

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 137/MP/2016

Coram:

**Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member
Shri I. S. Jha, Member**

Date of Order: 5th February, 2020

In the matter of:

Petition for relinquishment of the Long-term Open Access under the Bulk Power Transmission Agreement dated 5.1.2011 under the Regulation 18 read with Regulation 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

And

In the matter of

GMR Kamalanga Energy Limited (GMRKEL)
10th Floor, 'D' Block
IBC Knowledge Park
Bannerghatta Road
Bangalore-560029

.....Petitioner

Vs

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

.....Respondent

Parties present:

- 1) Shri Sanjay Sen, Senior Advocate, GMRKEL
- 2) Shri Hemant Singh, Advocate, GMRKEL,
- 3) Shri Lakshyajit Singh, Advocate, GMRKEL
- 4) Ms. Suparna Srivastava, Advocate, PGCIL
- 5) Ms. Nehul Sharma, Advocate, PGIL
- 6) Dr. V.N. Paranjape, PGCIL
- 7) Ms. Jyoti Prasad, PGCIL



ORDER

The Petitioner, GMR Kamalanga Energy Limited (GMRKEL) has filed the instant Petition for relinquishment of the Long Term Open Access under the Bulk Power Transmission Agreement dated 5.1.2011 under the Regulation 18 read with Regulation 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 referred to as "Connectivity Regulations").

Background

2. The Petitioner has set up a coal based thermal power plant of 1050 MW (3x350 MW) at Village Kamalanga in Dhenkanal District Odisha in accordance with the terms of a Memorandum of Understanding (MoU) dated 9.6.2006 executed by the Petitioner's holding company, i.e. GMR Energy Ltd., with the Government of Odisha. As per the MoU, an agency nominated by Government of Odisha would have the right to purchase 25% of power generated from the power project and the balance capacity was to be sold to third parties. The Petitioner applied for long term access in inter-State transmission system for evacuation of 800 MW out of 1050 MW power project. The Petitioner was granted LTA for 800 MW and the Petitioner entered into a BPTA dated 24.2.2010 for evacuation of 800 MW from Phase I of the power project. Subsequently, the Petitioner decided to expand the said thermal power plant with the addition of another unit of 350 MW (Phase II) and applied for connectivity and LTA for 220 MW to CTU. CTU granted LTA of 220 MW on 3.1.2011 with Western Region as the target region. The Petitioner entered into a BPTA with PGCIL on 5.1.2011 for evacuation of 220 MW of power to WR from Phase II and furnished a



Bank Guarantee of ₹11,00,00,000/- (Rupees Eleven Crore Only) dated 31.1.2011 valid till 31.5.2016. On the request of the Petitioner for revision of the LTA due to delay in commissioning of Phase II of the generation project on account of non-availability of coal linkage, a revised intimation of LTA was issued by CTU on 8.4.2013 and the transmission systems envisaged in Annexure 3 of the BPTA were also revised. Subsequently, the BPTA was amended on 11.9.2013 to revise the commissioning schedule of Phase II of the generation project to September, 2017.

3. The Petitioner was allocated a captive coal block at Rampia & Dip Side Rampia within the Mahanadi Coalfield Ltd along with other developers by the Ministry of Coal vide allocation letter dated 17.1.2008. Hon'ble Supreme Court, in its judgement dated 25.8.2014 in Manohar Lal Sharma Vs. The Principal Secretary & Others [2004 (9) SCC 516], cancelled the allocation of coal blocks which included the captive coal block allocated to the Petitioner. The Petitioner in its letter dated 19.10.2015, informed the CTU that it was affected by force majeure on account of cancellation of coal block by order of the Hon'ble Supreme Court and it is undue inability to tie up long term beneficiaries for supply of power due to limited number of bids being invited by the distribution companies and secure funding for completion of Phase II project due to non-availability of fuel and tied up beneficiaries. The Petitioner requested for surrender of 220 MW of LTA, waiver of transmission charges/damages on account of surrender and return of BG of Rs.11 crore. CTU, vide its letter dated 15.1.2016, rejected the request of the Petitioner and advised that the Petitioner could relinquish the LTA quantum fully or partly on payment of relinquishment charges. The Petitioner has filed the present petition with the following prayers:-

“(a) hold and declare that the LTA of 220 MW under BPTA dated 05.01.2011 stands relinquished with effect from 19.11.2015, without any liability to the Petitioner;

(b) direct Respondent No.1, being PGCIL, to return the bank guarantee bearing no. 110037IBGF00033 dated 31.01.2011 for an amount of Rs. 11,00,00,000/- (Rupees Eleven Crores Only) issued by IDBI Bank Limited, on behalf of the Petitioner.

(c) Pass any other order/orders as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the instant case."

Submissions of the Petitioner

4. The Petitioner has made the following submissions in support of its contention and prayers in the petition:

(a) Units I, II and III of Phase I of the Petitioner were commissioned in April 2013, November, 2013 and March 2014, respectively. The Phase II of the Petitioner was subjected to an unforeseen incidence on account of the de-allocation of the Rampia coal block pursuant to the order and judgment dated 25.8.2014 and 24.9.2014 of the Hon'ble Supreme Court in Manohar Lal Sharma vs. The Principle Secretary & Ors. reported in (2014) 9 SCC 516. Therefore, from that day and date, the primary source of fuel for the Phase II of the Petitioner's project was taken away by virtue of a Change of Law event which is also a *force majeure* event within the meaning of Clause 9.0 of the BPTA as it is an event beyond the reasonable control or contemplation of the Petitioner. The Petitioner made a request for coal linkage on 27.1.2010, which is yet to be granted by the Ministry of Coal.

(b) The Petitioner, through its Joint Venture Company, namely, GMR Mining and Energy Pvt. Ltd. also participated in the subsequent auctions of the coal blocks, initiated in terms of the Coal Mines (Special Provisions) Ordinance, 2014 and Coal Mines (Special Provisions) Act, 2015 and was technically qualified for the aforesaid coal blocks. However, GMR Mining and Energy Pvt.



Ltd. was not declared as the successful bidder for Mandakini and Utkal-C and the bid for Taraimar & Sarya coal block was cancelled.

(c) After cancellation of Rampia coal block, limited number of long term bids for procurement of power were invited, in which the Petitioner participated but failed to succeed. The Petitioner was not in a position to secure the much needed funding for Phase-II of the generation project from the Banks and Financial Institutions and hence the Project is now a stranded asset.

(d) The LTA granted to the Petitioner was to be serviced from the existing transmission system of PGCIL, which is evident from the amendment carried out in the BPTA vide amendment agreement dated 11.9.2013 and the minutes of the meetings conducted by PGCIL with the IPPs in the Eastern Region. As such, no system augmentation was required to be undertaken by PGCIL for operationalization of the 220 MW LTA granted in favour of the Petitioner.

(e) Under Regulation 18 of the Connectivity Regulations, the Petitioner has a statutory right to relinquish the Long Term Access before the expiry of the full term LTA subject to payment of compensation towards the stranded capacity resulting from such relinquishment in the manner provided in the said regulation. The question of stranded capacity in the present case does not arise as per the Connectivity Regulations read with the BCD Procedure since the LTA granted to the Petitioner cannot be implemented in the absence of adequate number of long term power procurement exercise being conducted by the Discoms and consequently, no relinquishment charges are payable by the Petitioner.



(f) From a conjoint reading of Regulation 2(v) and Regulation 18 of the Connectivity Regulations, it becomes evident that the relinquishment charges/compensation sought to be levied are based on the capacity which remain stranded in the transmission system in the event of relinquishment of LTA quantum by an LTA customer. Since there is no methodology in existence for working out the stranded capacity on account of relinquishment of LTA quantum, any relinquishment charges calculated and subsequently imposed by CTU would amount to an arbitrary and misguided imposition.

(g) From the combined reading of the Connectivity regulations and the Detailed Procedure, it is clear that the Petitioner is required to firm up and intimate the point of drawl in the target region at least to the extent of 50% of the quantum, 3 years and 9 months in advance from firming up beneficiaries and signing of BPTA. It is obvious that the Petitioner is not liable for any LTA charges in case CTU has gone ahead with augmentation/strengthening of the transmission system of its own volition/ accord.

(h) The Petitioner in its letter dated 19.10.2015 to PGCIL has sought relinquishment of 220 MW LTA granted under BPTA dated 5.1.2011. Therefore, PGCIL cannot raise any invoices pertaining to transmission charges for the period beyond 19.10.2015, on account of commissioning of the transmission lines.

