

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 293/MP/2015

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A. K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M.K. Iyer, Member

Date of Order: 18th July, 2017

In the matter of

Petition under Section 79 (1) (c) of the Electricity Act, 2003 read with Regulations 18 and 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 for keeping in abeyance the long term open access of 775.5 MW granted to Jaypee Nigrie Super Thermal Power Plant.

And

In the matter of

Jaiprakash Power Ventures Limited
Sector-128, District Gautam Budh Nagar,
Noida - 201304

.....**Petitioner**

Versus

Power Grid Corporation of India Ltd.
B-9, Qutub Institutional Area,
Katwaria Sarai, New Delhi – 110016

..... **Respondent**

Parties Present:

Shri Vishal Gupta, Advocate, JPVL

Shri Kumar Mihir, Advocate, JPVL

Shri Sitesh Mukherjee, Advocate, PGCIL

Ms. Akanksha Tyagi, Advocate, PGCIL

ORDER

The Petitioner has filed the present Petition under Section 79 (1) (c) of the Electricity Act, 2003 read with Regulations 18 and 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 (hereinafter “Connectivity Regulations”).

2. Briefly, the facts of the case are as under:

(a) Amelia (North) coal block and Dongrital-II coal block were allotted to Government of Madhya Pradesh. In order to select a Joint Venture partner for development of the coal block as well as for setting up the 1000 MW Thermal Power Plant, Government of Madhya Pradesh initiated a bidding process. Based on the bidding process, Jaiprakash Associates Limited was selected as successful bidder and was issued LOI on 10.11.2005. Consequently, a Joint Venture Agreement dated 27.1.2006 was executed between the JAL and Madhya Pradesh State Mining Corporation Limited (MPSMCL) which stipulated development of project in two phases of 500 MW each. An Implementation Agreement dated 12.12.2007 was entered into between the Petitioner and the Government of MP for construction, ownership, operation and maintenance of the Power Plant by the Petitioner. Subsequently, an amendment to the Implementation Agreement was executed on 27.3.2008 to enhance the capacity of the power plant from 1000 MW to 1320 MW.

(b) The Petitioner applied for Long Term Access (LTA) for 1320 MW to PGCIL and was granted LTA of 1240.8 MW. The Petitioner entered into a BPTA for Long Term Access dated 24.2.2010 along with 5 other LTA customers with PGCIL. In the said BPTA, it was agreed that 400 kV D/C transmission line along with 2 nos. of 400 kV bays at Satna (POWERGRID) would be implemented by the Petitioner and the common transmission system as per

Annexure 3 of the BPTA would be developed by PGCIL. The Petitioner also entered into a Transmission Service Agreement dated 1.9.2014 with PGCIL in terms of CERC (Sharing of Transmission Charges and Losses) Regulations, 2014.

(c) The Petitioner entered into a Power Purchase Agreement dated 5.1.2011 with MP Power Trading Company Limited (renamed as Madhya Pradesh Power Management Company Limited or MPPMCL) for procurement of 30% of power of the installed capacity of the power plant at the tariff to be determined by the Commission.

(d) The Petitioner entered into a Coal Supply Agreement on 25.12.2007 with Madhya Pradesh Jaypee Minerals Limited for supply of 2.5 MTPA Coal from Amelia (North) Coal Block which was replaced by a Coal Supply Agreement dated 17.12.2013 executed between the Petitioner and the Madhya Pradesh State Mining Corporation Limited to align the legal contractual obligations of the seller and the purchaser. The Petitioner also executed a Coal Supply Agreement on 27.1.2011 with MP Jaypee Coal Limited for supply of 2.7 MTPA Coal from Dongrital-II Coal Block for the generating station of the Petitioner.

(e) The Hon`ble Supreme Court vide its judgment dated 24.9.2014 cancelled all the coal allocations made since 1993 which included the Amelia (North) and Dongrital-II Coal blocks. Thereafter, the Government of India by promulgation of Coal Mines (Special Provisions) Ordinance, 2014 classified and marked Amelia (North) Coal Block for power sector and the Dongrital-II coal block for non-power sector. Subsequently, Amelia (North) coal block was auctioned in

which the Petitioner participated and emerged as the successful bidder. The Petitioner entered into a Coal Mine Development and Production Agreement (CMDP) on 2.3.2015 with the Government of India for development and production of the Amelia (North) Coal Block. As per CMDP, the Petitioner was required to enter into long term PPAs equal to 85% of the installed capacity in order to fully utilize the coal for its plant.

