

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 103/MP/2017
Alongwith
I.A. No. 28/2017**

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

Date of Order: 6th July, 2017

In the matter of

Petition under Sections 79(1) (c) & (k) of the Electricity Act, 2003 read with Regulation 32 of the CERC (Grant of Connectivity, Long Term Access and Medium Term Open Access in Inter-State Transmission and Related Matters) Regulations, 2009 seeking suspension of payment of PoC charges of part allocation of 400 MW (Southern Region) Long Term Access out of total LTA quantum of 546 MW granted under Bulk Power Transmission Agreement dated 24.2.2010.

And in the matter of

Simhapuri Energy Limited (SEL)
Madhucon Greenlands
6-3-866/2, 3rd Floor
Begumpet, Hyderabad-500016

.....**Petitioner**

Versus

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

.....**Respondent**

The following were present:

- 1) Shri Ramjee Srinivasan, Senior Advocate, SEL
- 2) Shri Matru Gupta Mishra, Advocate, SEL
- 3) Shri Hemant Singh, Advocate, SEL
- 4) Shri Nishant Kumar, Advocate, SEL
- 5) Ms. Suparna Srivastava, Advocate, PGCIL
- 6) Shri Dilip Rozekar, PGCIL

ORDER

The Petitioner, Simhapuri Energy Limited, has filed the present petition seeking suspension of payment of transmission charges to Power Grid Corporation of India Limited (PGCIL) in terms of the Bulk Power Transmission Agreement dated 24.2.2010 read with Transmission Service Agreement dated 18.7.2017 till the commencement of supply of power under the Power Sale Agreement to AP Discoms on the ground of being affected by force majeure events.

2. Brief facts of the case are that the Petitioner has setup a 600 MW (4x150MW) power plant at villages Tamminapatnam and Mommidiunder Chillakur Mandal District SPSR Nellore in the State of Andhra Pradesh. The Petitioner entered into a Bulk Power Transmission Agreement dated 24.2.2010 (BPTA) with PGCIL for 491 MW which was amended vide amendments dated 2.1.2012 and 17.10.2012 raising the Long Term Access (LTA) quantum to 546 MW. Out of the 546 MW LTA, 411 MW is for Southern Region (SR) and 135 MW is for Western Region. On 18.7.2013, the Petitioner entered into a Transmission Service Agreement with PGCIL in terms of the Central Electricity Regulatory Commission (Sharing of Transmission Charges and Losses) Regulations, 2010 as amended from time to time. The Petitioner participated in the bidding process and was selected for sale of 400 MW power to Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL) and Eastern Power Distribution Company of Andhra Pradesh Limited (APEPDCL). The Petitioner has been unable to enter into PPA with any distribution company in Western Region qua 135 MW. There was a balance capacity of 146 MW LTA (135 MW qua Western Region and 11 MW qua Southern Region) which the Petitioner has claimed to have surrendered vide letter dated 28.4.2017.

3. The Petitioner has submitted that it opened the Letter of Credit on 10.6.2016 which was communicated to PGCIL on 13.6.2016. The Petitioner has submitted that the LTA was operationalized by CTU in July 2016 pursuant to which the Petitioner has been paying the transmission charges in terms of the invoices raised by PGCIL. The Petitioner has submitted that vide its letter dated 2.12.2016, it informed PGCIL that though it had signed the Power Supply Agreement (PSA) with the AP DISCOMs for sale of 400 MW power, pursuant to a tariff based competitive bidding process, with commencement of power supply envisaged to commence from June 2016, APDISCOMs approached the Hon'ble Andhra Pradesh Electricity Regulatory Commission (APERC) on 13.12.2016 as a result of which the bid tariff of ₹4.439/kwh could not be adopted by APERC until December 2016. The said delay in the adoption of tariff by APERC from June 2016 to December 2016 could not have been contemplated by the Petitioner and as such was beyond its control. Subsequently, Meenaskhi Energy Private Limited (MEPL) filed a Writ Petition No. 6143 of 2017 before the High Court of judicature at Hyderabad, challenging the disqualification of MEPL from the said bidding process on account of a change in its ownership wherein APERC was restrained from taking any final decision until final disposal of the writ petition and was directed to continue with the process of hearing objections against the adoption of tariff. These subsequent developments i.e. Force Majeure events in terms of Clause 9 of the BPTA and Article 14 of the TSA were beyond the control of the Petitioner which resulted in delay in operationalization of the PSA and consequent commencement of power under the said PSA. The Petitioner has submitted that even till date, the commencement of supply of power has not taken place under the PSA.