(i) The Commission in order dated 2.12.2013 in Petition No. 244/MP/2012 referring to Clause 7.1 of the BCD Procedure held that long-term PPA(s) is a necessary and mandatory condition for availing long-term access.

(j) PGCIL is the nodal agency for development of ISTS in a coordinated manner for smooth evacuation and delivery of electricity as per the market condition. CTU is aware of the fact that 77% of the LTAs have not fructified due to non-signing of long term PPA. As a statutory agency it was PGCIL's responsibility to review the whole scheme related to transmission services keeping in mind the ground realities.

Submissions of PGCIL

5. PGCIL has made the following submission vide affidavit dated 16.2.2017:

(a) The Petitioner filed an application with PGCIL on 8.12.2007 for grant of long term access to the ISTS for evacuation of 800 MW power from its above 1050 MW power project with six other independent power generators. PGCIL granted LTA to the Petitioner on 14.5.2009.

(b) CTU filed Petition No. 233/2009 for regulatory approval before implementing High Capacity Power Transmission Corridors (HCPTC), including HCPTC-I for evacuating power from the power plant of the Petitioner and six other Independent Power Producers setting up their projects in Odisha. The Commission approved the scheme vide order dated 31.5.2010 and observed that the operationalization of LTA alongwith recovery of transmission charges was to be governed by the applicable Regulations and terms and conditions of tariff as specified by the Commission from time to time.

(d) The Petitioner signed a BPTA with CTU on 24.2.2010 for 800 MW for Phase I of its generation project. The Petitioner planned a fourth unit of 350 MW in Phase II of its power project and approached CTU for connectivity and



long term access for 220 MW through its application dated 10.8.2010. In the Meeting for Connectivity and Long Term Access of IPP generation projects in the Eastern Region held on 28.12.2010, the transmission systems required for grant of LTA to the Petitioner was discussed and LTA was granted vide letter dated 3.1.2011. The Petitioner signed the BPTA with CTU on 5.1.2011. Pursuant to the signing of BPTA on 5.1.2011, the Petitioner furnished a bank guarantee dated 22.2.2011 for ₹11,00,00,000/- for the 220 MW LTA granted to it, which can be encashed by PGCIL as per Clause 6.0(b) of the BPTA, in case of adverse progress of the generation unit. Based on the request of the Petitioner vide letter dated 5.7.2013, LTA was revised vide letters dated 8.4.2013 and 11.9.2013, with the generation commissioning date as September 2017. The transmission system in Annexure 3 was accordingly revised as under:

- (i) Angul-Jharsuguda (Sundergarh)-Dharmajayagarh 765 kV D/c Line;
- (ii) Addition of 2x1500 MVA, 765/400 kV ICT Jharsuguda (Sundergarh); Addition of 2x1500 MVA, 765 /400 kV at Angul; Split bus arrangement at 400 kV and 765 kV bus in both Angul and Jharsuguda (Sundergarh) substations.
- (iii) Jharsuguda (Sundergarh)-Raipur Pool 765 kV D/c line; LILO of both circuits of Rourkela-Raigarh 400 kV D/c(2nd line) at Jharsuguda (Sundergarh);

Therefore, the Petitioner's LTA was not granted on existing system as claimed by the Petitioner.

(e) Clause 9.0 of the BPTA deals with occurrence of force majeure conditions which is in the context of compliance of the terms of the BPTA. Any issues of the long term customer prior to operationalisation of LTA were neither conceived nor were a matter of contractual agreement with PGCIL under the

BPTA which is evident from the last sentence of Clause 9.0, which provides that “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”. Therefore, the BPTA contemplates only such events of force majeure owing to occurrence of which the ongoing transmission/drawal of power have been disrupted. In the light of the clear provisions in the BPTA, the Petitioner cannot contend that non-availability of long term bids in the target region was a force majeure condition within the meaning of Clause 9.0 of the BPTA. Therefore, the issues affecting the Petitioner prior to operationalisation of the LTA cannot be covered under Clause 9.0 of the BPTA.

(h) The associated transmission system for Phase-II projects in Odisha was finalized in the meeting regarding connectivity and LTA/MTOA with Eastern Region constituents held on 5.1.2013 where the representatives of the Petitioner were also present. The Minutes of Meeting held on 5.1.2013 reveals that the Petitioner is completely wrong in contending that PGCIL had unilaterally carried out amendments to the transmission line to be constructed by it for evacuation of power from the Petitioner’s Phase-II project. Further, the Petitioner is also wrong in stating that no system augmentation was required to be undertaken by PGCIL for operationalization of 220 MW LTA granted to it and it could be serviced from the residual capacity of the transmission system being developed for Phase-I.

(i) The Petitioner, vide letter dated 19.10.2015, informed PGCIL that there were delays in development of Phase-II of its generation project for reasons allegedly beyond its control, because of which the commissioning of the

projects has become uncertain. As per the Record of Proceedings dated 6.10.2016 issued by the Commission, the LTA of 220 MW has been treated as relinquished with effect from 6.10.2016 with liability of the Petitioner to pay relinquishment charges as per the order in Petition No.92/MP/2015.

Rejoinder of Petitioner

6. The Petitioner has submitted its rejoinder to the reply filed by the Petitioner vide affidavit dated 12.4.2017. The Petitioner has clarified that it is not liable to pay the relinquishment charges for 220 MW LTA capacity from 19.10.2015 on account of the following reasons:

(a) The Petitioner, with clear intention to develop the Phase II of its generation project, undertook various activities including obtaining the necessary environmental clearance. The Petitioner was subjected to an unforeseen incidence on account of the de-allocation of the Rampia coal block pursuant to the final order and judgement dated 25.8.2014 and 24.9.2014 of the Hon'ble Supreme Court in *ManoharLal Sharma vs. The Principle Secretary &Ors*, reported in (2014) 9 SCC 516. The Petitioner has been deprived of the source of fuel for Phase II by virtue of *force majeure* conditions as defined in the BPTA, due to which the project of the Petitioner became a non-starter.

(b) Regulation 2(1)(l) of the Connectivity Regulations, specifies that LTA means the right to use the ISTS for a period exceeding 12 years, but not exceeding 25 years. The same has now been amended vide the amendment regulation dated 17.2.2017, wherein LTA has been defined as the right to use the ISTS for a period exceeding 7 years. Further, as per Regulation 18(l)(b), a Long-Term Customer has a right to relinquish LTA in the event it has not



availed the access rights for a period of at least 12 years.

(c) PGCIL did not augment/construct the transmission corridor pertaining to 220 MW LTA capacity in the Eastern Region. Hence, the present Petition cannot be linked with the order in Petition No. 92/MP/2015.

(d) Non-floating of long term bids by the distribution companies due to shortage of fuel is a *force majeure* event as per the BPTA relieving the Petitioner from its liabilities to pay the relinquishment charges.

(e) The Petitioner has referred to the observations made by the Tribunal while dealing with the issues of *force majeure* in judgments in Appeal No. 123 of 2012 and Appeal Nos. 139 and 140 of 2012. The Petitioner has also referred to the judgments of the Hon'ble Supreme Court in the matter of "Satyabrata Ghose vs. Mugneeram Bangur Co. and Anr., reported in AIR 1954 SC 44" and "Raja Dhruv Dev Chand vs. Raja Harmohinder Singh and Anr., reported in AIR 1968 SC 1024", on the issue of frustration of contracts (Section 56 of the Contract Act, 1872) which is the principle on which *force majeure* is based.

(f) The minutes of meeting dated 8.2.2013 and 3.1.2011, qua the meeting conducted with constituents of ER on 5.1.2013 and 28.12.2010 respectively, shows that no new transmission corridor was constructed or planned for implementing the BPTA dated 5.1.2011 of Phase II of project of the Petitioner. As such, Regulation 18 of the Connectivity Regulations pertaining to payment of any relinquishment charges is not applicable.

Submissions during the hearing

7. During the hearing of the petition, learned senior counsel for the Petitioner submitted as under:-

(a) Once a contract has been entered into on account of provisions in the statute or regulations and the principles in the regulations have been incorporated in the contract, it cannot be said that the regulation will operate independent of the contract. Since the incident of relinquishment charge is on account of a contract executed in terms envisaged under Regulation 15 of the Connectivity Regulations, Regulation 18 would then be required to be applied in a manner envisaged by the parties in the contract/BPTA. Accordingly, Clauses 5 and 9 of the BPTA becomes relevant and would control the obligations of the parties.