(f) After commercial operation of the transmission system within the scope of PGCIL as per the BPTA, PGCIL in its letter dated 17.7.2015 requested the Petitioner to open an LC in its favour against the LTA granted to the Petitioner in order to operationalize the LTA. In response, the Petitioner vide its letter dated 17.8.2015 requested PGCIL to keep the LTA in abeyance till availability of the customer(s) for long term procurement and not to raise invoices for the LTA granted. PGCIL vide its Legal Notice dated 9.10.2015 directed the Petitioner to open the Letter of Credit within seven days failing which necessary action would be initiated against it. The Petitioner vide its letter dated 27.10.2015 further requested PGCIL to consider the Petitioner's request to keep in abeyance the LTA of 775.5 MW. As PGCIL did not respond to the said letter, the Petitioner has approached the Commission within the present petition with the following prayers:

“(a) Declare that the change in policy of the Government of India whereby one of the captive coal blocks i.e. Dongrital - II Coal Block (which was earmarked for the Petitioner's Jaypee Nigrie Super Thermal Power Plant) was de-reserved from power sector after cancellation of allocation by the Hon'ble Supreme Court and restrictions placed on use of coal & changed financials and economics of Amelia (North) coal block is are change in law/policy and consequently a force majeure condition affecting the performance of the Petitioner under the Bulk Power Transmission Agreement; and

(b) Direct PGCIL to keep the long term open access of 775.5 MW granted

to the Petitioner for its Jaypee Nigrie Super Thermal Power Plant in abeyance till the time the Petitioner's inability to enter into long term PPA persists in respect of power from the said plant or till PGCIL grants open access of the said capacity to some other long term customer whichever is earlier;

(c) Pass an ad interim ex-parte order restraining the Respondent from raising bills/demands of any nature on the Petitioner and from insisting to open letter of credit with regard to the LTOA granted to it under Bulk Power Transmission Agreement during the pendency of the instant Petition; and

(d) Pass any other or further orders as this Hon'ble Commission may deem fit and proper in facts and circumstances of the present case."

3. The Petitioner has submitted that pursuant to the judgment of the Hon'ble Supreme Court dated 24.9.2014, the Petitioner vide its letter dated 30.3.2015 requested the Government of Madhya Pradesh to mutually rework the terms of the PPAs executed between them. Government of Madhya Pradesh has not responded to the request of the Petitioner. The Petitioner has further submitted that the Government of India advised the States to consider capping of capacity charges of power plants with captive coal and such restrictions have adversely affected the Petitioner by extinguishing its flexibility of entering into long term PPAs. The Petitioner has submitted that despite the Petitioner's willingness to enter into long term PPAs, it is unable to do so. The Petitioner has submitted that in the absence of long term PPA, the Petitioner is not being able to run its generating station with full capacity and is forced to keep 56% capacity of its plant idle at the cost of incurring heavy financial losses and sub-optimal utilization of the 400 kV D/C dedicated transmission line up to Satna sub-station of PGCIL. The Petitioner has submitted that Article 9 of BPTA provides for "change in law" and "force majeure" events to address the unprecedented and unforeseen impact of the change in Government of India Policy on coal allocation, linkage and supply. The Petitioner has further submitted that Section 61 of the Electricity Act, 2003 provides that the Electricity Regulatory Commissions shall ensure that the generation of power is

done on commercial principles and the generator of electricity gets adequate and reasonable returns on its investments. The Petitioner has submitted that in order to achieve the objective of Section 61 of the Act and on the facts and circumstances of the case, the Petitioner has sought intermediation of the Commission for permission to keep the LTA granted to it in abeyance till the time the Petitioner's inability to enter into long term PPA persists or till PGCIL grants open access of the said capacity to some other long term customer whichever is earlier.

