

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 127/MP/2016  
Along with IA Nos. 2/2017, 70/2017,  
88/2017 and 89/2017**

**Coram:  
Shri P.K. Pujari, Chairperson  
Shri A.K. Singhal, Member  
Dr. M.K. Iyer, Member**

**Date of Order: 5<sup>th</sup> of October, 2018**

**In the matter of**

Application under Section 92 (2) of the Electricity Act, 2003 read with Regulations 111, 112 and 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking urgent directions and stay the operation of the LTA termination notice dated 18.6.2018 issued by the Respondent.

**And**

**In the matter of**

Ind Barath Energy (Utkal) Limited  
Plot No. 30-A, Road No. 1, Film Nagar,  
Jubilee Hills, Hyderabad-500 096, Telangana

**.....Petitioner**

**Vs.**

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

**...Respondent**

**The following were present:**

- 1) Shri Tushar Srivastava, Advocate, IBEUL
- 2) Shri Shariq Ahmid, Advocate, IBEUL
- 3) Shri M.G.Ramachandran, Advocate, PGCIL
- 4) Ms. Ranjit Ramachandran, Advocate, PGCIL
- 5) Shri Swapnil Verma, PGCIL

## ORDER

The Petitioner, Ind Barath Energy (Utkal) Limited, has filed the present petition for adjudication of the dispute between the parties in relation to non-release of bank guarantee furnished with respect to long term open access granted to the Petitioner along with the following prayers:

“(a) Allow the present petition and direct the PGCIL to release the Bank Guarantee immediately, on such terms as this Commission may deem it and proper; and

(b) Pass such other and/or further order as this Commission may deem fit and proper under the facts and circumstances of the case.”

2. The Petitioner has set up a 700 MW (2X350 MW) thermal power plant (hereinafter referred to as the ‘generating station’) at Jharsuguda in the State of Odisha. The Petitioner was granted LTA for 616 MW and has entered into LTA Agreement with PGCIL on 24.2.2010. The Petitioner has paid a Bank Guarantee (hereinafter referred to as “BG”) of Rs. 30.80 crore. Unit-I and Unit-II of the generating station were scheduled to achieve COD in December, 2011 and February, 2012 respectively. As per the LTA Agreement, the Petitioner was required to lay down 400 kV D/C line with associated line bays from the generating station to Jharsuguda Pooling station of PGCIL. The PGCIL was required to develop the transmission system for strengthening of transmission system in the State of Odisha. Subsequently, the Petitioner entered into a TSA dated 19.8.2014 as per the requirements of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 (hereinafter referred to as “the Sharing Regulations”). The Petitioner has submitted that owing to local resistance and Right of Way (ROW) problem, the Petitioner could not

complete the transmission line. The matter was taken up during the 119th OCC meeting held on 18.3.2016 at Eastern Regional Power Committee and the Petitioner was allowed to evacuate the power from its project through Rourkela Raigarh 400 Kw Ckt No.1 of PGCIL through LILO arrangement. The Petitioner took up construction of the LILO work consisting of 23 km of 400 kV D/C line up to the LILO point from its generating station. The Petitioner has furnished Letter of Credit of Rs. 27,73,00,000/- in terms of the TSA in favour of PGCIL. The Petitioner has submitted that the project has already achieved COD and the Petitioner is making efforts to complete the transmission line. After completion of its generating station, the Petitioner approached CTU for return of the BG which was refused. The Petitioner has filed the present petition seeking direction to PGCIL to release the Bank Guarantee with respect to Long Term Open Access granted to the Petitioner.

3. Notice was issued to PGCIL to file its reply.

4. PGCIL in its reply dated 6.12.2016 has submitted that the Petitioner is required to maintain both the bank guarantee and the LC as per the provisions of the Details Procedure, TSA and LTA. However, the Petitioner did not open the LC for required amount. Therefore, the Petitioner has acted in contravention of not only the LTA but also the specific directions of the Commission dated 27.9.2016.

5. The Petition was first heard on 15.9.2016. Learned counsel for the Petitioner submitted that it had opened the LC for 500 MW corresponding to the operationalization of LTA. Learned counsel for PGCIL submitted that the Petitioner had opened the LC

only for 500 MW as against the LTA of 616 MW, apart from not paying the transmission charges from the date of operationalization of LTA. The Commission through the ROP dated 15.9.2016 directed the Petitioner to keep the LC alive till the next date of hearing.

6. The matter was next heard on 27.9.2016. The Commission directed the Petitioner to file ERLDC's letter dated 19.7.2016 declaring COD of the unit-I of the generating station.

