

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 61/MP/2017

Coram:

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M. K. Iyer, Member

Date of Order: 28th February, 2018

In the matter of:

Petition under Section 79 (1) (f) of the Electricity Act, read with Regulation 18 of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009.

And

In the matter of

Visa Power Private Limited
Visa House, 8/10, Alipore Road,
Kolkata – 700027

...Petitioner

Versus

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

...Respondent

The following parties were present:

Ms. Swapna Seshadri, Advocate, VPL
Shri Sitesh Mukherjee, Advocate, PGCIL
Shri Deep Rao, Advocate, PGCIL
Ms. Jyoti Prasad, PGCIL
Shri Swapnil Verma, PGCIL
Shri Dilip Rozekar, PGCIL

ORDER

The petitioner, Visa Power Limited has filed the present petition under Regulation 18 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 as amended from time to time (Connectivity Regulations) seeking relinquishment of long term access without any liability under Bulk Power Transmission Agreement (BPTA) dated 24.2.2010.

2. The Petitioner has submitted that the following facts have led to the filing of the present petition:-

(a) The Petitioner is in the process of setting up a 1,200 MW (2x600MW) power plant at Raigarh, Chhattisgarh. The Petitioner had executed a BPTA with Powergrid on 24th February, 2010 for long term open access for 678 MW (Western Region – 478 MW and Northern Region – 200 MW) of power to be generated from the proposed plant;

(b) As required under BPTA, the Petitioner had submitted a bank guarantee of ₹ 33.90 Crore (₹ 5 Lacs / MW for 678 MW) in favour of the Respondent. The Petitioner was allotted connection point at Powergrid's Korba Substation at Bensia and was required to build its own transmission line from the Power plant (~ 13 KMs) to the sub-station along with bay extension at the sub-station end;

(c) Accordingly, the Petitioner had awarded the contract for laying of transmission network to KEC International Limited and the contract for the Bay extension work to GE (T&D) India Limited (formerly known as Alstom (T&D) India Limited). The Petitioner has already invested substantial amount in building the required transmission infrastructure as the bay-extension work has been completed and the transmission line work is at advance stage of completion;



(d) The Petitioner was allotted Fatehpur East coal block jointly with 4 other IPPs to meet the fuel requirement of its Chhattisgarh Power Project. The petitioner had achieved the financial closure for the project considering the same and had started availing disbursement towards implementation of the project;

(e) The Petitioner had taken several steps for implementation of the same such as allotment of water resource, execution of loan agreement, clearance from Airport Authorities, obtaining allotment of river water, awarded contract for BTG package, Environment clearance obtained on 23.8.2011 and acquired land. The Hon'ble Supreme Court, vide the Judgment dated 24.9.2014 had cancelled all the coal block allocations made to IPPs, including to the Petitioner. The cancellation of the coal block was an event beyond the control of the Petitioner and the Petitioner could not proceed with the implementation of the thermal power plant. The petitioner has claimed that the cancellation of the coal block amounted to a force majeure event.

(f) The Petitioner, vide letter dated 20.10.2014, informed Powergrid regarding the above Force Majeure event which completely jeopardized the viability of the project and delay in the project implementation on account of the above mentioned force majeure event and other developments in the Project as recorded in the various minutes of the Joint Co-ordination Committee (JCC). The Petitioner has extended the Bank Guarantee of Rs.33.90 Crore from time to time upto 23.5.2016 which was invoked by Powergrid on 5.7.2016.

(g) The project has got delayed for implementation due to unforeseen and unavoidable circumstances beyond the control of the Petitioner. Therefore, the Petitioner has approached Powergrid for allowing the extension of the start date of



the open access till September, 2019 on account of the Force Majeure Event but Powergrid has suggested that the Petitioner may approach the Commission for relinquishment of the Long Term Open Access (hereinafter "LTOA") along with other reliefs.

(h) The Petitioner has made all efforts possible for the implementation and commissioning of the project. The above facts would sufficiently indicate as to the intention of the Petitioner towards implementation of the project. The Petitioner is more than willing to continue with the commissioning of the Project as and when the said Force Majeure situation is remedied and coal is made available to the project.

(i) The petitioner has informed to the Powergrid, vide letter dated 20.10.2014, with regard to cancellation of coal block. The relevant part of which reads as under :-

"The situation which has emerged from the across-the-board cancellation of allotment of coal blocks is entirely beyond control of VISA Power Limited. The Company therefore invokes the provisions of the Clause 9 of the Long Term Access Agreement dated 24th February 2010, executed between Power Grid Corporation of India Limited and VISA Power Limited, for declaration of 'force majeure' and consequent suspension of contractual obligations.

While we are fully committed to commission the plant in due course, we will have to wait till such time the Ministry of Coal, Government of India, remedies the aforesaid force majeure situation and comes up with an alternative scheme for providing necessary coal linkage for power generation."

(j) The Petitioner is not in a position to utilize the open access unless and until the start date of open access is extended to match with the commissioning of the generating station. Alternatively, the Petitioner needs to relinquish the Long Term Open Access without any liability of paying the transmission charges since



the implementation of the Project is not viable due to reasons beyond the control of the Petitioner and covered by the Force Majeure clause in the BPTA.

(k) The relinquishment of long term open access on the part of the Petitioner shall not lead to stranding of the transmission capacity. Withdrawal of 678 MWs from the total transmission capacity of Powergrid shall in no manner leave the capacity stranded. Reference can be made of number of IPPs connected to the transmission licensee, who shall utilise the capacity of the Powergrid.