4. PGCIL in its reply to the Petition has submitted that the Petitioner applied for LTA for 1320 MW in accordance with the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2004. The Petitioner was granted LTA for 1240.8 MW with target beneficiaries as WR (853.3 MW) and NR (387.3 MW). The Petitioner signed BPTA with PGCIL on 24.2.2010. On 1.9.2014, Transmission Service Agreement was signed between PGCIL and other generators including the Petitioner. Upon firming up beneficiaries through signing of long term PPA with Madhya Pradesh Power Management Company Limited, the LTA was revised on 29.4.2015 with LTA of 775.5 MW (WR 389 MW and NR 386.5 MW) to the Petitioner and 465.30 MW to MPPMCL. During the 8th Joint Coordination Committee meeting of High Capacity Corridors for IPPs held on 9.1.2015, the Petitioner informed the COD schedule of Unit 1 as September, 2014 as against the BPTA schedule of May, 2013 and COD schedule of Unit II as February, 2015 as against the BPTA schedule of November, 2013. The Petitioner also intimated that the dedicated transmission line within the scope of the Petitioner was ready. PGCIL also informed the status of transmission lines within the scope in the said meeting. PGCIL vide its letter dated 17.7.2015 requested the Petitioner to sign the revised BPTA after firming of the beneficiaries and also requested the Petitioner to open the

LC of Rs. 30.02 crore corresponding to 775.5 MW. In reply to the said letter, the Petitioner vide its letter dated 17.8.2015 replied that due to cancellation of all coal block allocated by GOI including the coal block allotted to the Petitioner, the LTA of 775.5 MW be kept in abeyance till the Petitioner finds customers for long term procurement and further requested to open the LC and not to raise invoices till that time.

5. PGCIL has submitted that the provisions of the Connectivity Regulations and the Sharing Regulations allow generators to take LTA on target region basis in the case of non-firming of beneficiaries at the time of application from LTA or grant of LTA. As and when, the beneficiaries are firming up, LTA is to be regularised in the name of the beneficiaries. Till the time the generators have not firming up beneficiaries, they shall be liable to pay the transmission charges corresponding to non-firmed LTA. PGCIL has further submitted that the Petitioner has already firming up about 35% of the total LTA originally granted and the same has been operationalized. For the balance quantum of LTA, the beneficiaries have not been firming up, though both the units and the dedicated transmission lines and the system strengthening of ISTS have been commissioned. As per the data obtained from WRLDC regarding supply of power to the grid, the total injection by the Petitioner during the last four months from October, 2015 to January, 2016 with reference to the generation @ 85% of PLF with 10% auxiliary consumption are 79.12%, 73.78%, 78.47% and 73.48% respectively. The actual generation achieved at the Petitioner's project is quite substantial, therefore the reason of non-availability of coal is misleading. The cancellation of captive coal block does not in any manner wholly or partly prevent the Petitioner in the performance of its obligations under the BPTA and therefore, does not constitute force majeure as provided in Article 9 of

the BPTA. The cancellation of captive coal block does not prohibit wholly or partly the import of coal. Only if the performance of BPTA has become relatively onerous, it ought not to automatically imply a force majeure situation. It is a settled law that a contract is not frustrated merely because the circumstances in which it was made are altered. So long as the PGCIL by its acts of omission or commission has not contributed to the Petitioner being unable to commence operation of its LTA, PGCIL cannot be held responsible for it. Force majeure can occur even after the LTA has been operationalized and even a dispute can arise post-operationalization, then also the charges would be payable in terms of the BCD procedure issued under Sharing Regulations and TSA.

6. PGCIL has submitted that there is no provision in the Connectivity Regulations for keeping the LTA in abeyance. In case the LTA is kept in abeyance, PGCIL would not be able to allocate the corresponding capacity to any other person. The system to which LTA was sought was a part of the High Capacity Power Transmission Corridor-IV for which the regulatory approval has been accorded by the Commission based on the commitment of the generation projects in the area including the Petitioner. If the project developers are allowed to keep their LTAs in abeyance, it could lead to increased charges of other DICs in the PoC pool. Regulation 18 of the Connectivity Regulations provides procedure for relinquishment of the LTA. In case the LTA applicant does not want the transmission capacity to be reserved in its favour, the LTA applicant can follow the procedure and relinquish its LTA. Upon the relinquishment, the transmission capacity would be allocated to other persons who desire to have transmission capacity reserved.