(b) The Commission in Petition No. 69/MP/2014 (Aryan MP Power Generation Pvt. Ltd. Vs. PGCIL) and in Petition No. 317/MP/2013 (Navbharat Power Pvt. Ltd. Vs. PGCIL) and other orders has interpreted Clause 9 of the BPTA to cover a temporary phase when the project developer is unable to utilize the transmission system or when the licensee is unable to make its transmission system available due to any force majeure event and has held that the said provision cannot be used for making an exit from BPTA. Force Majeure cannot be of “temporary nature” for the reason that the definition of force majeure includes war, rebellion, mutiny, fire, flood, change in law etc. and some of these events creates a permanent disability to jeopardize the ability of the Petitioner to start operation again. Therefore, Clause 9 of the BPTA is without any limitations as to the time for which force majeure period can be claimed.



(c) Clauses 1 to 11 of the BPTA unambiguously provide that the obligation contained under the terms relating to payment of transmission charges (Clause 2) and relinquishment charges (Clause 5) shall stand discharged in the event of occurrence of force majeure situation (Clause 9). Therefore, Clause 9 is an omnibus clause that cuts right through the agreement and includes the failure to carry out the obligation to pay the transmission charges and relinquishment charges as envisaged in Clauses 3 and 5 of the BPTA. The functional basis of a power project is long term PPAs and if the same are not executed due to reasons not attributable to the project developer, the existence of force majeure events as provided in Clause 9 cannot be denied. Further, Clause 6 of the BPTA has no application to the present case as this is not a case of exit/abandonment of the project.

(d) The event narrated by the Petitioner i.e. non-availability of long term PPA is an event of force majeure within the meaning of Clause 9 of the BPTA and on occurrence of such force majeure event, the obligation to pay the relinquishment charges under Regulation 18(1) of the Connectivity Regulations stands extinguished. An analysis of the various provisions of the BPTA would show that the statutory right of CTU to collect transmission charges was made in terms of the contract/BPTA. As per the minutes of the 37th and 40th Reports of the Parliamentary Standing Committee issued in March, 2018 and August, 2018 respectively, there was no possibility of signing of PPAs which resulted in the assets being stranded/stretched and several projects being declared NPAs. Lack of agreement for supply of power between generators and distribution

licensees is an event of force majeure which is recognized by the Central Government.

8. Learned Counsel for CTU submitted as under:
 - a) The Commission in its order dated 8.3.2019 in Petition No. 92/MP/2015 has decided the issue of stranded capacity and payment of relinquishment charges. The Commission has held that Regulation 18 of the Connectivity Regulations was in conformity with the provisions of the Act and in advancement of the objects of the Act with regard to Open Access. Further, the Commission has held that the Relinquishment Charges were in the nature of the compensation which a long term customer was obliged to pay as transmission charges in accordance with the mechanism envisaged in the Regulation 18 of the Connectivity Regulation. Therefore, the issue as regards the liability of payment of relinquishment charges has been settled by the Commission which is binding on the petitioner being a party in the Petition No. 92/MP/2015.
 - b) In line with the direction of the Commission in order dated 8.3.2019 in Petition No. 92/MP/2015, CTU has computed the stranded capacity and relinquishment charges of the various generators including the Petitioner. The Petitioner is liable to pay Rs. 3.05Crores as Relinquishment Charges.
 - c) The allegations made by the Petitioner as regards the responsibility of the CTU to execute the transmission corridors taking into account the actual long term PPAs entered by the Petitioner has been dealt with by the Commission in Para 94 of the Order dated 8.3.2019 in the Petition No. 92/MP/2015. Since, signing of the PPAs is not a pre-condition for implementation of transmission



corridors, the same cannot be pleaded as a Force Majeure event relieving the Petitioner from paying the relinquishment/transmission Charges under the BPTA.

d) The Commission in the Order dated 8.3.2019 in Petition No. 92/MP/2015 has held that since BPTA is in terms of the Connectivity Regulations, it is in the nature of a statutory contract. The relationship between the CTU and the LTA customer being statutory in nature has to be governed by the provisions of the Connectivity Regulations. Further, the liability for payment towards the relinquishment charges is to be determined based on Regulation 18 of the Connectivity Regulations. Since, the issue as regards the applicability of the Regulation 18 in the context of BPTA stands adjudicated, the submission of the Petitioner in this regard is liable to be rejected.

e) Under Clause 5.0 of the BPTA, the obligation to pay the transmission charges under the BPTA is absolute and the Petitioner cannot transfer/relinquish its rights and obligations without the prior approval of the Commission. Since, the relinquishment is to be upon the payment of necessary compensation in accordance with the regulations, Regulation 18 of the Connectivity Regulation has been included as an operating contractual provision under the express terms of Clause 5.0 of the BPTA. Therefore, the inter argument of the statute ousting the Regulation is of no consequence.

f) While interpreting a contract, what is of essence is the intention of the parties in the context in which it appears and the nature of the rights and obligations agreed there under. As such, the Force Majeure Clause under BPTA must be construed accordingly and cannot be given a wider area of



applicability than what has been intended by the parties. The BPTA is a contract for use of transmission line of a transmission licensee by a DIC wherein the DIC agrees to bear the transmission charges as a consideration for use of the said transmission lines irrespective of the actual power flow. In other words, so long as a DIC is connected to the transmission lines of the licensee and retains the rights to access the system, it is liable to pay transmission charges to the licensee. It is in this context that Clause 9 of the Connectivity Regulations provides for an exclusion Clause in the nature of the force majeure event which temporarily absolves the parties from any liabilities arising from a breach of contract. This is evident from the last sentence of the Clause 9 which says that power flow should be started as soon as the force majeure event is over. Therefore, Clause 9 of the BPTA being temporary in nature and being restrictive in application cannot be relied upon by the Petitioner to contend that the entire BPTA including Clause 5.0 of the BPTA ceases to operate as between the parties. The liabilities under Clause 5 of the BPTA and Regulation 18 of the Connectivity Regulations must be distinguished from the liabilities under Clause 9 of the BPTA. Clause 9 of the BPTA only provides for a departure of payment from the transmission charges and by no means can provide for departure from obligation under the Clause 5 of the BPTA.

g) As per the findings of the Commission in various cases and of the Appellate Tribunal in Appeal No. 54 of 2014, the absence of long term PPA cannot be construed as a force majeure event. The Petitioner is accordingly liable to pay the Relinquishment Charges.

11. Learned Senior Counsel for the Petitioner has further submitted as under:

(a) Relinquishment Charges have been made as part of the contractual obligations under Clause 5 and therefore, the same is amenable to the Clause 9 of the BPTA. While the relinquishment charges can be computed in terms of the protocol provided under Regulation 18, levy of the same is subject to the terms and subject of the BPTA. Further, the BPTA does not contain any exception or non obstante clause specifying that the relinquishment charges will be levied as per the Connectivity Regulations. In the absence of such stipulations, CTU cannot argue that the compensation for relinquishment is a statutory charge which is payable de-hors the provisions of the BPTA.

(b) The argument by PGCIL that PPA is not at all relevant while considering the LTA application is fundamentally flawed. Regulation 12 of the Connectivity Regulations provides that an agreement for sale/purchase of power is a consideration at the time of applying for LTA. Clause 22.7 of the Detailed Procedure under the Connectivity Regulation casts an obligation on an LTA customer to confirm the exact details of the PPA executed 3 years prior to the intended date of operationalization of the LTA. Clause 7.1 of the BCD Procedure provides that an LTA cannot be operational in the event long term PPA is not available. Regulation 15-B of the Connectivity Regulations provides that LTA can only be availed by having a contract of above one year. In view of the above provisions, the Commission is precluded from taking a view that non-availability of long term PPAs as a result of non-initiation of a long term power purchase processes by the distribution licensees will have no impact on the BPTAs.

(c) Ministry of Power issued the guidelines for procurement of power under Design, Build, Finance, Own and Operate (DBFOO) basis on 8.1.2013. As per DBFOO, coal cost is a pass through in certain scenarios which relate to the source of coal. For example, if the bids are called for scenarios relating to domestic coal linkage or from domestic coal mines, then power plants based on imported coal cannot participate in such bids. The said stipulation is a departure from the earlier Case 1 bidding regime where coal source was at the discretion of the bidders. This factor has materially affected the Petitioner from entering into long term PPA. The aforesaid reason cannot be ignored by the Commission and in the event of relinquishment of BPTA/LTA on account of the said force majeure reasons, no relinquishment charges can be levied.