(l) It is further humbly submitted that unless the long term open access granted in favour of the Petitioner pursuant to the BPTA is relinquished, the Petitioner shall be unnecessarily subjected to payment of charges and further Powergrid has even invoked the bank guarantee furnished in favour of Powergrid.

(m) The Petitioner has made all due payments to various authorities and agencies for grant of approvals, clearances and also towards the process of land acquisition. The delay in the commissioning of the project is an outcome of unforeseen circumstances beyond the control of the Petitioner. It is not that the delay in the implementation of the project is in any manner attributable to the Petitioner.

(n) The case of the Petitioner is squarely covered by the Force Majeure clause in the BPTA which reads as under –

“The Parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure event 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 of the control of the defaulting party. But any 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 concerned after such eventuality has come to an end or ceased to exist.”

3. Against the above background, the Petitioner has made the following main prayers:

- a) Admit the Petition;
- b) Direct the Petitioner & Powergrid to extend the start date of the LTOA till 30.09.2019 and allow Powergrid to allot this capacity to some other IPP on short term basis till the said date;
- c) Direct Powergrid to retain the Bank Guarantee proceeds of an amount of Rs.33.90 Crores in Fixed Deposit and pay interest to the Petitioner on monthly / quarterly basis, as the Interest Cost incurred by the Petitioner on the said amount is far higher;
- d) In the alternative, direct relinquishment of the long term open access under the Bulk Power Transmission Agreement dated 24.02.2010 without any liability on the part of the Petitioner and refund the Bank Guarantee Proceeds of Rs 33.90 Crore, along with due interest. This long term open access should be reinstated once the Petitioner is in a position to resume the project activities, when a fresh Bank Guarantee will be furnished by the Petitioner;
- e) Direct that the Petitioner is not liable to make any payment towards transmission charges; and
- f) Pass such further order(s) as deemed appropriate in the facts and circumstances of the case.



4. Notice was issued to the Respondent to file its reply. The Respondent has filed its reply and Petitioner has filed rejoinder to the same.

Reply of the Respondent

5. The Respondent, Powergrid Corporation of India Ltd., vide affidavit dated 3.10.2017, has submitted as under:-

(a) The respondent submitted that none of the prayers are maintainable in terms of the provisions of the Connectivity Regulations and CERC (Sharing of inter-State Transmission Charges and Losses) Regulations, 2010 (hereinafter referred to as the "Sharing Regulations") and various orders of the Commission;

(b) There is no provision in the Connectivity Regulations or Sharing Regulations for extension of the start date of LTA. Per contra, in terms of Regulation 8(5) of the Sharing Regulations, in the event of commissioning of the associated transmission system and the generation project being incomplete, the generator is liable to bear transmission charges till the completion of the generation project after which the liability for transmission charges may be borne by the generator/its beneficiaries as per the terms of the PPA;

(c) There is ample clarity with regard to the utilization of the unutilized LTA under MTOA or STOA in terms of Regulation 16B of the Connectivity Regulations and applicable provisions of STOA Regulations. Therefore, allocations under MTOA or STOA for unutilized capacity reserved for LTA, as the case may be, are a matter of regulatory dispensation that need not be adjudicated in a Petition like the present one. Similarly, there are provisions under Sharing Regulations for offset of transmission charges paid under MTOA/STOA in the bills raised for



transmission charges under LTA. However, there is no provision for deferment of liability to pay transmission charges under LTA. Further, it has been expressed view of the Commission 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;

(d) In terms of the BPTA dated 24.2.2010 and the BG itself, the LTA customer is obligated to keep the construction phase BG extended from time to time. It is on this account that the construction phase BG of the Petitioner was encashed. Thus, the encashment of Petitioner's BG cannot be faulted. And therefore, the Petitioner too cannot be said to be entitled for any special dispensation with respect to the proceeds from the encashment of the said BG;

(e) It has been held in a number of judgments of the Apex Court as well as Appellate Tribunal and the Commission that courts ought to be slow in interfering with the encashment of BG under the terms of an underlying contract except in cases of egregious fraud or irretrievable injustice and that it is not the case of the Petitioner that there is any egregious fraud on the part of the Respondent in the encashment of the said BG. Further, there are no specific pleadings in the Petition regarding irretrievable injustice being caused to the Petitioner. For this reason as well, the Petitioner is disentitled from seeking any special dispensation regarding the proceeds from the encashment of said BG, especially when the encashment has been on account of the Petitioner's own failure;



(f) The petitioner is seeking relinquishment of the LTA not only without any liability but also without any specifics about the notice period and date of relinquishment as per the requirements of Regulation 18. Under Regulation 18 of the Connectivity Regulations, a long term customer may relinquish long term access by payment of relinquishment charges. The relinquishment charges are to be credited to the PoC Pool for reducing the burden of the remaining Designated ISTS Customer ("DIC");

(g) The provisions of Connectivity Regulations especially when read with the provisions of Sharing Regulations, do not provide for exemption from payment of relinquishment charges on any grounds whatsoever. Accordingly, the prayer for relinquishment of LTA without any liability and refund of the proceeds from the construction phase BG is not maintainable;

(h) The extant mechanism for sharing of transmission charges under the Sharing Regulations, often referred to as the PoC Pool system, is a closed system and the effects of any defaults by any party to the PoC Pool is subsumed by the members of the Pool, i.e. DICs or the ISTS Licensees. Accordingly, the present prayer of the Petitioner for a blanket direction that the Petitioner is not liable to make any payment towards transmission charges is at the expense of the other DICs and/or ISTS Licensees;