7. As regards the opening of LC, PGCIL has submitted that Clause 2(d) of the BPTA provides that the Petitioner is required to open an LC for 105% of estimated average monthly billing for charges and would provide security in the form of irrevocable bank guarantee in favour of PGCIL. Article 12.1 of the TSA provides that the Petitioner shall abide by the BCD Procedure, and such procedure shall be construed as part of the TSA. PGCIL vide its letters dated 17.7.2015 and 9.10.2015 requested the Petitioner to open LC of Rs. 30.02 crore for 775.5 MW towards payment security mechanism as per the Connectivity Regulations which has not been complied with by the Petitioner.

Analysis and Decision:

8. We have considered the submissions of the Petitioner and the Respondent and perused documents on record. The Petitioner has sought a declaration that the Change in the Policy of the Government of India to de-reserve the Dongrital-II coal block after the cancellation of allocation by the Hon'ble Supreme Court and the restrictions placed on Amelia Coal block are changes in law/policy and are consequently force majeure in terms of BPTA. The Petitioner has further sought a direction to PGCIL to keep the LTA of 775.5 MW granted to it in abeyance till Petitioner's ability to enter into long term PPA persists or till PGCIL grants open access of the said capacity to some other long term customers. PGCIL has strongly denied that in terms of Connectivity Regulations and the BPTA, the prayers of the petitioner are maintainable. The following issues arise for our consideration in this petition:

- (a) Whether the cancellation of coal blocks and inability of the Petitioner to enter into PPA for full capacity of the generating station are force majeure events

as per provisions of BPTA dated 24.2.2010 and relieve the Petitioner from its liability to pay the transmission charges?

(b) Whether pending execution of the long term PPAs by the Petitioner, the LTA for 775.5 MW granted to the Petitioner can be kept in abeyance in terms of the Connectivity Regulations?

(c) Whether any direction can be issued to PGCIL for not raising the bills for transmission charges or for not insisting on opening of LC.

Issue No. 1: Whether the cancellation of coal blocks and inability of the Petitioner to enter into PPA for full capacity of the generating station are force majeure events as per provisions of BPTA dated 24.2.2010 and relieve the Petitioner from its liability to pay the transmission charges?

9. The Petitioner was selected as a Joint Venture Partner by Madhya Pradesh State Mining Corporation Limited for development of two coal blocks namely, Amelia and Dongrital-II and setting up of 1000 MW Thermal Power Plant. An Implementation Agreement was entered into between the Petitioner and Government of MP for construction, ownership, operation and maintenance of the Power Plant by the Petitioner. By an amendment to the Implementation Agreement, the capacity of the generating station has been increased to 1320 MW.

10. The main contention of the Petitioner is that the cancellation of the allocation of all coal blocks allotted by the Government of India from 1993 onwards including the Amelia (North) and Dongrital-II blocks by the Hon`ble Supreme Court vide order dated 24.9.2014 from which the entire coal requirement of the Petitioner`s generating station was to be sourced and promulgation of the new policy by Government of India by way of an ordinance are force majeure events under Clause 9 of the BPTA. Secondly, the Petitioner has contended that subsequently, it

executed a Coal Mine Development and Production Agreement (CMDP) dated 2.3.2015 with the President of India for development and production of the Amelia (North) Coal Block. As per new CMDP, a generator was required to enter into long term PPAs equal to 85% of the installed capacity to fully utilize the coal for its plant. The Petitioner has submitted that when the plant was set up by the Petitioner, there was no such restriction imposed on the Petitioner. Thirdly, Government of India advised the States to consider capping of capacity charges of power plants with captive coal. Such restrictions, according to the Petitioner, have extinguished the flexibility of the Petitioner to enter into long term PPAs available to it earlier. The Petitioner has submitted that its inability to enter into long term PPAs and the ground conditions between the time when the investment decision was taken and the post provisions of CMDP being effective has resulted in a situation where the Petitioner was not able to run its generating station with full capacity. The Petitioner has submitted that due to this change in law/policy resulting in non-availability of coal as promised and assured to the Petitioner, it is not in a position to run its generating station and is forced to keep 56% capacity of its plant idle and is already incurring heavy financial losses in this regard. The Petitioner has submitted that due to non- utilising of its 60% idle capacity of the generating station, it is not able to optimally utilise the 400 kV D/C dedicated transmission line up to Satna sub-station of PGCIL for carrying its merchant power. Accordingly, the Petitioner vide its letter dated 17.8.2015 invoking the provisions of Clause 9 of the BPTA informed PGCIL that due to existence of the force majeure events, the Petitioner is not able to utilize the LTA under the BPTA and requested to keep the LTA of 775.5 MW in abeyance till the Petitioner finds customers for long term procurement and requested PGCIL to not insist for opening of LC. However, the Petitioner received a legal notice dated

