by learned counsel for GUVNL and submitted that Section 178 of the Electricity Act, 2003, empowered the Commission, by notifications, to make Regulations consistent with the Act and the rules to carry out the provisions of the Act. In exercise of said powers, the Commission has framed various Regulations including Open Access Regulations. As per the provisions, the transmission charges and surcharge should be collected by CTU. Section 40(b) and (c) of the Electricity Act, 2003 provides that it shall be the duty of transmission licensee to comply with the directions of the Regional Load Despatch Centre and the State Load Despatch Centre as the case may be and to provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of the transmission charges. With regard to the quantification, learned counsel for TANGEDCO submitted that Regulations can neither be challenged nor be questioned.

4. Learned counsel for Essar Power M.P. Limited (EPMPL) and MB Power submitted that there is no challenge to the application of Regulations as it is a law which should be followed. Learned counsel further submitted as under:

(a) The definition of “stranded capacity” means the transmission capacity in the ISTS which is likely to remain unutilized due to relinquishment of access rights by a long-term customer. However, it does not mean that the transmission capacity in ISTS remains unutilized in the long-term. Therefore, the meaning of the “stranded capacity” shall be given full effect to as it does not envisage that it is stranded for only long-term customers. However, there should be the “coordination” between the generating company with concerned CTU and STU for planning and timely construction of the required transmission system augmentation.

(b) The “stranded capacity” cannot remain stranded forever, the determination of

stranded capacity would require setting up a base-case to be set-up for every season in every year for next 25 years as per the definition of stranded capacity. However, relinquishment charges should be recoverable/ adjusted after having complete accounting of the commercial usage and the revenue earned by the CTU for the transmission system.

(c) On a specific query of the Commission as to whether it is correct with EPMPPL to not to pay the relinquishment charges and sell its power on STOA, learned counsel submitted that they have no other option as Stranded capacity is unpredictable.

5. Learned senior counsel for Jindal India Thermal Power Limited (JITPL) and Vedanta submitted that whether it is LTOA, MTOA or STOA, every generator is the long-term user of the transmission system as it cannot sell the power without using the transmission system. Learned senior counsel further submitted as under:

(a) As per Regulation 18(3) of Connectivity Regulations, the compensation paid by the long-term customer for the stranded capacity shall be used for reducing transmission charges payable by other long-term customers or medium-term customers in the year in which such compensation payment is due in the ratio of transmission charges payable for that year by such long-term and medium-term customers.

(b) The Commission vide order dated 8.6.2013 in Petition No.118/MP/2012 had observed that surrender of capacity by the Petitioner neither causes stranding of transmission capacity nor does it affect the liability of others for payment of PoC charges. It is the law which enforced the Petitioner to come up with stranded capacity for Regulation 18 to trigger and if it cannot, then it cannot take the benefit of the Regulations.

(c) Learned counsel placed reliance upon the Hon'ble Supreme Court judgements in Sukhdev Singh & Others V. Bhagatram Sardar Singh Raghuvanshi & Anr. [(1975) SCC 421] that rules and regulations of the Act are limitation of power and not the expansion of power. These are restrictions and condition to exercise the power to determine the liability under Regulation 18. Therefore, if stranded capacity is defined in the Regulation, it cannot be ignored as it's a restriction.

6. Learned counsel for WBSEDCL submitted that the question is if the fundamental principle is to compensate for a loss, is it possible to not to show the loss but compensate for it. Learned counsel further submitted as under:

(a) The Petitioner is collecting the relinquishment charges without there being any stranded capacity. However, the compensation can be claimed only upon the capacity remain stranded. Therefore, the stranded asset must be demonstrated to have been stranded and must be read as stranded only in the terms of long-term access even if utilized but if it is being utilized then there is stranding of the asset.

(b) In the dynamic reality where every 15 minute is recorded and data is available, it is not difficult to envisage where the capacity is stranded. If the capacity is available and the corridor is utilized, the question of notional stranded capacity does not arise. Therefore, if the data is available for every 15 minutes, the Petitioner cannot be permitted to argue that they are not aware of whether any capacity is

available or not or whether the transmission capacity is utilized or not.

(c) As per Section 38 (2)(c) of the Electricity Act, 2003, PGCIL is required to undertake planning and coordination relating to development of the inter-State Transmission System network (ISTS) network in efficient and economical manner. The discharge of statutory function be subjected to bilateral transaction between PGCIL and beneficiaries. PGCIL's function and discharge of statutory functions cannot be guided or controlled by stipulations of BPTA. PGCIL in any case due to its statutory obligations have to build network in terms of its planning and coordination in efficient and economical manner.

(d) The co-joint reading of Regulation 18 and Regulation 2(1)(v) of the Connectivity Regulation connotes that the Regulation charges are levied if there is non-utilization of transmission access due to relinquishment of access rights. Before levying of any compensation the factors such as what was the existing demand at the time of relinquishment, what was the capacity which was stranded and the estimation of loss suffered by PGCIL should be taken into consideration.

7. Learned counsel for DB Power Limited (DBPL) submitted that in most of the cases the relinquishment charges have been consequent upon the generator not coming up with the project or abandoning the project. However, the cases where there is only shift of target beneficiary or where there is only change of region and not the change in LTA, in such cases, the relinquishment charges should not be levied.

8. Learned counsel for Jindal Power Limited (JPL) and DIL submitted that JPL and DIL are using the power partly, whereas, double charges have been levied on them. Learned counsel further submitted that transmission corridors and generation systems are being looked upon as isolated entities, which is not the case here as both are dependent on each other, therefore, there is no risk of allocation. However, as per Regulation 9 of the Connectivity Regulations, MTOA was introduced to take care of the remaining capacity i.e. existing capacity which comes from the stranded capacity. Learned counsel submitted that the transmission charges are being paid on yearly basis whereas compensation is being paid for 12 years.

9. Learned counsel for PEL Power Limited (PPL) submitted that even after informing the Petitioner in one year that LTA is not required, the Petitioner took the investment approval and went ahead with the construction of High Capacity Corridor. Learned counsel further submitted that the Petitioner created the asset fully knowing that the same is not required and therefore, such cases should be kept separate from the present order. The relinquishment charges cannot be levied in perpetuity. However, if the same asset is being utilized by the MTOA/ STOA customer and the charges are being recovered from these customers, the money should be paid back to the generator and when the LTA customer gets in, the compensatory payment should be stopped.

10. After hearing the parties, the Commission directed the parties to file their written submissions within a week with an advance copy to each other, failing which, the order shall be passed based on the documents available on record.

11. Subject to the above, the commission reserved the order in the Petition.

By order of the Commission
Sd/-
(T. Rout)
Chief (Law)