7. The Petition was next heard on 15.11.2016, Learned counsel for the Petitioner submitted that due to shortage of funds, the Petitioner could not open LC for remaining 116 MW. The Commission directed the Petitioner to open LC for the entire quantum and on compliance with the directions by the Petitioner, CTU would release 50% of the BG.

**I.A.No. 2/2017 filed by PGCIL**

8. In the IA, PGCIL submitted that despite the Commission's direction dated 15.9.2016 and 15.11.2016, the Petitioner had not opened LC and as on date of the filing of the IA, Rs. 48.74 crore is outstanding against the Petitioner towards payment of transmission charges. PGCIL made the following prayers in the IA:

- (a) Uphold the retention of the Petitioner's/non-Applicant's construction phase bank guarantee on account of non-completion/non-commissioning of required generation units and dedicated transmission line in terms of the Bulk Power Transmission Agreement and applicable Regulations and Procedures;
- (b) Direct the Petitioner/Non-Applicant for payment of transmission charges including surcharge under the BPTA/TSA for the LTA granted and operationalized in its favour within a time period of 15 days.
- (c) In default of the above or in case of non-compliance of the Commission's directions for payment of applicable transmission charges and/or surcharge,

permit the encashment of Petitioner`s/Non-Applicant`s construction phase bank guarantee and appropriate the amount for settlement of dues.

(d) Pursuant to the encashment, permit the termination of LTA and TSA for breach on part of the Petitioner/Non-Applicant with directions for liability on the Petitioner/Non-Applicant to pay the outstanding amount as well as relinquishment charges as may be applicable.”

9. The matter was further heard on 19.1.2017. The Commission directed the Petitioner to open the LC for the entire quantum and to pay balance outstanding amount to PGCIL by 15.3.2017. The Commission further directed that the CTU shall release the bank guarantee only after the LTA is operationalized.

**I.A.No. 88/2017 filed by the Petitioner**

10. In this IA, the Petitioner sought modification of the ROPs dated 15.9.2016, 15.11.2016 and 19.1.2017 and to allow the Petitioner to make payment of transmission charges by resorting to the payment mechanism suggested by the Petitioner in Para 11 of the IA. The Petitioner further prayed to allow it to supply power to the parties with whom it had entered into PPA, pending the payment of outstanding transmission charges.

11. The matter was heard on 16.5.2017. The Commission directed the Petitioner to make payment of Rs. 10 crore by 25.5.2017 and to pay balance outstanding amount including surcharge in 12 monthly installments starting from July, 2017 onwards.

**I.A.No.70/2017 filed by the Petitioner**

12. The Petitioner in this IA submitted that on account of the financial hardships and non-commencement of the commercial operation of the generating station, it could not

make payment as per the directions of the Commission and sought modification of the ROP dated 16.5.2016 to the extent of allowing the Petitioner to make initial payment of Rs. 5 crore to PGCIL and balance outstanding dues (including surcharge) in 12 monthly installments (to be paid by last day of the month) from next subsequent month from the start of supply of commercial power from Unit-I of its generating station.

13. Meanwhile, PGCIL vide its letter dated 25.10.2017 and 31.10.2017 instructed the Punjab National Bank to invoke the bank guarantee of Rs. 30.80 crore and LC of Rs. 14.28 crore. The bank guarantee and LC were accordingly encashed.

**I.A.No. 89/2017 filed by the Petitioner**

14. The Petitioner filed this IA seeking a declaration that the action of PGCIL by invoking the bank guarantee and LC was illegal and non-est in law and prayed for allowing the Petitioner to start supply of commercial power from its generation project without PGCIL insisting on opening/reinstatement of LC.

15. The matter was heard on 30.1.2018. The Commission directed the Petitioner to file an affidavit to the effect that the Petitioner would pay the outstanding dues of PGCIL before the next date of hearing.

16. In the next hearing of the Petition on 26.4.2018, the learned counsel for the Petitioner informed that the lenders of the Petitioner had proposed to initiate the proceedings before the National Company Law Tribunal in order to effect changes in

the management of the Petitioner through another investor under the Corporate Insolvency Resolution Process of Insolvency and Bankruptcy Code, 2016 and requested to stand over the present proceedings and to direct PGCIL to maintain the status quo. The Commission directed the Petitioner to try to find out an amicable solution in consultation with PFC and place on record the steps taken/proposed to be taken by it to liquidate the outstanding dues of PGCIL.

17. PGCIL issued a notice dated 18.6.2018 for termination of LTA of the Petitioner under clause 16.4.4 for default under clause 16.2.1 of the TSA on account of non-compliance of clause 3.6 of the BCD Procedure for not opening the LC.

#### **I.A. No. 55/2018 filed by the Petitioner**

18. The Petitioner filed this IA seeking stay on the termination notice for LTA by PGCIL. The Commission in its order dated 3.8.2018 declined to grant stay of the termination notice observing that the Petitioner did not have the right to use the LTA without paying the transmission charges. The IA was disposed of vide order dated 3.8.2018. PGCIL has since terminated the LTA of the Petitioner.

#### **Analysis and Decision**

19. The present petition has been filed seeking direction to PGCIL to release the bank guarantee of Rs. 30.80 crore. According to the Petitioner, the bank guarantee was given to PGCIL in terms of clause 6 of the LTA Agreement @Rs. 5 lakh for the 616 MW LTA granted to the Petitioner. The Petitioner has further submitted that BG is required to

be retained for six months after the schedule date of completion of the generation project and since the Petitioner has commissioned Unit-I of the generation project and is in the advance stage of commissioning of the Unit-II, the BG should be released to the Petitioner. PGCIL has submitted that the transmission lines which were mentioned in the LTA Agreement have been commissioned by PGCIL and the LTA has been operationalized. The Petitioner is required to open the LC as per the LTA Agreement and pay the transmission charges from the date of operationalization of LTA. Since the Petitioner opened LC only for 500 MW as against 616 MW and has not been paying transmission charges, PGCIL has encashed the BG and LC to recover the outstanding dues. Further, since the Petitioner has not been replenishing the LC, the PGCIL has terminated the LTA for the failure of the Petitioner to replenish the LC.

20. First we examine the provisions of the LTA Agreement dated 24.2.2010 signed by the Petitioner with PGCIL. Clauses 2 and 6 of the LTA Agreement which are relevant for the purpose of the present dispute are extracted as under:

“2.0 (a) Long term transmission customer shall share and pay the transmission charges in accordance with the regulation/tariff order issued by Central Electricity Regulatory Commission from time to time of POWERGRID transmission system of concerned applicable Region i.e Northern Region/Western Region/Eastern Region and Southern Region including charges for inter-regional link/ULDC/NLDC charges and additions thereof. These charges would be applicable corresponding to the capacity of power contracted from the said generation project through open access from the scheduled date of commissioning of generating projects as indicated at Annexure-1 irrespective of their actual date of commissioning.

(b) Long term transmission customer shall share and pay the transmission charges of the transmission system detailed in Annexure-3 in accordance with the sharing mechanism detailed in Annexure-4. In case, in future any other long-term transmission customer(s) is/are granted open access through the



transmission system detailed in Annexure-3 (subject to technical feasibility), he/they would also share the applicable transmission charges.

(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 as per Annexure-1. The commissioning of transmission system would be pre-poned only if the same is agreed mutually by concerned parties.

(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-1. Initially the security mechanism shall be valid for a minimum period of three (3) years and shall be renewed from time to time till the expiry of the open access.

(e) The estimated average transmission charges would be reviewed every six months and accordingly, the amount of security would be enhanced/reduced by long term transmission customers

(f) In case the long term transmission customer defaults in payment of the monthly charges of POWERGRID bills, then POWERGRID shall be entitled to encash/adjust the BG immediately.

(g) In case of encashment/adjustment of BG by POWERGRID against non-payment of monthly charges by long-term transmission customer, the same should be immediately replenished/recouped by long-term transmission customers before the next billing cycle.”

6.0 (a) In case any of the developers failed to construct the generating “station/dedicated transmission system or makes an exist or abandon its project, POWERGRID shall have the right to collect the transmission charges and/or damages as the case may be in accordance with the notification/regulation issued by CERC from time to time. The developer shall furnish a Bank Guarantee from a Nationalized Bank for an amount which shall be equivalent to Rs 5 (five) lakhs/MW to compensate such damages. The bank guarantee format is enclosed as Annexure Y. The details and categories of bank would be in accordance with clause 2 (h) above. The Bank Guarantee would be furnished in favour of POWERGRID in accordance with the time frame agreed during the meeting held at CEA on 1.2.2010.

(b) This bank guarantee would be initially valid for a period upto six months after the expected date of commissioning schedule of generating units(s) mentioned at Annexure-11 (however, for existing commissioned units, the validity shall be the same as applicable to the earliest validity applicable to the generator in the group mentioned at Annexure 1). The bank guarantee would be encashed by POWERGRID in case of adverse progress of individual generating units(s) assessed during coordination meeting as per para 7 below. However, the validity should be extended by concerned Long-Term transmission customer(s) as per the requirement to be indicated during co-ordination meeting.”

21. As per clause 6 of the LTA Agreement, the LTA customer is required to furnish the construction BG @ Rs. 5 lakh/MW and maintain the BG for a period of six months beyond the date of expected commissioning schedule of the generating units as mentioned at Annexure-11. Units-1 and 2 of the Petitioner's generating station were scheduled to be commissioned in December, 2011 and February 2012 respectively. Since, the CODs of the Units were delayed, the Petitioner has been extending the validity period of BG from time to time. The COD of Unit-I of the generating station was declared on 20.7.2016 and COD of Unit-II is still to be declared. The transmission system was put under commercial operation and the LTA was operationalized w.e.f. from 16.12.2015. In terms of clause 2 (a) and (b) of the LTA Agreement, the Petitioner is required to pay the transmission charges with effect from the said date. The Petitioner has not been paying the transmission charges.

22. In terms of clause 2 (d) of the LTA Agreement, the Petitioner is required to open LC for 105% of the estimated average monthly billing of the transmission charges covered under clause 2 (a) and (b) of the LTA Agreement, apart from the BG replenishment to two months average monthly billing. The LC/BG amount was liable

to be encashed if the Petitioner did not pay the transmission charges. On encashment of the LC/BG, the Petitioner is required to replenish the same.

23. The Commission in ROP dated 15.11.2016, directed the Petitioner to open the Payment Security Mechanism in the form of LC for the entire quantum of LTA and on compliance thereof, PGCIL would release 50% of the BG amount. However, the Petitioner did not comply with the directions. Further, the Commission vide Record of the Proceedings dated 16.5.2017 directed the Petitioner to make payment of Rs. 10 crore by 25.5.2017 and the balance outstanding amount (including surcharge) in 12 monthly installments starting from July 2017 onwards. However, the Petitioner made payment of Rs. 4 crore only. The Petitioner during hearing of the Petition on 26.4.2018, submitted that as per the new guidelines dated 12.2.2018 of RBI for resolution of stressed assets and on account of precarious financial condition of the Petitioner, the lenders of the Petitioner have proposed to initiate proceedings before the National Company Law Tribunal (NCLT) in order to effect changes in the management of the Petitioner through another investor under the Corporate Insolvency Resolution Process of Insolvency and Bankruptcy Code, 2016. Taking note of the submissions of the Petitioner, the Commission directed the Petitioner to approach Power Finance Corporation to convene a meeting of all the lenders of the Applicant and PGCIL to find out an amicable solution. Pursuant to the direction of the Commission, PFC convened the lenders meeting with PGCIL on 9.5.2018. No solution could be found in the meeting.

24. In our view, the provisions of the LTA Agreement needs to be implemented in toto. The Petitioner has prayed for release of the BG on the ground that it has

commissioned Unit-I of the generating station. On the other hand, the Petitioner is unwilling to open LC for the full amount and to pay the transmission charges in terms of the LTA Agreement, despite our indulgence to allow the Petitioner to pay in easy installments. PGCIL who has constructed the transmission lines based on the commitment of the Petitioner, cannot be denied the legitimate transmission charges. PGCIL has encashed the BG and LC amount and has adjusted the same towards the outstanding transmission charges. Considering all the relevant facts in the light of the provisions of the LTA Agreement, we are of the view that the Petitioner is not entitled to the refund of the BG amount unless it clears all outstanding transmission charges of PGCIL. Since the Petitioner has failed to pay transmission charges, we do not find any infirmity in the action of PGCIL to encash the BG and adjust the same against the outstanding transmission charges against the Petitioner.

25. It is further pertinent to note that PGCIL on 18.6.2018, issued notice for termination of LTA under clause 16.4.4 for default under clause 16.2.1 of the Transmission Service Agreement for non-compliance of clause 3.6 of the Billing, Collection and Disbursement Procedure approved under Sharing Regulations for non-opening of Letter of Credit. Aggrieved by the said decision of PGCIL, the Petitioner filed the IA No. 55/2018 seeking stay PGCIL's termination notice dated 18.6.2018. The Commission vide order dated 3.8.2018 declined to grant stay of the impugned letter. During the hearing of the Petition on 21.8.2018, learned counsel for PGCIL submitted that the LTA granted to the Petitioner has been terminated in terms of the notice dated 18.6.2018.

26. In the light of the above discussion, the prayer of the Petitioner for release of BG is rejected.

27. The Petition and IAs No. 2/2017, 70/2017, 88/2017 and 89/2017 are disposed of in terms of the above.

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

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

sd/-  
**(P.K. Pujari)**  
**Chairperson**