9.10.2015 from PGCIL referring to its earlier letter dated 17.7.2015 again asking the Petitioner to open LC failing which the Petitioner would be liable to necessary action.

11. PGCIL has submitted that the BPTA for evacuation of power is not a contingent contract on coal supply and therefore, BPTA cannot be said to be frustrated on account of the cancellation of coal block allocated for the project consequent to the Hon`ble Supreme Court order dated 24.9.2014 leading to force majeure event. Therefore, there is no force majeure affecting the performance of the Petitioner`s obligations assumed under the BPTA. PGCIL has submitted that the performance may become onerous or difficult to perform for the Petitioner due to change in Policy, but is not an impossibility to perform, particularly, in the context of Section 56 of the Indian Contract Act, 1857 or within the meaning of force majeure under Clause 9 of the BPTA. PGCIL has submitted that a mere reading of the Clause 9 of the BPTA makes it amply clear as to the nature of events contemplated to constitute an event of force majeure in the BPTA such as war, rebellion, fire, flood, etc. which are clearly beyond the control of the parties. PGCIL has submitted that none of the events stated above, which are in the nature of commercial/business risk and hardships at best, are covered within the scope of force majeure events under the BPTA. PGCIL has further submitted that the alleged force majeure event occurred on 24.9.2014. However, the Petitioner informed the respondent about the occurrence of force majeure on 17.8.2015 which is almost after one year. Clause 9 of the BPTA governs the manner in which notice is required to be given by one party to the other, and specifically lays down a requirement of giving a notice within a period of 30 days upon the occurrence of a

force majeure event. Therefore, the notice dated 17.8.2015, strictly in legal sense, cannot be considered as notice of force majeure

12. Let us first consider the provisions of Clause 9 of the BPTA with regard to force majeure event which provides as under:

"9.0 The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable to any claim for any loss or damage whatsoever arising out of failure to carry out the terms of this Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party. But the party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice of 30 days to the other party to this effect. Transmission/drawal of power shall be started as soon as practicable by the parties conferred after such eventuality has come to an end or ceased to exist."

13. As per the above provision of the force majeure, no party is required to claim any loss or damages on account of its failure to carry out the terms of the agreement which is attributable to any of the enumerated force majeure events or any other event beyond the control of the defaulting party. The use of the words "no party shall be liable to claim any loss or damage" relieves both the parties from claiming any loss or damage arising out of the failure to carry out the terms of the agreement by defaulting party. The words "defaulting party" refers to a party who is unable to carry out its obligations under the BPTA on account of being affected by force majeure or any other reason beyond its control. In other words, if either the Petitioner or PGCIL is affected by force majeure or reason beyond its control which results in its failure to carry out the terms of the agreement, then neither party is liable to claim or pay any loss or damages to the other party.

14. We have considered the submissions of the Petitioner and the Respondent in the light of the provisions of Clause 9 of the BPTA above. In the present case, the

petitioner does not fulfil the conditions of Clause 9 of the BPTA due to following reasons:-

- a) Notice for force majeure as required under the BPTA has not been given by the Petitioner. Though the Petitioner is claiming force majeure on the basis of the Hon'ble Supreme Court judgement dated 24.9.2014, the petitioner has not given such notice as per the timeline laid down in the BPTA.