4. The Petitioner has submitted that on 23.12.2016, PGCIL encashed the bank guarantee of ₹14.90 crore given by the Petitioner. Subsequently, PGCIL vide its letter dated 12.1.2017 requested the Petitioner to reinstate the LC amount of ₹14.90 crore, which had been utilized towards the payment of outstanding LTA charges. Despite the occurrence of delay in commencement of power supply under the PSA with APDISCOMs, the Petitioner in the best interest of the project and in right earnest, proceeded to reinstate the LC amount of ₹14.90 crore on 1.2.2017. However, on 7.3.2017, PGCIL yet again proceeded to encash the LC amounting to ₹3.72 crore, on account of outstanding LTA charges. The Petitioner has been regularly paying the transmission charges since the operationalization of the LTA in July 2016. The Petitioner has submitted that the delay in payment/non-payment of LTA charges in the subsequent months, is solely on account of reasons beyond the control of the Petitioner and therefore, are events of Force Majeure under Clause 9 of the BPTA and Article 14 of the TSA. The Petitioner has submitted that such unilateral act of PGCIL by encashing the LC of the Petitioner on two separate occasions is unwarranted and unjustified. The Petitioner vide its letters dated 2.12.2016, 12.1.2017 and 17.5.2017 apprised PGCIL regarding Force Majeure events.

5. The Petitioner has submitted that the Commission vide order dated 2.12.2013 in Petition No. 244/MP/2012 has held that execution of long term PPA is a necessary condition for availing long term access. Out of 546 MWLTA granted to the Petitioner, the Petitioner has entered into a short term contract for RTC supply of 130 MW to the APDISCOMs. However, the cash flow of the Petitioner is adversely affected even on account of the short term supply of power. Therefore, the Petitioner has been

unable to recover any substantial revenue from the sale of 130 MW power to TS Discoms.

6. The Petitioner has filed the Interlocutory Application seeking interim relief restraining PGCIL from taking any coercive measures towards recovery of transmission charges, including encashment of Letter of Credit (LC) or through any other means till final decision in the present petition.

7. Learned senior counsel for the Petitioner submitted that a long-term PPA is a *sine qua non* for availing the LTA and in the present case, the long term PPA/PSA was not being operationalized on account of the order of the Hon'ble High Court of Judicature at Andhra Pradesh, thereby preventing the applicant from availing the LTA granted by PGCIL. Learned senior counsel for the Petitioner submitted that the non-commencement of power supply under the PSA is not on account of any default on the part of the Petitioner and is in the nature of force majeure events. The said event squarely falls within the ambit of Article 14 of the Transmission Service Agreement (TSA), as well as Clause 9 of the BPTA executed between the petitioner and PGCIL. Learned Senior Counsel submitted that on account of intervention of force majeure events, the imposition of transmission charges are required to be suspended for a period till the AP Discoms get the PSA approved by the APERC and the power starts scheduling under the PSA.

8. Learned counsel for PGCIL submitted that the present petition is contrary to the provisions of the 2009 Connectivity Regulations as the Petitioner is trying to establish a nexus between the payment of transmission charges and signing of the PPA and the same is not envisaged either in the Connectivity Regulations or in the Sharing Regulations. Learned Counsel submitted that the second proviso to