(d) The BPTA is not an underlying contract for underwriting the costs of PGCIL. Where a generator is not able to evacuate power on account of reasons which are beyond its control, the said generator cannot be made liable to underwrite the cost of PGCIL on account of non-usage of the transmission system. As per Section 38(2)(b) of the Act, CTU is required to effectively coordinate the construction of transmission systems with various entities including the generators. It follows therefrom that when the generators have raised their concerns pertaining to non-evacuation of power on account of reasons beyond their control, CTU cannot just proceed with the transmission corridors only on the basis of BPTAs being signed with the generators. As per Para 5.3.2 of the National Electricity Policy, CTU is required to undertake network expansion after identifying requirements in consultation with the stakeholders and taking up the execution after the due regulatory approval. When PGCIL develops transmission corridors without execution of



contracts/BPTA with the beneficiaries, the risks in developing the transmission network cannot be entirely attributable to the LTA customers. CTU has to take the risk of developing transmission infrastructure in the event of occurrence of any unforeseeable or uncontrollable event.

(e) CTU's interpretation of clause 9 of the BPTA is only applicable to the extent of "transmission of electricity in a transmission system", and not for the purpose of injection or withdrawal of power is completely erroneous. After injection of power by the generator from its generating station, it has no role qua such generation of power. If the force majeure clause is interpreted as per the argument of CTU, then it will be applicable for the benefit of CTU, and for no other entity. Any issues qua the flow of power in the transmission system can only be attributable to CTU and in such an event, any benefit of force majeure will always be availed by CTU. The above interpretation will render clause 9 as otiose as only CTU can invoke the said clause since the generator does not have any role after injection of power in the transmission system from its power plant.

Analysis and Decision

9. We have considered the submissions of the Petitioner and Respondents and perused all relevant documents on record and the regulations of the Commission and the orders issued by the Commission having bearing on the adjudication of disputes raised in the petition. The following issues arise for our consideration:

Issue No. 1: Whether Clause 9 of the BPTA dealing with force majeure is an omnibus provision cutting across all provisions of the BPTA including clause 3 and 5 and in the event force majeure is proved, relieves an affected party from its liability to pay the transmission charges or relinquishment charges as the case may be, or is a

standalone provision applicable for disruption in injection/supply of power of temporary nature?

Issue No.2: Whether the case of the Petitioner is covered under clause 9 of the BPTA?

Issue No.3: What shall be the date of relinquishment?

Issue No.4: What are the reliefs admissible to the Petitioner in terms of its prayers in the Petition?

These issues have been dealt with ad seriatim in the succeeding paragraphs of this order.

Issue No. 1: Whether Clause 9 of the BPTA dealing with force majeure is an omnibus provision cutting across all provisions of the BPTA including clause 3 and 5 and in the event force majeure is proved, relieves an affected party from its liability to pay the transmission charges or relinquishment charges as the case may be, or is a standalone provision applicable for disruption in injection/supply of power of temporary nature?

10. The Petitioner has set up a 1050 MW (3x350) Phase I coal based thermal power project at village Kamalanga in Dhenkanal District Odhisa and intended to expand its project capacity by 350 MW (Phase II). It applied for and was granted LTA of 220 MW for evacuation of power from its 350 MW of the Phase II and entered into a BPTA with CTU on 5.1.2011. The Petitioner was allotted a captive coal block alongwith six other generators at Rampia& Dip Side Rampia within the Mahanadi Coalfield Ltd vide the Ministry of Coal vide allocation letter dated 17.1.2008. The Petitioner did all the other activities towards the development of the said Coal Block and made application for grant of license to Ministry of Coal on 16.4.2008 and commenced construction of necessary infrastructure for Phase II of the generation project on the available land. However, the coal block was cancelled as per the directions of the Hon'ble Supreme Court. Further, on account of inadequate bids being invited in the target region, the Petitioner was unable to tie up for long term power purchase agreements. Due to above reasons, the Petitioner was unable to



secure funding for completion of Phase-II of the power project. Accordingly, the Petitioner has claimed that since the reasons are beyond the control of the Petitioner, it is affected by force majeure in terms of Clause 9 of the BPTA.

11. The Petitioner has submitted that CTU accorded long term access in terms of the Connectivity Regulations. The Petitioner and CTU entered into BPTA as required under Regulation 15 of the Connectivity Regulations for payment of transmission charges (Clause 2 of the BPTA). Clause 5 of the BPTA recognized the ability to relinquish or transfer obligations specified in the BPTA subject to approval of CTU and the Commission and further subject to payment of compensation. In terms of Clause 9 of the BPTA, the parties have agreed to limit their liability for loss or damage arising out of failure to carry out the terms of the agreement if such loss or damage is on account of force majeure. Further, force majeure has been defined in broad terms to include change in law or any other cause beyond the control of the defaulting party. The statutory right of CTU to collect the transmission charges was made in terms of the contract/BPTA. The Petitioner has submitted that the agreed terms of the BPTA, being Clauses 1 to 11 are unambiguous which provide that the obligations contained under the terms relating to payment of transmission charges (Clause 2) and relinquishment charges (Clause 5) shall stand discharged in the event of occurrence of force majeure situation (Clause 9). The Petitioner has submitted that Clause 9 is an omnibus clause that cut right through the agreement, since it provides that “no party is liable to any claim for any loss or damages whatsoever arising out of the failure to carry out the terms of this Agreement”. The Petitioner has submitted that use of the phrase “this agreement” includes the failure to pay the transmission charges and relinquishment charges as envisaged in Clauses 3 and 5 of the agreement. The parties entering into contract are fully aware



of the nature of the contract including the contingencies (i.e. Clause 9 of the BPTA) and it would not be proper if any other interpretation or meaning is given to the same which is contrary to the original intention of the parties i.e. inspite of occurrence of force majeure events under clause 9, the contractual obligations under Regulation 5 to pay the relinquishment charges continues to be alive.

12. The Petitioner has further submitted that a question which needs to be considered is whether the Petitioner would be liable for payment of relinquishment charges in terms of Regulation 18 of Connectivity Regulations read with the order dated 8.3.2019 in Petition No.92/MP/2015 irrespective of whether the Petitioner has demonstrated existence of force majeure events. The Petitioner has submitted that once a contract has been entered into on account of provisions in a statute/regulations and the principles in the regulations have been incorporated in the contract, it cannot be said that the regulation will operate independent of the contract. The Petitioner has submitted that the incident of relinquishment charge is on account of the contract executed in terms envisaged under Regulation 15 and hence Regulation 18 would require to be applied in a manner envisaged by the parties in the BPTA. It is in this context that Clauses 5 and 9 become relevant and would control the obligations of the parties, irrespective of whether such obligation has reference to determination made under the regulations.

13. CTU has submitted that the issue regarding liability of payment of relinquishment charges and method of determination of stranded capacity has been settled by the Commission in order dated 8.3.2019 in Petition No.92/MP/2015 and is binding on the Petitioners who were also parties in the said proceedings (subject to order in the appeals). The Petitioners cannot now be heard to contend that they are

not liable to make payment of the compensation in the manner provided under Regulation 18 of the Connectivity Regulations. CTU has submitted that the Petitioner in terms of Clause 2.0 of the BPTA has undertaken to share and pay to the CTU the transmission charges in accordance with the Regulations/Tariff orders of the Commission. Further, Clause 6 of the BPTA have bound the generators to pay the transmission charges when they are abandoning the project or making an exit. CTU has emphasized that it is in pursuance of the said provision that the Petitioner has furnished to the CTU the bank guarantee corresponding to the LTAs granted to them which can be encashed by the CTU in case of any adverse progress of the generating unit assessed in the Coordination Meeting. CTU has further submitted that Clause 5.0 of the BPTA prevents the Petitioner to relinquish or transfer its rights and obligations specified in the BPTA without the prior approval of the Commission and CTU and subject to payment of compensation in accordance with the regulations of the Commission issued from time to time. Therefore, Regulation 18 has been included as an operating contractual provision under the express terms of Clause 5.0 of the BPTA and therefore, the entire argument of the contract ousting the regulation is of no consequence. CTU has submitted that the contention of the Petitioner that the right to claim relinquishment charges based upon exit/surrender/relinquishment of LTA is subject to provisions of BPTA which has become frustrated on account of force majeure event, already stands adjudicated in order dated 8.3.2019 in Petition No.92/MP/2015 wherein the Commission has held that BPTAs or LTA Agreements are in accordance with the Connectivity Regulations and they are in the nature of statutory contract and are to be governed by the provisions of Connectivity Regulations. CTU has submitted that the interpretation supplied by the Petitioner to Clause 9 of the BPTA so as to broaden its applicability