6. The Commission vide RoP dated 22.5.2017 directed PGCIL to furnish the additional information with regard to date from which LTA would be effective and details of withdrawal and cancellation of the LTA granted on similar grounds and notice issued to other generators, if any. In response, the PGCIL has submitted as under:-



- a) PGCIL has submitted that the Petitioner's LTA is likely to be effective from 01.10.2017 with the commissioning of 2nd phase (1500 MW) of Pole 1 of +800 kV Champa – Kurukshetra HVDC bipole;
- b) PGCIL has submitted that the Petitioner has not made any allegation against the Respondent for withdrawal/cancellation of LTA. Moreover, the Respondent has also not taken any action for withdrawal/cancellation of LTA of the Petitioner. On the contrary, the Petitioner's LTA is proposed to be operationalized with effect from 1.10.2017. Further, no notice has been issued by the Respondent to other generators associated with the HCPTC – V corridor for withdrawal/cancellation of LTA;
- c) However, out of LTA granted on the said corridor, some of the LTAs have been relinquished as permitted by the Commission in various petitions subject to payment of relinquishment charges as per the decision in Petition No. 92/MP/2015. The details on the relinquished capacity as well as operationalization is as follows:

Sr. No.	LTOA / LTA Applicant	LTOA granted	Relinquished	Under operation	Balance to be operationalized
1	RKM Powergen Ltd. (4X360)	819	N/A	200	619
2	Athena Chhattisgarh Power Ltd. (2X600)	683	N/A	N/A	683
3	SKS Power Gen. (Ch) Ltd. (4X300)	683	N/A	N/A	683
4	Korba West Power Co. Ltd. (1X600)	240	N/A	N/A	240
5	Visa Power Ltd. (1X600+1X660)	678	N/A	N/A	678
6	DB Power Ltd. (2X600)	705	N/A	458	247
7	Jindal Power Ltd. (4X600)	1400	N/A	590	810
8	Jindal Power Ltd. (400)	400	N/A		400



Sr. No.	LTOA / LTA Applicant	LTOA granted	Relinquished	Under operation	Balance to be operationalized
	MW)				
9	TRN Energy Pvt. Ltd (2X300)	393	N/A	390	3
10	KSK Mahanadi Power Co. Ltd. (6X600)	2340	N/A	1500	840
11	Bharat Aluminium Co. Ltd. (4X300)	200	N/A	200	N/A
12	Lanco Amarkantak Power Pvt. Ltd. (2X660)	858	N/A	N/A	858
13	Vandana Vidyut Ltd. (2X135 + 1X270)	265	N/A	N/A	265
14	GMR Chhattisgarh Energy Pvt. Ltd. (2X685)*	816	N/A	N/A	816
15	Chhattisgarh State Power Trading Co. Ltd **	5407	4699	N/A	708
	Total	15887	4699	3338	7850

*GMR Chhattisgarh Energy Pvt. Ltd have filed Petition no. 11/MP/2017 for relinquishment of 386 MW in WR and deferment of LTA for 430 MW in NR. There is no direction on the matter.

**Chhattisgarh State Power Trading Co. Ltd have filed Petition no. – 84/MP/2016 for relinquishment of 4699 MW which have been permitted by Hon'ble CERC subject to payment of relinquishment charges to be determined under Petition no. 92/MP/2015.

Current status of the transmission system

- d) PGCIL has submitted that the transmission assets covered under the HCPTC Corridor –V is partly implemented by the Respondent under regulated tariff mechanism and partly implemented by the transmission licensee selected through TBCB route. Almost all the transmission elements of the transmission corridor have been commissioned progressively except for few elements, which are also close to commissioning. The status of the same is given under:

Transmission System under the scope of the Respondent



Sr. No.	Transmission System	Status
1	Raigarh Pooling Station (Near Kotra) – Raipur Pooling Station 765kV D/c 2x240 MVAR line reactors at each end on both circuits	Commissioned
2	Raigarh Pooling Station (Near Kotra) – Raigarh 400kV D/c	Commissioned
3	Raipur Pooling Station – Raipur 400kV D/c	Commissioned
4	Establishment of 765/400kV 4x1500MVA Raigarh Pooling Station (near Kotra) (1x240 MVAR B/R) at 765kV, 1x80 MVAR bus reactor (charged at 400kV)	Commissioned
5	Establishment of 765/400kV 1x1500MVA Raipur Pooling Station (1x240 MVAR B/R)	Commissioned
6	Champa Pooling Station – Raipur Pooling Station 765kV D/c -150 KM - 2x240 MVAR line reactors at Raipur	Commissioned
7	Raigarh Pooling station(near Kotra) – Raigarh pooling station(near Tamnar) 765kV D/c	Commissioned
8	Champa Pooling Station – Dharamjaygarh/Korba 765kV S/c	Commissioned
9	Raigarh Pooling Station (near Kotra) – Champa Pooling Station 765kV S/c	Commissioned
10	Establishment of 765/400kV 6x1500MVA Champa Pooling Station (1x240 MVAR B/R) 1x80 MVAR bus reactor when charged at 400kV)	Commissioned
11	Establishment of 765/400kV 3x1500MVA Raigarh Pooling Station(near Tamnar) (1x240 MVAR B/R)	Commissioned
12	Raipur Pooling Station – Wardha 765kV D/c - 2x240 MVAR line reactor at Raipur Pooling Station and 2x330 MVAR line reactor at Wardha	Commissioned
13	Wardha bus reactor – 1x330 MVAR	Commissioned
14	Wardha – Aurangabad (PG) 765kV D/c - 2x330 MVAR line reactors at Wardha and 2x240 at Aurangabad	Commissioned
	Aurangabad(PG) – Boisar 400kV D/c (Quad) - 2x63 MVAR line reactors at each end on both circuits	Severe RoW issues in Nashik Dist. due to grape garden by Sept17
15	Establishment of 765/400kV 2x1500MVA Aurangabad (PG) S/s (1x240 MVAR B/R)	Commissioned
16	Augmentation of transformation capacity at Boisar by 1x500MVA	Commissioned
17	Vadodara – Asoj 400kV D/c(Quad)	Commissioned
18	Padghe (kudus) – Padghe(PG) 400kV D/c (Quad)	Interim arrangement approved in WR Standing Committee meeting to by-pass Padghe (Kudus) of MSETCL; The interim is likely to be commissioned by Dec'17
19	Aurangabad (PG) – Padghe(PG) 765kV 1xD/c - 2x240 MVAR line reactors at each end on both circuits	
20	Establishment of 765/400kV 2x1500MVA Padghe(PG) S/s [GIS] (1x240 MVAR B/R)	
21	Raipur Pooling Station – Wardha 765kV 2nd D/c-	Commissioned