Regulation 12 of the 2009 Connectivity Regulations provides that in case augmentation of transmission system is required, the applicant shall have to bear the transmission charges for the same, even if the source of off-take or supply is not identified. Learned Counsel submitted that once the transmission system is put in place by augmentation or system strengthening, thereafter the liability to pay transmission charges commences irrespective of the existence or non-existence of PPA for supply of power from the generating station. The liability to pay transmission charges is, therefore, not dependent upon an operational PPA and in the present case, there is no operational PPA. Learned counsel for PGCIL further submitted that the commercial formalities to be carried out between the generators and beneficiaries have no bearing on the payment of transmission charges. If there is a target region LTA, the liability to pay transmission charges arises as and when the transmission system is put in place irrespective of the operationalization of the PPA. PGCIL has been raising the bills in respect of transmission charges on the applicant and the Petitioner has made the payments in respect of the same. However, from February 2017 to April 2017, the Petitioner has not paid the transmission charges amounting to ₹22 crore.

9. The Petitioner has also filed the IA seeking a restraint on PGCIL from taking any coercive measures against the Petitioner, including encashment of the LC till the pendency of the present petition.

10. After going through the pleadings and the oral submissions during the hearing, the Commission proposes to dispose of the petition at the stage of admission. As per the Connectivity Regulations, the Petitioner applied for and was granted the Long Term Access by CTU for a quantum of 546 MW. The Petitioner

and CTU signed a Bulk Power Transmission Agreement (BPTA) on 24.2.2010 which is placed on record as Annexure P-1 to the Petition. As per Annexure 1 of the said Agreement, the Petitioner was granted LTA for 491 MW with the tentative beneficiaries in Southern Region for 356 MW and in Western Region for 135 MW which was modified to 546 MW (411 MW in Southern Region and 135 MW in Western Region).As per para 2.0(c) of the BPTA, the Petitioner as a Long Term Transmission Customer has undertaken to pay the transmission charges from the date of commissioning of the transmission system. The said para is extracted as under:

“(c) Each Long Term Transmission Customer (including its successor/assignee) shall pay the applicable transmission charges from the date of commissioning of the respective transmission system which would not be prior to the schedule commissioning date of the generating units as indicated by the respective developer as per the Annexure 1. The commissioning of transmission system would be preponed only if the same is agreed mutually by concerned parties.”

As per Annexure 1 (modified), the scheduled commercial operation dates of the four units of the generating station of the Petitioner are 4.5.2012, 15.7.2012, January 2013 and February 2013 respectively. However, the Units 1, 2, 3, & 4 of the generating station have achieved COD on 4.5.2012, 15.7.2012, 26.2.2014 and 31.3.2015 respectively. CTU in its letter dated 7.12.2015 intimated the Petitioner that LTA granted to the Petitioner was going to commence shortly and advised the Petitioner to open the Letter of Credit for ₹25.36 crore. CTU vide its letter dated 8.2.2016 intimated the Petitioner that the common transmission system identified in the grant of LTA intimation has already been commissioned and requested the Petitioner to open the LC. The Petitioner established an LC for ₹25.36 crore on 10.6.2016 and intimation to that effect was given on 13.6.2016. Consequent to operationalization of LTA, the Petitioner is paying transmission charges to PGCIL since July 2016. In terms of the BPTA, transmission charges under the LTA are

being charged after the scheduled COD of the units of the generating station, in fact after the actual COD of the generating station. As on July 2016, the Petitioner did not have any long term PPA for supply of power and yet the Petitioner continued to pay the transmission charges. The reason being that once the transmission lines are executed on the basis of the commitment of the LTA customer, it becomes liable to pay the transmission charges from the COD of the transmission systems and payment of transmission charges are not linked with either the delay in COD of the units of the generating station beyond SCOD as recorded in the BPTA or the failure generating company to put in place the commercial arrangement such as long term PPA for sale of power from the generating station. In the present case, delay in COD is not applicable as the units were commissioned prior to operationalization of LTA. But not having a long term PPA cannot be the reason for non-payment of transmission charges corresponding to the LTA granted irrespective of whether the LTA is actually availed or not.