- b) Both units of the generating station of the Petitioner have been commissioned and the Petitioner has been generating and supplying power on short term basis. Cancellation of coal block by the Hon'ble Supreme Court cannot be treated as force majeure event, as the very basis of allocation of coal block to the allottees including the Petitioner was found to be illegal and hence terminated. After the judgment, the Central Government carried out auction of coal block and admittedly the Petitioner participated in the auction process and has been allocated Amelia (North) coal block. As regards the balance requirement of coal, the Petitioner has other avenues such as import of coal, e-auction coal and participation in bidding process for allocation of new coal block. Therefore, cancellation of coal block has not resulted in non-availability of coal, as the Petitioner has to arrange coal from alternative source to produce power and supply the same. In fact, the Petition is supplying electricity in the short term.

- c) As regards the non-signing of the long term PPAs by the distribution licensees, it is a commercial issue taken by the Petitioner and inability to enter into PPAs cannot be considered as a ground for not performing the obligations under the BPTA with PGCIL. Therefore, the Petitioner cannot

claim that it is unable to discharge its obligation under the BPTA on account of reasons beyond its control. The judgments of the Hon'ble Supreme Court in Satyabrat Ghosh Vs. Mugneeram Bhangur & Co. & Ors. and Dhanrajmal Gobindram Vs. Shamji Kalidas & Co. are not applicable in this case as the parties to the BPTA had never agreed that BPTA would be frustrated if the Petitioner is unable to supply power due to non-availability of coal or non-signing of the PPAs.

d) The Petitioner has vehemently argued that due to reasons beyond its control, it is not able to utilize the LTA under the BPTA. This argument cannot be accepted as PGCIL has in no way contributed to the impossibility of performance of contract by the petitioner. The transmission system as per the BPTA has been executed by PGCIL based on the commitment of the Petitioner and therefore, the Petitioner cannot be relieved of its obligation for payment of transmission charges. This issue has been dealt with by the Appellate Tribunal in appeal No. 197 of 2014 (Jayaswal NecoUrja Limited vs. PGCIL) as under:

“33. Assuming that the Appellant's contention about the existence of force majeure conditions is correct, so long as Respondent No.1 by its acts of omission or commission has not contributed to the Appellant's being unable to commence operation of its power plant, Respondent No.1 cannot be held responsible for it and encashment of Bank Guarantee cannot be faulted on that count.”

In view of the above finding of the Appellate Tribunal, it cannot be said that PGCIL by its acts of omission or commission has contributed to the Petitioner's inability to operationalize the LTA.

(e) In our order dated 12.4.2017 in Petition No. 317/MP/2013, the

Commission has interpreted the provision of clause 9 of the BPTA as under:

“19. The Petitioner has abandoned the project for the purely commercial reasons and the Petitioner cannot be said to be affected by reasons beyond its control. The Petitioner has relied upon the findings of the Hon`ble Appellate Tribunal for Electricity dated 4.2.2014 in Appeal No. 123 of 2012. In the said case, the Appellate Tribunal held that the approval under the Bombay Tenancy and Agricultural Land (Vidarbha Region and Kutch Area) Act,1958 and for water source under the Environment Protection Act,1986 and CRZ Regulations are statutory/ legal approvals under the PPA and accordingly, it fall under *force majeure* events and the period of delay is required to be suspended or excused and to that extent the period of Commercial Operation Date, Date of construction default and Scheduled Commercial Operation Date were to be extended under the LTA Agreement. In the present case, the Petitioner has abandoned the project on account of delay in obtaining clearances and is seeking to wriggle out of the LTA Agreement. From the analysis of Clause 9 of the LTA Agreement, it clearly emerges that the said clause is for providing temporary amnesty to the parties affected by force majeure in order to make their agreement work. The provision of Clause 9 of the LTA Agreement does not permit a defaulting party to abandon the LTA which is evident form the last sentence of the said clause which states that drawal/transmission of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.”

This is squarely applicable in this case.

15. In view of the above, we are unable to hold that the Petitioner is affected by force majeure in terms of the BPTA on account of cancellation of captive coal block and non-signing of the PPA for full capacity of its generating plant. In terms of the BPTA, the Petitioner carries the liability to pay the transmission charges after the COD of the transmission system which were executed by PGCIL.

Issue No. 2: Whether the LTA granted to the Petitioner of 775.5 MW can be kept in abeyance of the Connectivity Regulations?