Sr. No.	Transmission System	Status
	380 km - 2x240 MVAR line	
22	Reactor at Raipur Pooling Station and 2x330 MVAR line reactor at Wardha	Commissioned
23	Wardha – Aurangabad (PG) 765kV 2nd D/c – 2x330 MVAR line reactor at Wardha and 2x240 line reactor at Aurangabad	Commissioned
24	Establishment of 3000MW 800KV HVDC bipole terminal each at Champa Pooling station and Kurukshetra (NR)	1 st Phase of 1500 MW commissioned in March'17 and balance 1500 MW commissioned in Sept, 2017
25	Kurukshetra(NR) - Jalandhar 400kV D/c(Quad) one ckt. via 400/220kV Nakodar S/s	Commissioned
26	LILO of Abdullapur – Sonapat 400kV D/c(triple) at Kurukshetra	Commissioned
27	Establishment of 400/220kV 2x500 MVA S/s at Kurukshetra	Commissioned

Transmission System implemented by POWERGRID – Entire System Commissioned

S. No.	Transmission System	Status
1	Aurangabad(PG) – Dhule (IPTC) 765kV S/c line	Commissioned
2	Dhule (IPTC) – Vadodara (PG) 765kV S/c line	Commissioned
3	Dhule (IPTC) – Dhule (MSETCL) 400kV D/c Quad line	Commissioned
4	Establishment of 765/400kV, 2x1500MVA Dhule(IPTC) S/s	Commissioned

e) In response to the Commission query with regard to whether PGCIL has matched the commissioning of transmission line with commissioning of generation projects and submit the details regarding placing of the order for associated system vis-à-vis progress of generation project, PGCIL has submitted that in terms of the BPTA, the Respondent convened JCC meetings at regular intervals and the minutes of the said meetings have been posted on the Respondent's website and the copy has also been marked to this Hon'ble Commission. Looking into large number of generation projects involved and large sized transmission system undertaken, part of which was implemented under regulated mechanism and part under TBCB, there is fair matching of the



generation and transmission system.

Rejoinder of the petitioner to the Reply

7. The petitioner in its rejoinder vide affidavit dated 23.12.2017 to the reply filed by PGCIL has submitted as under:-

(a) That the petitioner has made all efforts possible for the implementation and commissioning of the project. However, the issue of cancellation of coal block allotted to the Petitioner by the Supreme Court of India has led to the project coming to an absolute stand still. The Petitioner has been compelled to wait for alternate fuel security and/or linkage mechanism and once the same is made available, the Petitioner will be in a position to complete the project for which revised date of commencement of commercial operation will be intimated in due course subject to exemption from payment of transmission charges for such period.

(b) That the Petitioner is not in a position to utilize the open access unless and until the start date of open access is extended to match with the revised date of commissioning of the generating station. Alternatively, the Petitioner seeks to relinquish the Long Term Open Access without any liability of paying the transmission charges since immediate implementation of the Project is not feasible due to reasons beyond the control of the Petitioner and covered by the Force Majeure clause in the BPTA.

(c) That until the long term open access granted in favour of the Petitioner pursuant to the BPTA is relinquished or the start date of open access is suitably extended to match with the revised date of commercial operation of the



generating station, as stated hereinabove, the Petitioner will be unduly subjected to payment of charges.

(d) That the delay in the commissioning of the project is an outcome of unforeseen circumstances beyond the control of the Petitioner as aforesaid. It is not that the delay in the implementation of the project is in any manner attributable to the Petitioner.

(e) That it is the settled principle of law is that what is not 'prohibited is permitted. (REF: CSPDCL v. Aryan Coal Benefactions Pvt Ltd & Ors [2010] APTEL 11 & Reliance Energy Limited v. The TATA Power Company Ltd & Ors [Judgment dated 22.5.2006 passed by the Appellate Tribunal]). Therefore, it is not that by extending the start date of commencement of LTA, the Commission or Powergrid will violate any of the provisions of the Connectivity Regulations. It is just that there is no specific provision dealing with this aspect.