11. In case of the Petitioner, the Letter of Award (LOA) for supply of 400 MW on long term basis for a period of 12 years was issued by APDICOMs on 20.9.2016 and PSA was signed on 23.11.2016. APDISCOMs approached AP Electricity Regulatory Commission (APERC) on 13.12.2016 for adoption of tariff. APERC invited objections on the petition and is in the process of hearing the same. In the meanwhile, MEPL, L1 bidder, challenged its disqualification before the AP High Court in Writ Petition No.6142 of 2017. In accordance with the interim directions of AP High Court, APERC would hear the objection but cannot pass the final order till the disposal of the writ petition. The Petitioner has submitted that this development is a force majeure event, recusing the Petitioner to pay the transmission charges in terms of Clause 9 of BPTA and Article 14 of the TSA. We have gone through the said provisions of the BPTA

and TSA and are of the view that the case of the Petitioner is not covered under these provisions. The LTA was operationalized after COD of the transmission systems covered under the BPTA, even in the absence of any long term PPA and the Petitioner has been paying the transmission charges. In other words, existence of long term PPA for evacuation of power is not a condition precedent for payment of transmission charges under the BPTA and TSA. If the PSA subsequently entered into by the Petitioner could not be given effect to on account of pendency of the Petitions before the APDISCOMs and Hon'ble High Court of AP, the same shall not constitute a force majeure either under BPTA or the TSA.

12. The Petitioner has submitted that the Commission in its order dated 2.12.2013 in Petition No. 244/MP/2012 has held that "execution of long term PPA is a necessary condition for availing the long term access" and therefore, in the absence of long term PPA, the Petitioner is not liable to pay the transmission charges. We have gone through our order dated 2.12.2013 in Petition No. 244/MP/2012. In the said petition, the issue was whether an LTA customer is entitled to over-riding priority of long term access even when scheduling power under medium term access or short term open access. The Commission decided that only when the long term access is availed by scheduling power under long term PPA, then only priority of long term access will be available. In the said order, the question whether liability for transmission charges under LTA shall be payable only if there is long term PPA, was never an issue and therefore, the reliance of the Petitioner on the said order is misplaced.

13. Learned counsel for Respondent PGCIL submitted during the hearing that as per second proviso to clause (1) of Regulation 12 of Connectivity Regulations, the

Petitioner is liable to pay the transmission charges. The First and second provisos to clause (1) of Regulation 12 are extracted as under:

“Provided that in the case where augmentation of transmission system is required for granting open access, if the quantum of power has not been firm up in respect of the person to whom electricity is required to be supplied or the source from which electricity is to be procured, the applicant shall indicate the quantum of power along with the name of the region(s) in which the electricity is proposed to be interchanged using the inter-State Transmission System;

Provided further that in case augmentation of transmission system is required, the applicant shall have to bear the transmission charges for the same as per these regulations, even if the source of supply or off-take is not identified;”

The above provisions have been made in order to enable the CTU to make transmission systems for the LTA customers based on their applications for transfer of power to the target regions in the absence of firm PPA. The interest of the CTU has been secured by providing that in the absence of identified beneficiaries for supply of power, the LTA Customers shall be liable for payment of transmission charges. The Petitioner is a LTA Customer and since system strengthening has been carried out by CTU based on the application of the Petitioner to target regions, the Petitioner is liable to pay the transmission charges in the absence of firm PPA.

14. In the light of the above discussion, we are of the view that since the Petitioner has been granted LTA to target regions and is under statutory as well as contractual obligations to pay transmission charges after COD of the transmission system executed based on the LTA, the Petitioner is liable to pay the transmission charges, irrespective of whether it actually avail the long term access or not. Accordingly, no relief can be granted on the prayers of the Petitioner.

15. We also observe that even though the transmission lines were ready in February, 2016, PGCIL has operationalized the LTA only in July, 2016. Since the LTA customers carry the liability to pay the transmission charges from the date of

commissioning of the transmission system based on which LTA has been granted, any delay in operationalization of the LTA beyond the COD of the concerned transmission system goes against the letter and spirit of the Connectivity Regulations and BPTA. In our view, CTU should take immediate steps to operationalize the LTA after commissioning of the transmission system without being at the mercy of the LTA customers to open the LC in order to operationalize the LTA.

16. Petition No.103/MP/2017 along with the IA are 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