to situations which were never intended to be covered, is absolutely erroneous and has occurred on account of the unwarranted comparison by the Petitioner of the force majeure clause in the BPTA with the force majeure clause in the Power Purchase Agreement between the generating companies and distribution licensees. CTU has submitted that the force majeure clause in the BPTA must be interpreted on the principle of interpretation of contract i.e. the intention of the parties, the context in which they appear and the nature of rights and obligations agreed thereunder and cannot be given a wider area of applicability than what has been intended by the parties. CTU has submitted that the BPTA is a contract for use of transmission lines of a transmission licensee by a DIC wherein the DIC agrees to bear the transmission charges as a consideration for use of the said transmission lines irrespective of the actual power flow, meaning thereby that so long as a DIC is connected to the transmission lines of the licensee and retains the right to access the system, it is liable to pay the transmission charges to the licensee. It is in this context that Clause 9 provides for an exclusion clause in the nature of force majeure which temporarily absolves the parties from any liability arising out of the breach of contract if the same has occurred on account of force majeure which prevents the use of the transmission lines and suspends the power flow. That is why the clause says that power flow is to be started as soon as force majeure event is over. CTU has submitted that clause 9 of the BPTA being temporary in nature and restrictive in its application cannot be relied upon by the Petitioner to contend that once it becomes applicable, the entire BPTA including clause 5.0 ceases to operate between the parties. CTU has emphasized that the applicability of Clause 9 cannot be extended to matters which are beyond the eventualities affecting “transmission/drawal of power”. CTU has submitted that the attempt of the Petitioner

to misinterpret the provisions of Clauses 9 and 5 of the BPTA read with Regulation 18 of the Connectivity Regulations so as to evade its liability of payment of relinquishment charges at the time of relinquishment of the LTA, is also negated by the clear language of Clause 9 of the BPTA.

14. We have considered the submissions of the Petitioner and CTU. The main contention of the Petitioner is that once the BPTA has been signed as required under Regulation 15 of the Connectivity Regulations, the rights and liabilities of the parties to the BPTA shall be governed by the provisions of the BPTA and not in accordance with the provisions of the Connectivity Regulations. To be specific, the Petitioner's contention is that the relinquishment charges determined under Regulation 18 of the Connectivity Regulations cannot be levied if the Petitioner is excused for performance on account of force majeure in terms of Clause 9 of the BPTA. Therefore, the question for consideration is whether the relinquishment charges are statutory or contractual in nature. The Commission has dealt with the issue in its order dated 8.3.2019 in Petition No.92/MP/2015. Relevant observations and findings of the Commission in the said order are extracted as under:

"97. We have considered the submissions of the parties. Long Term Access rights have been granted to the LTA customers under provisions of Regulation 12 of the Connectivity Regulations and such access rights carry with itself the corresponding commitment under Regulation 26 to pay the transmission charges for the transmission systems included in the LTA grants. Further, in terms of the Connectivity Regulations, the LTA customers have signed the Bulk Power Transmission Agreements or Long Term Access Agreement making unconditional commitment to pay the transmission charges throughout the term of the LTA. Regulation 18 deals with the relinquishment of long term access rights by the LTA customers. Regulation 18 provides for an exit provision for the long term customers to relinquish the LTA rights subject to payment of transmission charges for a maximum period of 12 years with a notice period of one year or payment of transmission charges in lieu thereof. Since BPTA or LTA Agreements are in terms of the Connectivity Regulations, they are in the nature of statutory contract. Therefore, the relationship between the CTU and the LTA customers are basically statutory in nature and has to be governed by the provisions of the Connectivity Regulations. As a corollary, the relinquishment of access rights of the LTA customers has to be strictly construed in terms of the provisions of the Connectivity Regulations.



98. Regulation 18 which deals with the relinquishment of long term access rights by LTA customers is extracted 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 atleast 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 anytime 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.”

99. Regulation 18 provides for relinquishment of access rights fully or partly before expiry of the full term of long term access by making payment of compensation for the stranded capacity. The regulation has fixed a period of maximum of 12 years for the purpose of compensation for access rights even though the tenure of the LTA is 25 years. Further, the compensation has been fixed at an amount of 66% of the transmission charges (net present value) for the stranded transmission capacity for a



period falling short of 12 years. In other words, the long term customers relinquishing the access rights are exempted from paying 34% of the transmission charges (net present value) for a period falling short of 12 years. Thus on account of the exit of a long term customer through relinquishment, the entire transmission charges from 13th year to 25th year and 34% of the transmission charges from 1st year to 12th year for the relinquished capacity has to be borne by other long term customers and medium term customers. This aspect becomes clear from Regulation 18(3) which provides that the compensation received on account of relinquishment shall be applied for reducing the transmission charges of other long term and medium term customers which are required to bear the additional transmission charges which would have been borne by the relinquishing long term customers but for the relinquishment of long term access rights. Therefore, Regulation 18 statutorily provides for a compensatory mechanism for relinquishment of access rights by long term customers by apportioning the risks between the relinquishing long term customers and the other long term and medium term customers keeping in view the likely utilization of the relinquished transmission assets. It is pertinent to mention that neither BPTA nor Long Term Access Agreements between the long term customers and CTU provide for any compensatory mechanism but only mention that it shall be determined as per the regulations of the Commission. In other words, the compensatory mechanism for long term access rights is statutory in nature. Therefore, the Commission does not agree with the contention of relinquishing long term customers that the compensation on account of relinquishment of long term access rights shall have to be decided on the principles of section 73 and 74 of the Indian Contract Act, 1872.....”

In the light of the above findings of the Commission, the issue whether the relinquishment charges shall be governed by the Connectivity Regulations or the provisions of the BPTA stands settled. Since appeals have been filed against the said order, it is needless to say that the above findings are subject to the decision of the Appellate Tribunal. As the matter stands today, the issue is settled and cannot be reopened in the present proceedings.

15. Another argument of the Petitioner is that Clause 9 of the BPTA is an omnibus clause that cut right through the agreement and the use of the words “this agreement” includes the failure to carry out the obligation to pay the transmission charges and relinquishment charges or even loss/damages for adverse progress, as envisaged in Clauses 3, 5 and 6 of the BPTA. The Petitioner has submitted that the Commission has taken a view qua Clause 9 in Aryan Coal and other related matters that the said clause provides temporary amnesty and appeals are presently pending against these orders. Despite being aware that the Commission has become functus



officio qua the interpretation of Clause 9 of the BPTA, the Petitioner has urged the Commission to take an independent view on account of the submissions made in the petition. Therefore, without any prejudice to our findings in our earlier order, we are examining the submissions of the Petitioner.

16. The relevant provisions of the BPTA dated 24.2.2010 are quoted hereunder:

“1.0 In accordance with Central Electricity Regulatory Commission Regulations, 2009 and Electricity Act 2003 (including their amendment, if any) and in accordance with the term mentioned above, POWERGRID agrees to provide such open access required by these Long Term Transmission Customers from the date and in the manner mentioned in the Annexure 1, Annexure 2 , Annexure 3 and Annexure 4 of this agreement for a period of 25 years from the schedule date of open access of individual long-term open access customers (as specified in Annexure I).

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 lime of POWERGRID transmission system of concerned applicable Region i.e. Northern Region, Western Region, Southern Region including charges for inter-regional links/ULDC/NLDC charges and any 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-I 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 tile 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 at Annexure-3 (subject to technical feasibility), he/they would also share the applicable transmission charges.

(c)Each Long transmission customer (including its successor/assignee) shall pay the applicable transmission charges from the date of commissioning of the respective transmission system which would not be prior to the schedule commissioning date of generating units as indicated by the respective developer as per Annexure-I. The commissioning of transmission system would be preponed 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 (BO), in favor of POWER GRID, 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 valid for a minimum period of three (3) years and shall be renewed from time to time till the expiry of the open access.

3.0 POWERGRID agrees to provide Long Term Access required by Long term transmission customer as per the details mentioned above and in accordance with



the Regulations under the Central Electricity Regulatory Commission (Open Access in Interstate Transmission) Regulations 2009 and conditions specified by the CERC from time to time.

However, during the tenure of this agreement if any of the covenants and conditions recited in this agreement including agreements at Annexure- A, Band C found inconsistent with the provisions of the Electricity Act 2003 and/or applicable notifications/rules/regulations issued either by CERC or by GOI as per the provisions of the Electricity Act, then notwithstanding anything contained in the agreement referred to above, the said rules and regulations shall prevail.