16. The Petitioner has submitted that after cancellation of the Captive Coal Blocks by the Government of India, the Petitioner tried to explore the possibility of entering into long term PPAs outside the State of M.P. on the basis of procuring coal from other sources. However, it was not possible for the Petitioner to enter into

PPAs for the remaining capacity of the plant on the basis of the coal to be procured from other sources including imported coal as the rate/tariff of such power was coming out to be very high and was not attractive to the buyers. Therefore, the Petitioner has sought to keep its LTA in abeyance till it is able to tie up the buyers through long term PPA for the full capacity.

19. PGCIL has submitted that there is no provision either in the Connectivity Regulations or in the BPTA to keep the LTA in abeyance. PGCIL has further submitted that if the LTA is kept in abeyance, it cannot be allowed to other LTA applicants and consequently the transmission charges corresponding to the LTA will remain unrecovered and shall be borne by other DICs.

20. We have considered the submissions of the parties. When PGCIL has built a transmission line on the basis of the commitment of a long term open access customer such as the petitioner, it becomes the obligation of the said LTA customer to pay the transmission charges for the transmission system. Further, it is an admitted fact that the petitioner is running its plant at 44% only on account of lack of PPA. The petitioner is also selling power in the short term market. The power plant of the petitioner is in a running condition only and it can generate power on account of non-availability of coal linkage and non-signing of the PPAs. There are commercial issues affecting the petitioner with regard to the generating station. PGCIL cannot be made to suffer in the matter of payment of transmission charges. We have also gone through the provisions of the Connectivity Regulations and BPTA. There is no provision to keep the LTA in abeyance either in the Connectivity Regulations or in the BPTA. In case, the LTA customer does not want to avail the LTA and pay charges, the only option available to it is to relinquish its access rights in terms of

Regulation 18 of the Connectivity Regulations. The said Regulation provides as under:

“18. Relinquishment of access rights

(1) 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 as follows:-

(a) **Long-term customer who has availed access rights for at least 12 years**

(i) **Notice of one (1) year** – If such a customer submits an application to the Central Transmission Utility at least 1 (one) year prior to the date from which such customer desires to relinquish the access rights, there shall be no charges.

(ii) **Notice of less than one (1) year** – If such a customer submits an application to the Central Transmission Utility at any time lesser than a period of 1 (one) year prior to the date from which such customer desires to relinquish the access rights, such customer shall pay an amount equal to 55% of the estimated transmission charges (net present value) for the **stranded** transmission capacity for the period falling short of a notice period of one (1) year.

(b) **Long-term customer who has not availed access rights for at least 12 (twelve) years** – such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of 12 (twelve) years of access rights:

Provided that such a customer shall submit an application to the Central Transmission Utility at east 1 (one) year prior to the date from which such customer desires to relinquish the access rights;

Provided further that in case a customer submits an application for relinquishment of long-term access rights at any time at a notice period of less than one year, then such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the period falling short of a notice period of one (1) year, in addition to 66% of the estimated transmission charges (net present value) for the **stranded** transmission capacity for the period falling short of 12 (twelve) years of access rights.

(2) The discount rate that shall be applicable for computing the net present value as referred to in sub-clause (a) and (b) of clause (1) above shall be the discount rate to be used for bid evaluation in the Commission’s Notification issued from time to time in accordance with the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees issued by the Ministry of Power.

(3) The compensation paid by the long-term customer for the **stranded transmission capacity** shall be used for reducing transmission charges payable by other long-term customers and medium-term customers in the year in which such

compensation payment are due in the ratio of transmission charges payable for that year by such long-term customers and medium-term customers.”

Under the above provisions, long term customer may relinquish long term access rights fully or partly, before the expiry of full term of long term access, by making payment of compensation for stranded capacity as provided therein. It is pertinent to mention that the regulations do not envisage any exemption from payment of compensation in case of relinquishment of LTA on any ground.