(f) That the Powergrid itself has extended the start date of commencement of LTA which is clear from the case of Himachal Sorang, order dated 31.01.2013 in Petition No. 43/MP/2012, extracted as under:

"12. The respondent has submitted that the petitioner had applied for long term open access in March 2009 for 100 MW from Sorang HEP in Himachal Pradesh. The application was discussed during the LTOA meeting held on 30.5.2009 and it was decided that Sorang HEP Power would be evacuated through LILO of one circuit of 400 kV D/C Karcham Wangtoo-Abdullapur line and the LILO would be constructed by the petitioner, LTOA was granted to the petitioner without any additional system strengthening by the intimation dated 17.7.2009. Subsequently, BPTA was signed by the petitioner and the respondent according to which the date of commencement of open access was May 2011 or actual date of commercial operation of the first unit, whichever is earlier. The respondent has further submitted that the petitioner vide its letter dated 2.8.2010 requested PGCIL to revise the date of commencement of open access from May 2011 to January 2012 because of the anticipated delay in the commissioning schedule of the Project due to some unforeseen circumstances. Subsequently, by its letter dated 28.2.2011, the petitioner revised the schedule of commissioning to May 2012 and



requested for extension of commencement of open access from May 2012. The respondent has submitted that since long term access is granted based on the decision taken by the beneficiaries of the concerned region, the request of the petitioner regarding extension of the date of commencement of open access was placed before the NRPC. The respondent has further submitted that the matter was discussed in the 19th meeting of the Technical Coordination Committee (TCC) and 21st meeting of NRPC held on 1st and 2nd June, 2011 respectively which did not recommend extension of the date of commencement of open access, The respondent has further submitted that subsequent to the decisions in NRPC, the petitioner by its letter dated 7.7.2011 sought revision of its request for extension of the commencement of open access from the date Karcham Wangtoo-Abdullapur transmission line is commissioned. The respondent has submitted that M/s JP Power Grid Limited in its letter dated 2.4.2012 has informed the NRPC that the Karcham Wangtoo-Abdullapur line has been commissioned in March 2012 and declared under commercial operation w.e.f 1.4.2012. The respondent has submitted that the petitioner is entitled to avail open access w.e.f 1.4.2012 i.e. the date of commercial operation of Karcham Wangtoo -Abdullapur transmission line.

25. The above discussion leads us to the conclusion that the petitioner sought postponement of commencement of open access till the commissioning of the Karcham-Wangtoo transmission line. The respondent has agreed to the request of the petitioner and has started billing from April 2012 as the Karcham-Wangtoo transmission line was commissioned with effect from 1.4.2012. The claim of the petitioner for further postponement of commencement of open access cannot be considered, as no force majeure event has been brought to our notice which took place after April 2012 which had the impact of delaying the project. The petitioner's project is being delayed on account of improper planning and execution of the works of the project and the respondent cannot be made to suffer for the failure on the part of the petitioner to execute the project in time. Therefore, no relief can be granted to the petitioner and the petitioner is liable to pay the transmission charges to the respondent from 1.4.2012."

(g) That the submissions of Powergrid regarding maintaining proceeds of BG Encashment in an FD with interest thereon are misconceived and without any merit. The underlying principle of furnishing a bank guarantee is that of a security which is encashable in the event of a proven default. In the light of the fact that the Petitioner has been affected by a Force Majeure event, which is beyond the control of the Petitioner, non-completion or delayed completion of the project, arising out of such Force Majeure occurrence, ought not to be interpreted as a default of the Petitioner. In this context, the Petitioner craves to rely on Article 9.0



of the BPTA executed between the parties on 24.02.2010, which specifically absolves the party affected by Force Majeure from any liability for any claim arising out of failure to carry out the terms of the agreement to the extent that such a failure is due to Force Majeure.

(h) That the Petitioner is seeking is for Powergrid to keep the money in a separate account subject to the result of the present petition. This Commission has given a similar dispensation in the GMR and other cases. The case of the Petitioner is that it is affected by Force Majeure and therefore, the relinquishment charges are not payable. Regulation 18 is not a blanket provision imposing the relinquishment charges irrespective of the facts. In order for relinquishment charges to be applicable, Powergrid has to prove stranded capacity. The Commission has already held in the case of Lanco Kondapalli Power Limited - Order dated 21.02.2014 in Petition No. 63/MP/2013 that unless stranded capacity is demonstrated, there can be no question of payment of relinquishment charges.

(i) That the Commission is seized of several cases wherein parties have invoked the Force Majeure clauses in their respective BPTAs. It is submitted that whenever the Commission comes to the conclusion based on individual facts that there is a force majeure, there ought to be no question of levy of relinquishment charges. Otherwise, the provisions of the BPTA will be rendered meaningless and otiose.

(j) That the manner in which the relinquishment charges will be used in the PoC regime is not relevant to decide as to whether the relinquishment charges ought to be levied or not. It is submitted that transmission charges are levied for



taking the benefit of LTA. If the LTA itself is non-existent, there can be no question of levy of transmission charges.

(k) That the generating station of the Petitioner has been affected by Force Majeure and the Petitioner is unable, as an effect thereof, to utilize the LTA which had been granted to the Petitioner. In such circumstances, it is not understood as to for what the transmission charges would be levied on the Petitioner.

Additional Submissions of the petitioner

8. The petitioner in its written submission, vide affidavit dated 30.1.2018, has reiterated the original submission:-

(a) That the contention of the Powergrid that Article 9 can be taken benefit of only once the LTA commences, is without any merit. There is no such qualification for Article 9. If Force Majeure is claimed prior to the commencement of LTA, the same has to be tested on its merit. If Force Majeure is claimed after commencement of LTA, the last three lines of Article 9 only provide the consequences of the same and the effort to be made by the parties to restart the transmission as soon as practicable.

(b) The petitioner requested to allow the cancellation of coal block as a Force Majeure event for atleast the interim period until alternate source of coal is made available to the Petitioner and allow the extension of date of LTA. The Petitioner is not in a position to utilize the open access unless and until the start date of open access is extended to match with the commissioning of the generating station. Alternatively, the Petitioner needs to relinquish the Long Term Open Access



without any liability of paying the relinquishment charges since the implementation of the Project is delayed due to reasons beyond the control of the Petitioner and covered by the Force Majeure clause in the BPTA.

(c) The Petitioner has made all due payments to various authorities and agencies for grant of approvals, clearances and also towards the process of land acquisition. The delay in the commissioning of the project is an outcome of unforeseen circumstances beyond the control of the Petitioner. It is not that the delay in the implementation of the project is in any manner attributable to the Petitioner.

(d) It is submitted that in the said judgment dated 31.01.2013 passed by the Commission in Petition No. 43/MP/2012 (Himachal Sorang case), this Commission had accepted the decision of Powergrid to allow the extension of the start date of the commencement of LTA. The Petitioner is emphasizing on the fact that such an extension is possible in the absence of any Regulation prohibiting the same and therefore, the same cannot be denied to the Petitioner herein on the said ground.

(e) Powergrid in the hearing stated that except this case there is no other case and even in this case, the extension of start of LTA was granted because Powergrid's transmission infrastructure was not ready. It is submitted that the readiness of the transmission infrastructure of Powergrid is immaterial since taking the argument of Powergrid itself, the Connectivity Regulations do not recognize such aspects to delay the start date of LTA. Therefore, the test is whether the Regulations prohibit such a course or not.



(f) The contention of Powergrid that the facts of the Himachal Sorang case are different from the present one is irrelevant to the present issue. If the extension of LTA can be allowed in one case, it can be allowed in the present case also more so when the delay caused in development of the connected generating station is on account of Force Majeure. Powergrid cannot be permitted to take a different stand in the present proceedings to the prejudice of the Petitioner.

(g) It is incorrect that the Petitioner kept on extending the generating commissioning schedule from an early stage and that the extension sought on account of force majeure is an afterthought. Merely because the Petitioner indicated some extension in the commissioning of its generating units in previous JCC Meetings does not mean that its claim of Force Majeure is an after-thought. The Force Majeure affecting the power plant is the cancellation of the coal block.

(h) The Petitioner had been making efforts to commission the units and therefore as is clear from the JCCs held till May 2015 namely till the 9th JCC, the Petitioner did not take any position on the delay in the implementation of the project. It was only in October, 2015 in the 10th JCC, that the Petitioner brought to the notice of Powergrid that the coal block allocation was cancelled by the Hon'ble Supreme Court.

(i) It is only after October, 2015, the Petitioner sought extension due to the Force Majeure event after taking all bona fide steps towards commissioning of the project. It is denied that the argument with respect to force majeure is an after-thought. The chart given by Powergrid in fact supports the case of the Petitioner. It is not that the Petitioner was seeking extensions of start date of LTA. The



generating schedule was being given as the activities at plant site were being conducted. However, the Petitioner did not invoke Force Majeure till the Hon'ble Supreme Court cancelled the coal block allocations.

(j) The Petitioner has been trying to secure coal linkage from alternate sources. The Petitioner is praying to consider the cancellation of coal block as a Force Majeure event for the interim period until the alternate source of coal is made available to the Petitioner. However, till such time alternate arrangements for coal are in place, the Force Majeure will subsist and needs to be adjudicated upon.

(k) Merely because the BPTA has been entered into for 25 years does not mean that the cancellation of coal block is not a Force Majeure under the BPTA. There is no minimum period required for any event to be a Force Majeure. As regards the payment of relinquishment charges is concerned, it is submitted that the relinquishment of long term open access on the part of the Petitioner shall not lead to stranding of the transmission capacity. Withdrawal of 678 MWs from the total transmission capacity of Powergrid shall in no manner leave the capacity stranded. Reference can be made of number of IPPs connected to the transmission licensee, who shall utilize the capacity of the Powergrid. Therefore, no additional burden will be placed on other DICs (Designated Inter-State Transmission System Customers) as contended by Powergrid herein.

(l) The burden to demonstrate stranded capacity for the applicability of relinquishment charges is on Powergrid as per Regulation 18 of the Connectivity Regulations. The Commission has already held in the case of Lanco Kondapalli



Power Limited - Order dated 21.2.2014 in Petition No. 63/MP/2013 that unless stranded capacity is demonstrated, there can be no question of payment of relinquishment charges

(m) The Commission is seized of several cases wherein parties have invoked the Force Majeure clauses in their respective BPTAs. It is submitted that whenever the Commission comes to the conclusion based on individual facts that there is a force majeure, then there ought to be no question of levy of relinquishment charges. Otherwise, the provisions of the BPTA will be rendered meaningless and otiose.

(n) The Petitioner is not liable to pay the transmission charges. The transmission charges cannot be claimed before operationalization of LTA and owing to the Force Majeure event faced by the Petitioner, the LTA needs to be delayed. As far as the question of Bank guarantee is concerned, after it stands invoked, the said issue becomes subject to the outcome of the present petition and therefore, Powergrid needs to keep the same in a separate account till the decision of the Commission in the present petition.

(o) The National Company Law Tribunal (NCLT), Kolkata bench has been approached by one of the secured lenders of the Petitioner and vide order dated 22nd Dec 2017, an Interim Resolution Professional (IRP) has been appointed. Further, Mr Anil Goel, the IRP has been appointed as the Resolution Professional by virtue of the 1st Committee of Creditors (COC) meeting held on 24.1.2018. In view of the above mentioned submissions, it is respectfully prayed to this Commission to allow the extension of date of LTA without levying any



transmission charges on the Petitioner and in the alternative, allow the Petitioner to relinquish the capacity without payment of relinquishment charges.

Analysis and Decision

9. On the basis of the case and the submissions made on behalf of the parties, the following issues arise for our consideration:-

Issue:A Whether the Petitioner can be discharged from its liability to pay the transmission charges in terms of Clause 9.0 of the BPTA on account of cancellation of the coal block?

Issue:B Whether the petitioner is entitled to relinquish the LTA under BPTA dated 24.2.2010 without any liability?

Issue:C Whether any direction is required to be issued for retaining of Bank Guarantee in Fixed Deposit in this case?

These issues have been discussed in the succeeding paragraphs.

Issue: A Whether the Petitioner can be discharged from its liability to pay the transmission charges in terms of Clause 9.0 of the BPTA on account of cancellation of the coal block?

10. The Petitioner was allotted Fatehpur East coal block jointly with 4 other IPPs to meet the fuel requirement of its Chhattisgarh Power Project. The Petitioner had achieved the financial closure for the project considering the same and had started availing disbursement towards implementation of the project. The petitioner has submitted that the Supreme Court, vide the Judgment dated 24.9.2014, had cancelled all the coal block allocations made to IPPs, including to the Petitioner. The cancellation of the coal block was an event beyond the control of the Petitioner and the Petitioner



could not proceed with the implementation of the thermal power plant. The cancellation of the coal block amounted to a force majeure event. The Petitioner immediately vide letter dated 20.10.2014 informed Powergrid regarding the above Force Majeure event which completely jeopardized the viability of the project. The petitioner approached Powergrid for allowing the extension of the start date of the open access till September, 2019 on account of the Force Majeure Event but Powergrid has suggested that the Petitioner may approach the Commission for relinquishment of the LTOA along with other reliefs. The petitioner has claimed that its case is covered under Clause 9 of the Force Majeure in the BPTA which reads as under –

“The Parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure event 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 of the control of the defaulting party. But any 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 concerned after such eventuality has come to an end or ceased to exist.”

11. PGCIL has submitted that there is no provision in the Connectivity Regulations or Sharing Regulations for extension of the start date of LTA. Per contra, in terms of Regulation 8(5) of the Sharing Regulations, in the event of commissioning of the associated transmission system and the generation project is incomplete, the generator is liable to bear transmission charges till the completion of the generation project after which the liability for transmission charges may be borne by the generator/its beneficiaries as per the terms of the PPA. There is no provision for deferment of liability to pay transmission charges under LTA. Further, it has been also an expressed view of the Commission 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.

12. We have considered the submissions of the petitioner and the respondents. In the present case, the Petitioner is claiming force majeure on the basis of the Supreme Court judgement dated 24.9.2014. However, cancellation of coal block by the Supreme Court cannot be treated as force majeure event. Since for meeting the 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. Further, Powergrid has in no manner contributed to the non-commissioning or delay in commissioning of the project by the Petitioner. The Appellate Tribunal in its judgement in Appeal No. 197 of 2014 (Jayaswal NecoUrja Limited vs. PGCIL) has dealt with the issue 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 the light of the above, the cancellation of the coal block and consequent non-commissioning or delay in commissioning of the project cannot relieve the Petitioner from its liability to pay the transmission charges in terms of the BPTA.

13. 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...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 from 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.”

In the instant case, the petitioner has sought a direction for deferment of LTA till 2019 or alternatively, to be discharged from obligations under the BPTA without any liability. The provisions of clause 9 of the BPTA do not permit a defaulting party to abandon the BPTA and therefore, the prayers of the Petitioner to defer the LTA or relinquish the LTA without liability cannot be permitted in terms of clause 9 of the BPTA. The petitioner is contractually bound to discharge its obligations under the BPTA including the payment of the transmission charges after the COD of the transmission systems executed by Powergrid in terms of the BPTA. Further, there is no provision to defer the operationalization of LTA and as soon as the transmission systems based on which LTA was granted are put under commercial operation, the generator shall be liable to pay the transmission charges. The Petitioner has relied on the order of this Commission in Himachal Sorang case and has submitted that in the light of the decision in the said case, the Commission may allow deferment of operationalization of LTA. In case of Himachal Sorang, the commissioning of both generating station and transmission system were delayed beyond SCOD and the Commission directed that Himachal Sorang shall be liable to pay the transmission charges from the date of commissioning of the transmission lines. The Commission in the order dated 31.01.2013 in Petition No. 43/MP/2012 has decided the issue as under:

"12. The respondent has submitted that the petitioner had applied for long term open access in March 2009 for 100 MW from Sorang HEP in Himachal Pradesh. The application was discussed during the LTOA meeting held on 30.5.2009 and it was decided that Sorang HEP Power would be evacuated through LILO of one



circuit of 400 kV D/C Karcham Wangtoo-Abdullapur line and the LILO would be constructed by the petitioner, LTOA was granted to the petitioner without any additional system strengthening by the intimation dated 17.7.2009. Subsequently, BPTA was signed by the petitioner and the respondent according to which the date of commencement of open access was May 2011 or actual date of commercial operation of the first unit, whichever is earlier. The respondent has further submitted that the petitioner vide its letter dated 2.8.2010 requested PGCIL to revise the date of commencement of open access from May 2011 to January 2012 because of the anticipated delay in the commissioning schedule of the Project due to some unforeseen circumstances. Subsequently, by its letter dated 28.2.2011, the petitioner revised the schedule of commissioning to May 2012 and requested for extension of commencement of open access from May 2012. The respondent has submitted that since long term access is granted based on the decision taken by the beneficiaries of the concerned region, the request of the petitioner regarding extension of the date of commencement of open access was placed before the NRPC. The respondent has further submitted that the matter was discussed in the 19th meeting of the Technical Coordination Committee (TCC) and 21st meeting of NRPC held on 1st and 2nd June, 2011 respectively which did not recommend extension of the date of commencement of open access, The respondent has further submitted that subsequent to the decisions in NRPC, the petitioner by its letter dated 7.7.2011 sought revision of its request for extension of the commencement of open access from the date Karcham Wangtoo-Abdullapur transmission line is commissioned. The respondent has submitted that M/s JP Power Grid Limited in its letter dated 2.4.2012 has informed the NRPC that the Karcham Wangtoo-Abdullapur line has been commissioned in March 2012 and declared under commercial operation w.e.f 1.4.2012. The respondent has submitted that the petitioner is entitled to avail open access w.e.f 1.4.2012 i.e. the date of commercial operation of Karcham Wangtoo -Abdullapur transmission line.

25. The above discussion leads us to the conclusion that the petitioner sought postponement of commencement of open access till the commissioning of the Karcham-Wangtoo transmission line. The respondent has agreed to the request of the petitioner and has started billing from April 2012 as the Karcham-Wangtoo transmission line was commissioned with effect from 1.4.2012. The claim of the petitioner for further postponement of commencement of open access cannot be considered, as no force majeure event has been brought to our notice which took place after April 2012 which had the impact of delaying the project. The petitioner's project is being delayed on account of improper planning and execution of the works of the project and the respondent cannot be made to suffer for the failure on the part of the petitioner to execute the project in time. Therefore, no relief can be granted to the petitioner and the petitioner is liable to pay the transmission charges to the respondent from 1.4.2012."

In the above quoted case, the generator, Himachal Shorang sought postponement of LTA till the commissioning of the Karcham-Wangtoo transmission line which was agreed by Powergrid. However, the request of Himachal Shorang for further



postponement of commencement of LTA on account of non-commissioning of the generation project due to force majeure was not agreed to and Powergrid started billing the generator from the date of commissioning of Karcham-Wangtoo transmission line. The Commission considered the claim of the Himachal Shorang for force majeure and found that delay in commissioning of the generation project was on account of improper planning and execution of the project and hence cannot be considered as force majeure. In the present case also, we have rejected that the delay in commissioning of the generation project of the Petitioner due to cancellation of coal block is affected by force majeure. Therefore, the Petitioner shall be liable to pay the transmission charges from the dates of commissioning of the transmission assets within the scope of Powergrid. In our view, the decision in Himachal Shorang case does not support the case of the Petitioner. On the contrary, in terms of the said order which has been upheld by the Appellate Tribunal, the Petitioner is liable to pay the transmission charges from the date of operationalization of LTA.

Issue No. B: Whether the petitioner is entitled to relinquish the LTA under BPTA dated 24.2.2010 without any liability?

14. The Petitioner has sought a direction for relinquishment of the long term access under the Bulk Power Transmission Agreement dated 24.02.2010 without any liability on the part of the Petitioner to pay the transmission charges and refund the Bank Guarantee Proceeds of Rs 33.90 Crore, along with due interest. The Petitioner has further submitted that the long term access be reinstated once the Petitioner is in a position to resume the project activities, when a fresh Bank Guarantee would be furnished by the Petitioner. Powergrid has submitted that if the Petitioner is allowed to relinquish the LTA without any liability, it will add to the burden of the DICs.



15. Regulation 18 of the Connectivity Regulations permits the long term customer to relinquish LTA subject to payment of relinquishment charges. Regulation 18 of the Connectivity Regulations provide as under:

“ 18. Relinquishment of access rights

(1) 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: -

(1) 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 66% 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 least 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 is due in the ratio of transmission charges payable for that year by such long term customers and medium-term customers.”

16. The Connectivity Regulations provides that the 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 relinquishment charges in case of relinquishment of LTA. The petitioner has offered to relinquish the LTA which may be granted as per Regulation 18 of the Connectivity Regulation quoted above subject to categorical commitment to pay the relinquishment charges for the relinquished capacity. Assessment of stranded capacity on account of relinquishment of LTA and determination of relinquishment charges is under consideration of the Commission in petition No. 92/MP/2015. In our view, the Petitioner may make an application to Powergrid to relinquish the LTA in terms of Regulation 18 of the Connectivity Regulations, subject to its furnishing an undertaking that it shall be liable to pay relinquishment charges as determined by the Commission in petition No. 92/MP/2015.

Issue No. C: Whether any direction is required to be issued for retaining of Bank Guarantee in Fixed Deposit in this case?

17. Powergrid has encashed the Bank Guarantee of Rs. 33.90 crore on account of non-extension of BG before the expiry date. The petitioner has sought a direction to PGCIL for retaining of Bank Guarantee in Fixed Deposit and refund the Bank Guarantee alongwith interest. In our view, Powergrid has encashed the Bank Guarantee in terms of the BPTA and therefore, no directions can be issued for keeping the bank guarantee in



fixed deposit. It is however clarified that the encashed BG would be adjusted against the relinquishment charges to be determined in accordance with petition No. 92/MP/2015, in case the petitioner relinquishes its LTA in accordance with the 2009 Connectivity Regulation.

18. The petition stands disposed of in terms of the above.

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

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

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