5.0 The Long term transmission customer shall not relinquish or transfer its rights and obligations specified in the Bulk Power Transmission Agreement, without prior approval of POWERGRID and CERC and subject to payment of compensation in accordance with the CERC Regulations issued from time to time.

6.0 (a) In case any of the developers fail to construct the generating station or dedicated transmission system or makes an exit 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. These developers shall furnish a Bank guarantee from a nationalised 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) mentioned at Annexure-I (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 I), The bank guarantee would be encashed by POWER GRID in case of adverse progress of individual generating units assessed during coordination meeting as per para 7 below. However, the validity should be extended by the concerned Long Term transmission customer(s) as per the requirement to be indicated during co-ordination meeting.

(c) The POWERGRID shall build transmission system included at Annexure-3 keeping view of various commissioning schedules, however, till the completion of identified transmission elements the transfer of power will be based on the availability of system on short term basis.

(d) In the event of delay in commissioning of concerned transmission system from its schedule, as indicated at Annexure-4 POWERGRID shall pay proportionate transmission charges to concerned Long Term Access Customer(s) proportionate to its commissioned capacity (which otherwise would have been paid by the concerned Long Term Access Customer (s) to POWERGRID) provided generation is ready and POWERGRID fails to make alternate arrangement for dispatch of power.

9.0 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 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 cause," beyond 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.

10. In the event of finalisation of beneficiaries by the developers the applicable transmission charges and other charges covered under this agreement would be payable by the concerned beneficiary. These charges would be effective only from the date of signing of agreement by concerned beneficiary with POWERGRID for the validity period of open access."

17. Perusal of the above provisions makes the scheme envisaged in the BPTA clear. As per Clause 1, CTU has agreed to grant long term access to the Petitioner in accordance with the Act and Connectivity Regulations from the date and in the manner mentioned in Annexure 1 to 4 of the BPTA for a period of 25 years from the scheduled date indicated in Annexure 1. According to Clause 2, the Petitioner is under obligation to pay the transmission charges in accordance with the regulations and tariff order of the Commission issued from time to time. The applicable charges are payable by the Petitioner from the date of commissioning of the transmission system which should not be prior to the scheduled date of commissioning of the generating station irrespective of actual date of commissioning of the generating station. Further Clause 2 (d) provides for opening of LC and BG as security. As per Clause 3, CTU has agreed to provide the long term access as per the BPTA in accordance with the regulations and conditions as specified by the Commission from time to time. During the tenure of the agreement, if any of the covenants and conditions recited in the agreement are found inconsistent with the provisions of the Act or applicable notification, rules/regulations issued by the Commission or by GOI as per the provisions of the Act, then the said rules and regulations shall prevail. Therefore, the parties to the BPTA have expressly agreed that the provisions of the applicable notification/rules/regulations issued by GOI or the Commission shall prevail over any covenant or conditions of the BPTA. Clause 5 enjoins upon the



Petitioner not to relinquish or transfer its rights and obligations under the BPTA without prior approval of CTU and the Commission and subject to compensation determined in accordance with the regulations of the Commission issued from time to time. This means that the BPTA incorporates the relinquishment charges determined under Regulation 18 of the Connectivity Regulation as compensation for relinquishment in terms of Clause 5 of the BPTA. Clause 6 deals with four eventualities attributable to the Petitioner i.e. failure to construct the generating station, failure to construct the dedicated transmission system, exit from the project or abandonment of the project, on occurrence of which CTU has the right to collect the transmission charges and/or damages in accordance with the regulation/notification issued by the Commission from time to time. For compensating the damages, the Petitioner is required to give a bank guarantee @Rs.5 lakh/MW which could be encashed on account of adverse progress of the individual generating units assessed during the coordination meeting as per Clause 7. Clause 9 enjoins upon both parties to ensure due compliance of the terms of the agreement. However, a party is discharged from its liability for claim for any loss or damages if it fails to carry out the terms of the agreement to the extent such failure is due to force majeure events. There is also provision for notice by the party claiming force majeure to the other party. The Clause further enjoins on the parties to resume transmission/drawal of power as soon as practicable by the parties concerned after the eventuality ceased to exist or come to an end.

18. The Petitioner and CTU have argued at length with regard to applicability of force majeure clause in case of relinquishment of LTA and liability of parties to pay the relinquishment charges. It is a settled principle that while interpreting the contract, the intention of the parties, the context in which they appear and the nature

of rights and obligations agreed thereunder are relevant considerations which should be kept in view. Therefore, Clause 9 of the BPTA has to be interpreted with due consideration of the above principle of construction. Different elements of Clause 9 are as under:

- (a) The parties shall ensure due compliance with the terms of the agreement.
- (b) No party shall be liable for any claim of damages or loss arising out of failure to carry out the terms of the agreement.
- (c) The party shall be relieved of the liability 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 cause beyond the control of the defaulting party.
- (d) The defaulting party shall satisfy the other party of the existence of such an event and give a written notice of 30 days.
- (e) 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.

It is evident from the above that the intention of the parties is to ensure due compliance of the terms of the BPTA. BPTA is a contract for use of the transmission lines of a transmission licensee by a long term customer wherein the transmission licensee agrees to provide long-term access to its transmission lines and the long term customer agrees to pay the transmission charges as a consideration of use of the said transmission lines. In other words, so long as the long term customer is connected to the transmission lines of the licensee and retains the right to access to the system, it is liable to pay the transmission charges irrespective of actual power

flow. Clause 9 provides for an exclusion in the form of force majeure which absolves a party from its liability to any loss or damages arising out of its failure to carry out the terms of the BPTA if it has occurred on account of force majeure which prevents the use of the transmission lines by the long term customer and suspends the power flow. The clause does not visualize the failure to be of permanent nature, It says that as soon as the event ceases to exist, the transmission/drawal of power shall be started as soon as practicable, meaning thereby that the clause is envisaged to be applicable for a temporary period. Therefore, Clause 9 of the BPTA covers situation of temporary in nature and has a restrictive application. The scope of the said clause cannot be given wider application to cover the cases under Clause 5 wherein the long term customer has an option to relinquish the LTA on payment of compensation in accordance with the regulations issued from time to time. We are of the view that Clause 9 of the BPTA cannot be considered as an omnibus provision to cover under its sweep clause 5 which deals with relinquishment of the LTA. Therefore, the Petitioner cannot escape its liability to pay the relinquishment charges under Clause 5 of the BPTA and Regulation 18 of the Connectivity Regulations by resorting to Clause 9 of BPTA.

19. The Commission in its order dated 31.10.2017 in Petition No.69/MP/2014 (Aryan MP Power Generation Pvt Limited Vs. Powergrid Corporation of India Ltd) has dealt with clause 9 of the BPTA in the context of clause of the BPTA as under:

“18. Next we consider whether the Petitioner is entitled to be discharged from its liability to pay the transmission charges on account of force majeure under clause 9 of the BPTA. Clause 9 of BPTA says that no party shall be liable to any claim for any loss or damage arising out of the failure of the other party to carry out the terms of the agreement to the extent such failure is on account of force majeure events such as war etc. and any other causes beyond the control of the defaulting party. In our view, losses or damages referred to in clause 9 of the BPTA shall not cover the liability of payment of transmission charges. In this connection, clause 6 of the BPTA is relevant which is extracted as under:

“6.0 (a) In case any of the developers fail to construct the generating station/dedicated transmission system or makes an exit 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.....”

Thus clause 6 says about both transmission charges and damages. Therefore, if a project developer is affected by force majeure, it will only be discharged from paying the damages only and not the transmission charges. Further, Clause 9 of the BPTA cannot be used to relinquish the LTOA under the BPTA. It is clear from the last sentence of the said clause which says that “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.” Therefore, the situation covered under clause 9 of the BPTA covers a temporary phase when the project developer is unable to utilise the transmission system or the when licensee is unable to make its transmission system available due to any force majeure event. It cannot be used for making an exit from BPTA which is governed in terms of clause 6.0 of the BPTA.”

Further in order dated 14.7.2017 in Petition No.317/MP/2013 (Navbharat Power Private Limited Vs. Power Grid Corporation of India Ltd & Another), the Commission has treated clause 9 of the BPTA as providing temporary amnesty and not for seeking an exit from the LTA . Relevant portion of the order is extracted 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 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.”

20. In the light of the analysis on the issue and our findings in the orders as quoted above, we hold that Clause 9 of the BPTA gives a temporary amnesty from

the compensation for loss or damages to the party affected by force majeure and cannot be used for evading relinquishment charges on account of relinquishment of LTA. Both Clause 5 of the BPTA and Regulation 18 of the Connectivity Regulations require that in case of relinquishment of LTA, the Petitioner is required to pay the relinquishment charges. Since CTU has determined the liability of the Petitioner for relinquishment charges pursuant to the order of the Commission dated 8.3.2019 in Petition No.92/MP/2015, the Petitioner is liable to pay the relinquishment charges.

Issue No.2: Whether the case of the Petitioner is covered under force majeure in terms of clause 9 of the BPTA?

21. The Petitioner has submitted that pursuant to the execution of the BPTA for Phase II of its project , it made best efforts to enter into PPA with the distribution companies in the target region but could not succeed. Since the long term power procurement in the region is substantially disproportionate to the commissioned IPPS, the situation is beyond the control of the Petitioner. The Petitioner has submitted that its inability to enter into long term PPA is an event of force majeure rendering the LTA impossible to perform and therefore, the Petitioner be allowed to relinquish the LTA of 542 MW without any liability for relinquishment charges. The Petitioner has further submitted that the captive coal block allotted to it has been cancelled by the order of the Hon'ble Supreme Court and even though it had applied for coal linkage in 2010, allocation of coal has not been made. Consequently, the Petitioner is unable to arrange finances to complete the project. These events are force majeure in terms of Clause 9 of the BPTA preventing the Petitioner to discharge its obligations under the BPTA and therefore, the Petitioner is relieved from payment of relinquishment charges for the LTA capacity of 220 MW relinquished.

22. CTU has submitted that nowhere in the BPTA, there is any reference to the PPA to be executed by the LTA Customers. Since LTA was granted to the Petitioner without executing the PPAs, non-execution of PPA cannot be interpreted as a force majeure event. CTU has further submitted that cancellation of coal block or inability of the Petitioner to arrange finances cannot be considered as force majeure which are risks associated with the execution of the generation project .

23. The Petitioner has submitted that PPA became a material requirement while granting as well as operationalizing the LTA. Therefore, absence of PPA resulted in frustration of the LTA. The Petitioner has quoted the following provisions of the Regulations, Procedures and orders of the Commission in support of its contention:

(a) Regulation 12 of the Connectivity Regulations requires the applicant for long term access to indicate the entity to whom power is to be supplied or procured and the quantum of power to be supplied or procured and therefore, the agreement for sale/purchase of power is a consideration at the time of applying for LTA.

(b) Para 22.7 of the Detailed Procedure issued under the Connectivity Regulations requires the LTA Customer to confirm to CTU with the exact details of the PPA executed by the said customer, three years prior to the intended operationalization of the LTA.

(c) Clause 7.1 of the BCD Procedure provides that LTA cannot be operationalized in the event a firm long term PPA is not available.

(d) The Commission in order dated 2.12.2013 in Petition No.244/MP/2012 relying on Clause 7.1 of the BCD Procedure has held that execution of long term PPA is a necessary condition for availing long term access.

(e) The Commission after recognizing the impossibility of availing LTA on account of lack of long term PPA inserted Regulation 15B through 6th amendment of the Connectivity Regulations and provided that LTA can be availed by having a contract of above one year.

(f) Even under Shakti Scheme, it was mandated that coal could be provided only for those generating companies who have long term or medium term PPA.

(g) Ministry of Power issued the guidelines for procurement of power under Design, Build, Finance, Own and Operate (DBFOO) basis on 8.1.2013. As per DBFOO, coal cost is a pass through in certain scenarios which relate to the source of coal. For example, if the bids are called for scenarios relating to domestic coal linkage or from domestic coal mines, then power plants based on imported coal cannot participate in such bids. This factor has materially affected the Petitioner from entering into long term PPA.

(h) The 37th and 40th Parliamentary Standing Committee Reports recognized the issue of lack of long term PPAs with distribution licensees being uncontrollable.

The Petitioner has submitted that non-availability of long term PPA has close link with the utilisation of the LTA and therefore, lack of long term PPA is a force majeure condition which is beyond the control of the Petitioner.



24. The Petitioner has submitted that cancellation of coal block is a force majeure event which has been covered by the judgement of the Appellate Tribunal for Electricity dated 21.12.2018 in Appeal No.193 of 2017 (GMR Kamalanga Energy Limited Vs Central Electricity Regulatory Commission & Others). The Petitioner has submitted that Clause 9 of the BPTA provides that a “change of law” is an event beyond the control of the affected party and therefore change of law is a force majeure event. The Petitioner has submitted that the BPTAs were executed much before the judgement of the Hon’ble Supreme Court cancelling the allocation of coal block and as such the latter declaration of law by the Supreme Court has to be treated as “change of law” qua Clause 9 of the BPTA. Therefore, cancellation of coal block is a force majeure event in terms of the BPTA. The Petitioner has submitted that the Central Government after recognizing the fact that execution of long term/medium term PPAs was an uncontrollable event modified/amended the Shakti Scheme for the purpose of selling power under day ahead market in the power exchange and for selling power to distribution licensees under short term. Where the long term or medium term PPAs were linked to supply of linkage coal, absence of coal linkage also becomes force majeure in terms of the BPTA.

25. We have considered the submissions of the Petitioner and Respondent CTU. The subject transmission systems based on which LTA was granted to the Petitioner were executed on the basis of the regulatory approval granted by the Commission vide its orders dated 26.3.2010 and 31.5.2010 in Petition No.233/2009. The Petitioner was a party to the said petition. The issue of signing of the PPA was considered at the time of according regulatory approval. Relevant para of the order dated 26.3.2010 is extracted as under:

“17. As regards the requirement for signing of PPAs with the beneficiaries, we observe that the IPPs have not been able to come forward to sign the PPAs, primarily because the States have not yet gone ahead with the bidding process for evacuation of power. However, linking the signing of the PPAs with regulatory approval will hamper the progress of the transmission projects. The Tariff Policy issued vide Govt. of India in para 7.1.4 does not make it mandatory for network expansion by the CTU/STU. The said para reads as under:

“In view of the approach laid down by the NEP, prior agreement with the beneficiaries would not be a pre-condition for network expansion. CTU/STU should undertake network expansion after identifying the requirements in consonance with the National Electricity Plan and in consultation with stakeholders, and taking up the execution after due regulatory approvals.”

In view of the above mandate of the Tariff Policy, we are of the view that the CTU should carry out consultation with the stake holders and satisfy itself about the bonafide nature of generation projects which are likely to materialize during the next three years and submit the detailed report about such projects, including the physical progress made wherever feasible and approach the Commission by first week of April, 2010.”

Therefore, the Petitioner is aware that the regulatory approval was granted to the Petitioner on the basis of the LTA and without linking it to PPAs. It was left to the Project Developer for tie-up with the beneficiaries for PPA. When availability of PPA was not a condition precedent either for applying for LTA or for regulatory approval, therefore, it cannot be pleaded at this stage that PPA is a necessary pre-condition of the PPA and hence its absence cannot be considered as force majeure frustrating the operation of the LTA. The Petitioner has in fact entered into long term PPA for 558 MW and the Petitioner's failure to enter into PPA for the balance capacity cannot be considered as force majeure.

26. As regards the reasons adduced by the Petitioner to prove that the existence of long term PPA is a necessary condition for availing the LTA and absence of long term PPA has led to frustration of the LTA, we are of the view that these provisions in the Connectivity Regulations and Detailed Procedure have been specified to cater to different requirements and cannot be pleaded as the basis for grant of LTA in the absence of which LTA stands frustrated. Regulation 12 requires an applicant for long term access to indicate the entity from which power is to be procured or



supplied and the quantum of power to be supplied. But the first proviso provides that where the source or quantum has not been fixed up, then the applicant has to indicate the quantum of power alongwith the name of the region where the electricity to be interchanged. Thus, PPA is not an essential condition for applying for LTA. Para 22.7 of the Detailed Procedure requires the LTA Customer to give details of the PPA three years prior to operationalization of LTA, the purpose being that the last mile connectivity could be planned and implemented. As regards Clause 7.1 of the BCD Procedure, scheduling can be done against the LTA quantum when there is long term, medium term and short term PPA. This provision is regarding scheduling and from the said provision, inference cannot be drawn that in the absence of long term PPA, LTA would be frustrated. In fact, Regulations allow for scheduling of medium term and short term power against the LTA quantum and offset is allowed. Regulation 15B of the Connectivity Regulations facilitates operationalization of LTA with PPA of the duration of more than one year. In other words, if the LTA Customer is able to make a medium term PPA of more than one year, it can schedule its power under MTOA. This provision does not support the case of the Petitioner that in the absence of long term PPA, LTA stands frustrated. The requirement for participating in Shakti Scheme or procurement under DBFOO or the observation of the Parliamentary Standing Committee cannot absolve the Petitioner from its liability towards LTA under the BPTA. In our view, the Petitioner had applied for and was granted LTA in the absence of long term Power Purchase Agreements and the Petitioner has taken the business risk by entering into BPTA in the absence of long term PPA. Failure of the Petitioner to enter into long term or medium term PPA for 552 MW cannot be considered as the reasons beyond the control of the Petitioner and hence, is not covered under Clause 9 of the BPTA. This finding of ours is

without prejudice to our finding in response to Issue 1 that Clause 9 is not applicable in case of relinquishment of LTA under Clause 5 read with Regulation 18 of the Connectivity Regulations.

27. As regards the cancellation of coal block by the Hon'ble Supreme Court and consequent interpretation of the same by the Appellate Tribunal for Electricity in judgement dated 21.12.2018 in Appeal No.193 of 2017 (GMR Kamalanga Energy Limited Vs Central Electricity Regulatory Commission & Others) as being under Change in Law in terms of the relevant PPA, we are of the view that the said finding was rendered in the context of the provisions of the PPA which has elaborate provisions on Change in Law and governed the relationship between the generating company and distribution licensees. The said finding cannot be applied in the present case under "change of law" which is an event of force majeure in terms of Clause 9 of the BPTA. Further, availability of coal linkage for generation of power by the Petitioner was never a consideration between the Petitioner and CTU while entering into BPTA. We have already held that Clause 9 of the BPTA applies to events of temporary nature and cannot be stretched to cover permanent exit from the obligations under BPTA for which there is provision in Clause 5 of the BPTA read with Regulation 18 of the Connectivity Regulations to relinquish the LTA on payment of relinquishment charges. We are of the view that Clause 9 of the BPTA is not applicable in the facts of the present case.

Issue No.3: What shall be the date of relinquishment?

28. The Petitioner has submitted that the Phase II of the Project was subjected to an unforeseen incidence on account of the de-allocation of the Rampia coal block pursuant to the order and judgment dated 25.8.2014 and 24.9.2014 of the Hon'ble

Supreme Court in Manohar Lal Sharma vs. The Principle Secretary & Ors. Thus, the primary source of fuel for the Phase II of the Petitioner's project was taken away by virtue of a Change of Law event which is also a *force majeure* event within the meaning of Clause 9.0 of the BPTA as it is an event beyond the reasonable control or contemplation of the Petitioner. The Petitioner made a request for coal linkage on 27.1.2010, which is yet to be granted by the Ministry of Coal.

29. The Petitioner has further submitted that after cancellation of Rampia coal block, limited number of long term bids for procurement of power were invited since 2010, in which the Petitioner participated but failed to succeed. The Petitioner was not in a position to secure the much needed funding for Phase-II of the generation project from the Banks and Financial Institutions and hence the Project is now a stranded asset.

30. The LTA granted to the Petitioner was to be serviced from the existing transmission system of PGCIL, which is evident from the amendment carried out in the BPTA vide amendment agreement dated 11.9.2013 and the minutes of the meetings conducted by PGCIL with the IPPs in the Eastern Region. As such, no system augmentation was required to be undertaken by PGCIL for operationalization of the 220 MW LTA granted in favour of the Petitioner. Further, from a conjoint reading of Regulation 2(v) and Regulation 18 of the Connectivity Regulations, it becomes evident that the relinquishment charges/compensation sought to be levied are based on the capacity which remain stranded in the transmission system in the event of relinquishment of LTA quantum by an LTA customer. Since there is no methodology in existence for working out the stranded capacity on account of relinquishment of LTA quantum, any relinquishment charges calculated and



subsequently imposed by CTU would amount to an arbitrary and misguided imposition.

31. The Petitioner vide its letter dated 19.10.2015 to PGCIL has sought relinquishment of 220 MW LTA granted under BPTA dated 5.1.2011. Therefore, PGCIL cannot raise any invoices pertaining to transmission charges for the period beyond 19.10.2015, on account of commissioning of the transmission lines.

32. PGCIL has submitted that the associated transmission system for Phase-II projects in Odisha was finalized in the meeting regarding connectivity and LTA/MTOA with Eastern Region constituents held on 5.1.2013 where the representatives of the Petitioner were also present. The Minutes of Meeting held on 5.1.2013 reveals that the Petitioner is completely wrong in contending that PGCIL had unilaterally carried out amendments to the transmission line to be constructed by it for evacuation of power from the Petitioner's Phase-II project. Further, the Petitioner is also wrong in stating that no system augmentation was required to be undertaken by PGCIL for operationalization of 220 MW LTA granted to it and it could be serviced from the residual capacity of the transmission system being developed for Phase-I.

33. We have considered the submissions of Petitioner and Respondents. We observe that CTU on its website has uploaded date of relinquishment and charges payable towards relinquishment for all entities as per our directions vide Order dated 8.3.2019 in Petition No. 92/MP/2015. We observe that as per the uploaded document by CTU on its website, for Petitioner, CTU has considered the date of relinquishment for Petitioner as 31.3.2019 and quantum of relinquishment as 220 MW. We observe that CTU has not provided any justification of considering date of

relinquishment as 31.3.2019 in its 19.10.2015 of the Petitioner which provides as follows:

Given the delays in the development of Phase-11 of the Power Plant, its commissioning is now an uncertainty. With little or no hope of an early revival, GKEL is now faced with the impossibility of performance of its obligations under the BPTA. As such the open access granted in its favor will remain unutilized indefinitely owing to reasons which, as stated hereinabove, are beyond GKEL's reasonable control. Further as the earliest date of operationalization of the LTA is September, 2017 and given the uncertainty in the development of the power plant it would be appropriate for GKEL to surrender the LTA now, while there is still around 2 years for operationalization of the LTA, so as to enable CTU to grant it to other LTA applicants or readjust the planned addition of Transmission Capacity to reduce against the surrendered quantum.

D. CTU's concurrence required :

"Accordingly, GKEL requests CTU to acknowledge the unforeseeable and uncontrollable events/circumstances that have severely affected the progress of development of Phase - II of the Power Plant thereby rendering it a stranded asset with the investment made by the promoters in jeopardy. Under these circumstances GKEL is left with no option but to approach CTU in accordance with the provisions of the BPTA and seek its consent to the following:

- 1. Surrender of the 220 MW LTA granted in its favor;*
- 2. Waive the transmission charges and/or damages as may be applicable for the surrender of
the open access; and*
- 3. Return the Bank Guarantee of Rs. 11 crores furnished by GKEL as per the BPTA.*

34. CERC vide Order dated 8.3.2019 in Petition No. 92/MP/2015 directed as follows with respect of date of relinquishment:

"161.....(b) Notice period for relinquishment shall be considered from the date the application was made to CTU for relinquishment and if no application was made, the date from which the Commission directs the CTU to accept the relinquishment."

35. We observe that date of relinquishment cannot be taken as 31.3.2019. We observe that Petitioner vide letter dated 19.10.2015 made an application for relinquishment of 220 MW. Hence 19.10.2015 shall be considered as date of relinquishment in terms of our Order in Petition No. 92/MP/2015.



Issue No.4: What are the reliefs admissible to the Petitioner in terms of the prayers in the petition?

36. The first prayer of the Petitioner is for a declaration that LTA of 220 MW under BPTA dated 5.1.2011 stands relinquished with effect from 19.10.2015 without any relinquishment charges. In terms of our order dated 8.3.2019 in Petition No.92/MP/2015, the Petitioner has a statutorily permissible right to relinquish its LTA subject to payment of compensation determined under Regulation 18 of the Connectivity Regulations. Hence the date of relinquishment shall be considered as 19.10.2015 as per our order date 8.3.2019 in Petition No.92/MP/2015.

37. The second prayer of the Petitioner is for a direction to the CTU to return its BG of Rs.11 crore. We are of the view that since the Petitioner has to make payment of relinquishment charges as calculated by CTU in terms of this Order and Order in Petition No. 92/MP/2015, BG shall be kept alive by the petitioner till it makes payment of relinquishment charges as calculated by CTU. In case the Petitioner does not make payment of relinquishment charges to CTU in accordance with timeline provided in order dated 8.3.2019 in Petition No. 92/MP/2015, CTU shall encash the BG and adjust the same against relinquishment charges and return the balance amount, if any, to the Petitioner.

38. Petition No. 137/MP/2016 is disposed of in terms of the above.

**sd/-
(I.S. Jha)
Member**

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

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