21. The Petitioner has prayed to keep 775.5 MW LTA in abeyance till signing of the long term PPA or till PGCIL grant LTA of the said capacity to other long term customers whichever is earlier. During the course of hearing, we had observed that there is no provision under the Connectivity Regulations for keeping the LTA in abeyance and in case, the LTA is kept in abeyance, the Respondent would not be able to allocate the corresponding capacity to any other person and then it could also lead to increased charges of other DIC's in the POC pool. In response, learned counsel for the Petitioner sought permission to relinquish the 775.5 MW LTA granted to it. Learned counsel for PGCIL submitted that the Petitioner can be permitted to relinquish the entire LTA subject to payment of relinquishment charges as per the provisions of the Connectivity Regulations.

22. In our view, the request of the Petitioner regarding relinquishment of LTA should be considered by PGCIL and LTA capacity be considered as relinquished, subject to condition that the Petitioner shall be liable to pay the relinquishment charges in terms of Regulation 18 of the Connectivity Regulations.

Issue No. 3: Whether any direction can be given to PGCIL not to insist on LC or not to raise any bills or demands towards transmission charges on the Petitioner?

23. The Petitioner in its third prayer has sought directions to PGCIL not to raise any demand or invest less towards transmission charges or not to insist on opening of LC in terms of the BPTA.

24. Clause 2.0 (d) of the BPTA provides as under:-

“(d) In addition to opening of LC for 105% of estimated average monthly billing for charges mentioned at 2(a) and 2(b) above, Long-term Transmission customer would provide security in the form of irrevocable Bank Guarantee (BG), in favour of POWERGRID, equivalent to two months estimated average monthly billing, three months prior to the scheduled date of commissioning of generating units as indicated at Annexure-I. Initially the security mechanism shall be renewed from time to time till the expiry of the open access.”

The above provision requires the LTA customer to open the LC equivalent of 105% of the monthly transmission charges and also to provide same form of payment security mechanism. However, the petitioner has not opened the LC claiming force majeure and Change in Law. We have already held that the case of the petitioner is not covered under either force majeure or Change in Law. The petitioner is therefore obligated in terms of the BPTA to open the LC.

25. It is noted that PGCIL has not operationalized the LTA and raised the bills for transmission charges on account of non-opening of LC. Second Proviso to Regulation 12 (1) of the Connectivity Regulations provides as under:

“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.”

Thus, as per the Connectivity Regulations, it is a condition precedent that an LTA customer shall have liability to pay the transmission charges where the

augmentation of transmission is required irrespective of identification of source of off-take. Further, Para 2.0 (c) of the BPTA provides as under:

“2.0 (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 scheduled commissioning date of generating units as indicated by the respective developer. The commissioning of transmission system would be preponed only if the same is agreed mutually by concerned parties.”

In terms of second proviso to Regulation 12 (1) of the Connectivity Regulations and para 2.0 (c) of the BPTA, the petitioner as a LTA customer is under a statutory and contractual obligation to pay the transmission charges from the date of commissioning of the transmission system executed by PGCIL in terms of the BPTA. 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. The Petitioner is selling power through short term open access by availing the same transmission system built for providing the long term access while availing the payment of transmission charges for LTA on account of non-operationalization of LC. Consequently, the LTA charges are being borne by the DICs who were neither parties to the BPTA nor are the beneficiaries of the transmission system built for providing LTA to the Petitioner. Since, the transmission system has been built by PGCIL on the basis of the contractual commitment of the Petitioner, the Petitioner is liable to pay the transmission charges for the LTA. Ideally, the LTA customers should open the LC as it is a statutory and contractual requirement. If the LTA customer delays in opening the LC or does not open the LC on some pretext or other and PGCIL does not operationalize the LTA, it leads to non-payment of transmission charges by the LTA customers for whom the line was

built. Absence of payment security mechanism should not deter PGCIL from operating the LTA and raising the bills for transmission charges after the transmission systems are declared under commercial operation. If the LTA customer does not provide the LC or does not pay the charges for a period of 90 days, PGCIL has been empowered in terms of our order in Petition No. 142/MP/2012 to deny short term open access. In our view, PGCIL should take immediate steps to operationalize the LTA after commissioning of the transmission system without linking the same to the opening of LC by LTA customers and raise the bills for transmission charges. In the event of failure to pay the transmission charges, the LTA customers shall be denied short term open access.

26. The Petition is disposed of in terms of the above directions.

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

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson