

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 164/MP/2017

Coram:

Shri P. K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I. S. Jha, Member

Date of Order: 5th of February, 2020

In the matter of:

Petition seeking surrender of 610 MW (575 MW in Western Region and 35 MW in Southern Region) out of total Long-term Access quantum of 1150 MW granted under the Bulk Power Transmission Agreement dated 24.12.2010.

And

In the matter of:

IL & FS Tamil Nadu Power Company Limited
4th Floor, B Block,
Navins Presidium
103, Nelson Maanicikkam Road,
Amminjikrai,
Chennai- 600029

...Petitioner

Versus

1. Power Grid Corporation of India Limited
B-9, Qutub Industrial Area
Kawaria Sarai
New Delhi- 110016

2. Powergrid Nagapattinam Madhugiri Transmission Limited
B-9, Qutub Industrial Area
Kawaria Sarai
New Delhi- 110016

3. Tamil Nadu Generation and Distribution Corporation Limited
NPKRR Maaligai, 144 Anna Salai,
Chennai , Tamil Nadu - 600002

...Respondents

Parties Present:

Shri Sanjay Sen, Senior Advocate, IL&FS

Shri HemantSingh, Advocate, IL&FS

Shri Lakshyajit Singh, Advocate, IL&FS



Ms. Suparna Srivastava, Advocate, PGCIL
Shri Sitesh Mukherjee, Advocate, PGCIL
Ms. Nehul Sharma, Advocate, PGCIL
Shri Karan Arora, Advocate, PGCIL
Dr. V.N. Paranjape, PGCIL
Ms. Jyoti Prasad, PGCIL

ORDER

The Petitioner, IL & FS Tamil Nadu Power Company Limited has filed the present Petition seeking declaration that the LTA of 610 MW (575 in WR and 35 MW in SR) granted under Bulk Power Transmission Agreement (BPTA) dated 24.12.2010 stands surrendered without any liability upon the Petitioner. The Petitioner has made the following prayers:

- a. hold and declare that the LTA of 70MW, under the BPTA dated 24.12.2010, stands surrendered/relinquished with effect from 19.11.2016, pursuant to the establishment of the FGD plant as per the directions of MoEF, without any liability upon the Petitioner;
- b. hold and declare that the LTA of 540 (505 MW in WR and 35MW in the SR) under BPTA dated 24.12.2010 stands surrendered/ relinquished with effect from 01.12.2016, without any liability upon the Petitioner;
- c. direct POWERGRID to return the Bank Guarantee dated 15.04.2011 for an amount of Rs. 57.5 crore;
- d. direct POWERGRID not to raise any demand upon the Petitioner for opening of Letter of Credit pertaining to 610 MW; and
- e. direct POWERGRID not to raise any invoice upon the Petitioner, pertaining to transmission or PoC charges for 610 MW.”

Submissions of the Petitioner

2. The Petitioner has set up a 1200 MW (2x600 MW) imported coal based thermal power project at Distt. Cuddalore, Tamil Nadu, for which the Petitioner was granted LTA for 1150 MW – 575 MW to SR & 575 MW to WR vide PGCIL letter dated 10.12.2010.



3. Pursuant to the grant of LTA, the Petitioner and PGCIL entered into a Bulk Power Transmission Agreement (BPTA) dated 24.12.2010. In terms of the BPTA, the following transmission system was required for the evacuation of power from the Petitioner's project:

Under the scope of the Petitioner:

- i. IL &FS Tamil Nadu- Nagapattinam Pooling Station 400kV Quad D/c line
- ii. 80 MVAR Bus Reactor at generation switchyard
- iii. Two nos. of 400kV bays each at IL &FS Tamil Nadu generation switchyard & Nagapattinam Pooling station of POWERGRID

Under the scope of PGCIL:

- i. New 765/400kV Pooling Station at Nagapattinam (GIS) (Initially charged at 400kV)
- ii. LILO of Neyveli- Trichy 400kV S/c line at Nagapattinam Pooling Station for interim arrangement which later shall be bypassed

Under the scope of Tariff Based Competitive Bidding:

- i. Nagapattinam – Salem 765 kV D/c (initially to be charged at 400kV)
- ii. Salem – Madhugiri 765 kV S/c (initially to be charged at 400kV)

4. The Petitioner has also furnished a Bank Guarantee (BG) of ₹ 57.5 crore to PGCIL. The two components of the evacuation network, under the scope of tariff based competitive bidding, namely; (a) the Nagapattinam - Salem 765 KV D/C (initially to be charged at 400 KV) and (b) the Salem - Madhugiri 765 KV S/C (initially to be charged at 400 KV) were awarded to Powergrid Nagapattinam Madhugiri Transmission Limited (a wholly owned subsidiary of PGCIL and hereinafter referred to as "Respondent No. 2") under the tariff based competitive bidding process. Accordingly, a Transmission Service Agreement was executed between the Petitioner and Respondent No. 2 on 2.2.2012.

5. The Petitioner has successfully commissioned Unit I of the Project on 29.9.2015 and Unit II on 30.4.2016. The Petitioner entered into a long-term Power Purchase Agreement (PPA) for 540MW with TANGEDCO on 12.12.2013 and the

LTA in the Southern Region became operational w.e.f. 29.9.2015. The Petitioner is duly making payments of PoC charges towards the aforesaid LTA, in accordance with the provisions of the Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 (Sharing Regulations). The Petitioner has also opened a Letter of Credit as payment security in terms of the provisions of the BPTA, for the operationalized LTA in the Southern Region (540MW).

6. PGCIL vide its letter dated 23.10.2016 informed the Petitioner that the Nagapattinam – Salem 765 KV D/C Transmission Line has been declared under commercial operation w.e.f. 23.10.2016 and the second transmission line i.e. the Salem – Madhugiri 765 KV S/C Transmission Line has not been completed yet, as the same is allegedly held up due to RoW issues.

7. During 21st Meeting of Southern Region Constituents regarding LTA and Connectivity applications in Southern region and operationalization of the balance 610 MW of LTA to the Petitioner held on 19.11.2016, the Petitioner requested PGCIL for a change of target region from WR to SR, on account of the fact that the WR is power surplus and the Petitioner was not able to tie up the required quantum on long term basis with any discoms in the target region. However, the Petitioner was informed that the change of target region was not possible as per the provisions of the Connectivity Regulations, but can be done only after obtaining a firm PPA with a beneficiary/buyer, upon payment of relinquishment charges. During the said meeting, the Petitioner had also requested for reducing the LTA capacity from 1150 MW to 1080 MW as both units of the generating station had already commissioned and full load dispatchable capacity was found to be 557 MW, thus reducing the ex-

bus capacity to $557 \times 2 = 1114$ MW. Further, after establishment of the FGD plant, as per the directions of MoEF in its letter dated 14.8.2012, the auxiliary power consumption had increased thereby reducing ex-bus capacity resulting in revising the LTOA to 1080 MW. PGCIL requested the Petitioner to give a letter indicating that the LTA sought was for 1080 MW, without altering the target region and that it would also abide by the outcome in Petition No. 92/MP/2015.

8. The Petitioner vide its letter dated 21.11.2016 requested PGCIL to revise LTA capacity to 1080 MW i.e. 575 MW for SR (including 540 MW LTA operationalized w.e.f. 29.9.2015 with PPA to TANGEDCO) and balance 505 MW to be continued in WR as target region till the Petitioner ties up long term PPAs. Further, the Petitioner also gave its consent for payment of relinquishment charges as determined by this Commission in Petition No. 92/MP/2015. PGCIL vide its letter dated 23.11.2016 reduced the LTA from 1150 MW to 1080 MW (575 MW for SR and 505 MW for WR). The Petitioner has submitted that FGD units were not envisaged earlier in the project and could be commissioned only after commissioning the Units. On account of the FGD, the auxiliary consumption of the power plant has further increased beyond the tested capacity. The Petitioner has further submitted that the reduction in the ex-bus capacity of the power plant, on account of the directions of MoEF, is an unforeseeable condition beyond the reasonable control of the Petitioner.

9. PGCIL vide its letter date 7.12.2016 requested the Petitioner to open the Letter of Credit (LC) for an amount of Rs. 48.76 crore i.e. LC for the LTA of 540MW already operationalized and for the remaining LTA of 540 MW i.e. 505 MW (WR-Target) and 35MW (SR-Target).

10. The Petitioner has submitted that despite its best efforts, the petitioner could not tie up PPA for 505MW in the WR and 35MW in the SR. as there have been no long term bids for procurement of power in the WR and the same is contrary to the projections of power demand/supply projected by Central Electricity Authority in its 17th EPS released in the year 2007, which projected that the said WR was power deficient and as such a significant quantum of power procurement bids were expected to be floated during the said period. However, the power demand scenario has undergone a sea change and the Western Region is no more a power deficit region and has instead become power surplus and had started supplying power to Southern Region. In the past only the following long term bids have been issued in the WR:

Sl. No.	Utility	Bid Capacity (MW)	Term of Procurement	RFP Date	Bid Deadline
1.	Dadra & Nagar Haveli (DNH)	200 MW	Long Term (7 years & 3 months)	March 2012	8 th June 2012
2.	Maharashtra (MSEDCL)	2000 MW (+20% to -30%)	Long Term (25 years)	23rd July 2009	7 th Aug 2009
3.	GUVNL (Gujarat)	3000 MW (\pm 20%)	Long Term (25 years)	22nd June 2009	11 th Jan 2010

11. There is a serious glut in long term PPA bid opportunities in the country. In spite of repeated advice/suggestions from MoP to DISCOMS, to procure power through long term bids, there have been limited long term power procurement tenders in the country. The Ministry of Power has acknowledged the existing & continuing vitiated power scenario and non-availability of Long Term PPA and as such has extended the cut-off date for meeting the criteria of Mega Power status of IPPs. Earlier, the stipulation in the MPP Policy was to obtain Long Term PPA for 85% of power within 36 months from receiving in principle approval. This period has



been extended twice, first to 60 months and now further extended for another 60 months. Insufficient opportunities for tie-up of power sale on Long Term basis through competitive bidding has adversely affected the IPPs. Out of 25 projects with "Provisional Mega" status of Gross capacity of 32,330 MW, with a Net Long Term PPA requirement of 22,464 MW, Long Term PPA secured has been only 5413 MW. For considerable period, there have been no long term PPA bids from the discoms.

12. At the time of grant of LTA, the Standard Bidding Documents for procurement of power by DISCOMS, published by Ministry of Power in 2009 were in force, which allowed the generators (irrespective of Fuel Source), to participate in bidding. However, the Standard Bidding Documents were revised in November' 2013, wherein certain restrictions have been imposed on the generators participating in the long term bids based on the fuel source. The Petitioner still managed to be successful for a quantum of 540 MW in the Southern Region on long term basis. However, despite the best efforts of the said Petitioner, it has been unable to tie up the quantum of 505MW in the Western Region and 35 MW in the Southern Region, on account of inadequate number of long term bids, which is beyond control of the Petitioner and a force majeure event in terms of the BPTA dated 24.12.2010 has occurred.

13. The Petitioner vide its letter dated 30.12.2016 relinquished 540 MW (505 MW to WR & 35MW to SR) by invoking Force Majeure clause under the BPTA executed with PGCIL and also informed PGCIL that the Petitioner would take steps to avail the relinquished LTA facility when the power scenario improves and long term PPAs are available. However, PGCIL vide its letter dated 7.2.2017 refused to acknowledge



force majeure event under Article 9 of the BPTA and did not accept the Petitioner's request for the relinquishment of LTA.

14. The Petitioner vide its letter dated 20.3.2017 reiterated its request for immediate relinquishment of LTA on account of force majeure conditions. However, PGCIL vide its letter dated 25.4.2017 refused to accept the relinquishment of LTA by the Petitioner on account of force majeure conditions and advised the Petitioner to relinquish the LTA in the manner of Regulation 18 of CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (Connectivity Regulations) and the Advisory issued by CTU on its webpage.

15. The Petitioner vide its letter dated 28.4.2017 submitted the declaration as per Regulation 18 of the Connectivity Regulations and the Advisory issued by CTU on its webpage for Relinquishment of LTA and also clarified that it wasn't able to tie up a long term PPA due to reasons beyond its control. PGCIL vide its letter dated 22.5.2017 revised the LTA quantum from 1080 MW to 540MW subject to payment of applicable relinquishment charges, as may be determined by this Commission in Petition No. 92/MP/2015.

16. The Petitioner has submitted that it has been compelled to surrender LTA of 505MW in the WR and 35MW in the SR on account of events beyond its control, which are in the nature of force majeure events. The inadequate number of long term bids in the target regions of the BPTA, is an event beyond control of the Petitioner which prevented implementation of the BPTA, keeping in mind the provisions of the Connectivity Regulations and the Detailed Procedure for grant of LTA. Accordingly, the Petitioner exercised its contractual rights contained in Article 9 of the BPTA by

surrendering 505MW in the WR and 35MW in the SR as a result of the continuing force majeure events since there is no likelihood of the said events coming to an end in near future.

17. The Petitioner has submitted that it surrendered the LTA owing to occurrence of force majeure event and therefore the surrender of LTA cannot be termed as relinquishment under Regulation 18 of the Connectivity Regulations. Further, no relinquishment charges can be levied upon the Petitioner unless it is shown that the capacity remained stranded for a period of 12 years starting from the date of operationalization of BPTA.

18. Notices were issued to the Respondents to file their replies. PGCIL has filed its reply to the petition vide affidavit dated 20.4.2018 and the Petitioner has also filed its Rejoinder vide affidavit dated 7.5.2018. The Commission vide RoP of hearing dated 3.9.2019 impleaded TANGEDCO as party to the Petition. TANGEDCO has also filed its reply vide affidavit dated 17.9.2019.

Submissions of PGCIL

19. The Petitioner vide application dated 3.11.2008 applied for the grant of LTA into the ISTS network for transmitting 1150 MW power from June 2013, which was granted to the Petitioner vide intimation dated 10.12.2010 on target region basis, with 575 MW in the Southern Region and 575 MW in the Western Region. The transmission system identified for grant of LTA to the Petitioner's project required development of High Capacity Power Transmission Corridor (HCPTC-XI). The regulatory approval for development of the said corridors was granted by the Commission vide order dated 13.12.2011 in Petition No. 154/MP/2011, whereby the progress of the projects in Nagapattinam/ Cuddalore area was examined and it was

found that the work at the Petitioner's project was in progress. After considering the contention of PGCIL that the proposed transmission system is required even if one generation project materialized, the Commission held that the implementation of elements under the transmission scheme (part of HCPTC- XI) was to be implemented in time frame of synchronization of New grid with SR grid. Thus, the PGCIL under the express direction of this Commission proceeded to implement the transmission Corridor-XI for evacuation of power from various projects in the Nagapattinam/ Cuddalore area, including the present Petitioner. Therefore, it cannot be contended on the part of the Petitioner that no transmission charges shall be payable by the Petitioner.

20. This Commission, in its earlier order dated 31.5.2010 in Petition No. 233/2009, granted regulatory approval for 9 (Nine) HCPTCs and emphasized that the mandate under Tariff Policy required CTU to undertake network expansion after identifying the requirement in consonance with the National Electricity Plan and in consultation with the stakeholders and taking up the execution after due regulatory approval. Accordingly, the Commission opined that the linking of the PPAs with regulatory approval will hamper the progress of the transmission projects. The Tariff Policy in para 7.1.4 does not make it mandatory for network expansion by the CTU/STU. Therefore, non- signing of PPAs with the project beneficiaries cannot be a ground for fulfilling the obligations qua payment of transmission charges.

21. The Petitioner and PGCIL entered into Bulk Power Transmission Agreement dated 24.2.2010, which recorded the rights and obligations of both the parties with respect to provision of open access over a long term into the transmission system of PGCIL. As per Article 2 of the BPTA, the Petitioner is required to share and pay the



transmission charges as per the Regulations of this Commission. The Petitioner is also obliged to pay transmission charges, from the scheduled date of commissioning of the transmission system which was not to be prior to the scheduled commissioning date of the generating units. Further, as per Article 5 of the BPTA, access right may be relinquished with the prior permission of this Commission and the PGCIL and upon the payment of compensation in accordance with the Connectivity Regulations.

22. The payment of relinquishment charges 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 is to make the resultant loss in transmission charges which would have been payable by the existing long-term customer for servicing the transmission assets. Relinquishment charges are not a charge separate and distinct from transmission charges for open access.

23. The force majeure clause under Article 9 of the BPTA is applicable only in the event one of the parties to the BPTA fails to carry out the obligations enshrined under BPTA. CTU is not concerned with the non-signing of PPA between the Petitioner and beneficiaries. There was no inter-se obligation agreed or recorded in the BPTA as regards the signing of PPAs by the Petitioner.

24. As per Clause 14 of the TSA executed between the Petitioner and PGCIL, any act or event which is not within the obligation undertaken in terms of TSA cannot be taken into consideration for invoking force majeure clause. TSA recorded the mutually agreed obligation as regards the providing of open access by PGCIL for the agreed quantum from the scheduled date of open access and the payment of



transmission charges by the Petitioner for availing open access. The firming of beneficiaries of the Petitioner's project and signing contractual arrangement between them is not within the ambit of TSA and thus, the Petitioner cannot be permitted to argue that non-signing of PPA with the beneficiaries is an event beyond its control and is a force majeure event under TSA.

25. The progress of the Petitioner's project was discussed in the various Joint Coordination Meetings of IPPs granted LTA in the Southern region. During the said meetings, the Petitioner never informed the Committee about the proceeding before the Hon'ble National Green Tribunal. However, the Petitioner reiterated that the project is likely to be commissioned as scheduled.

26. The Petitioner's claim of LTA relinquishment with effect from 1.12.2016 is not acceptable. The Petitioner has relinquished 540 MW LTA in accordance with Connectivity Regulations only vide its undertaking received on 3.5.2017 and it is only therefrom that the relinquishment can be said to have taken place subject to payment of relinquishment charges as may be decided by this Commission in Petition No. 92/MP/2015. Prior to such relinquishment, the Petitioner is liable to pay transmission charges. The PGCIL is not liable to return the bank guarantee till the Petitioner makes the payment of transmission/ relinquishment charges.

Rejoinder of the Petitioner vide affidavit dated 7.5.2018 to the reply filed by PGCIL

27. Once an LTA is granted to a generator, the same does not guarantee flow of power/operationalisation of the said LTA. For effecting flow of power/operationalisation of LTA, a long term PPA is required as a condition precedent. As per Clause 7.1 of the Billing, Collection and Disbursement Procedure (hereinafter

referred to as "BCD Procedure"), long-term PPA(s) is a necessary condition precedent for availing long-term access.

28. The Petitioner's request for relinquishment of the BPTA is merely a procedural formality as the LTA is impossible to be implemented in the absence of adequate number of Long Term Power Purchase (LTPP) being undertaken by the Discoms in the Western Region. Therefore, on a perusal of the regulatory provisions and the procedure made thereunder, it is evident that there is no requirement of exploring other aspects such as stranded capacity etc. since the BPTA/ LTA cannot be implemented in its entirety and the Petitioner is entitled to the relief sought in this petition.

29. PGCIL while discharging its statutory function towards planning and co-ordination of transmission has to undertake systematic study including reconnaissance and pilot study of the prospective generators, the future demand in a particular region and the fact of the execution/ firming of long term PPAs by the said generators before planning its transmission network. On the contrary, the PGCIL is contemplating laying of transmission lines or taking steps towards system strengthening not on the basis of its independent study of the particular region or sector, rather on the basis of the applications received towards grant of LTA. Therefore, it gives rise to a substantial question of law as to whether the PGCIL while discharging its function of CTU, would conduct itself within the parameters of risk aversion by bringing down the mandates of statutory obligations to the altar of contractual obligations which tantamount to performing statutory obligations by wearing the attire of contracting parties. Hence, a deep analysis of the issue would crystallize as to how the modus operandi adopted by PGCIL while discharging its



functions as CTU has somehow led to fading away of the statutory trappings, leaving behind the remnants of a private contracting party.

30. 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 of LTA. However, in the event there is stranded capacity created due to the relinquishment of LTA by the Petitioner, the Petitioner shall have to make payment of compensation towards stranded capacity in the manner provided under Regulation 18 of the Connectivity Regulations. However, in the present case, the question of stranded capacity does not arise since as per the said Regulations read with the BCD Procedure and Clause 9 of the BPTA, the LTA granted to the Petitioner cannot at all be implemented in the absence of adequate number of long-term power procurement exercises being conducted by the respective Discoms. As such no relinquishment charges are payable in the present case.

31. The Commission in its order dated 8.6.2013 in Petition No. 118/MP/2012, (Lanco Babandh Power Ltd. v. PGCIL and Another) has observed that non-availability of coal linkage for Lanco Babandh was an event beyond the control of the said generator. Applying the same principle in the present case, it is submitted that no long term bids for procurement of power in the WR by the Discoms qua the BPTA of the Petitioner is also an event beyond the control of the said Petitioner which is a force majeure event under the BPTA.

Reply of TANGEDCO

32. The present petition is not maintainable and liable to be dismissed. The petitioner's prayer to hold and declare that the LTA of 540 (505 MW in WR and 35MW in the SR) under BPTA dated 24.12.2010 stands surrendered/ relinquished

with effect from 01.12.2016, without any liability upon the Petitioner based on alleged force majeure condition is arbitrary and against the mandate of law and Regulations of the Commission.

33. There is no provision in the Connectivity Regulation with regard to Force Majeure conditions as claimed by the petitioner and consequences thereof to the LTA customer. Further, there is no provision neither in the Regulations nor in the BPTA under which relinquishment of LTA could be approved without any relinquishment charges. The transmission system was planned based on the commitment given by the IPPs. As per the BPTA, it was agreed by all the IPPs in Southern Region that the transmission charges for the above transmission systems will be borne by the respective IPPs. They will get it reimbursed from the beneficiaries once they enter into a PPA with beneficiaries.

34. The transmission corridors are developed by CTU essentially based on the Bulk power transfer requirements of the IPPs and both CTU and the generation developers should coordinate with each other for development of transmission system to match with the power evacuation requirements. If there is any mismatch, then they should settle the financial implications among themselves. The distribution utilities are in no way responsible for creation of any redundant transmission corridor due to non-materializing of the generation project or non-firming up of beneficiaries. Neither the generator nor the transmission service provider (TSP) can cite any reason to recover the cost of the stranded transmission system by socializing among the existing beneficiaries.



35. As per the provisions of the BPTA, the petitioner along with other generators is obligated to pay the charges for the transmission system developed in phases from the date of commissioning of the transmission assets as per SCOD which is matched with the SCOD of the generating units. The BPTA also mandates the generators to share the charges of other defaulting generators in such events. The existing DICs are no way responsible for the charges payable by the petitioner for the LTA quantum.

36. As per Clause 2.0 of the BPTA, the Petitioner is liable to pay the charges for the transmission system as per the applicable Regulations of the Commission. Payment of transmission charges is nowhere linked with PPA tie up of the petitioner with beneficiaries. It is the responsibility of the petitioner to find the beneficiary and enter into PPA. Once the LTA is granted based on the application of the petitioner, the petitioner is bound to abide by the provisions of the Regulations.

37. Clause 5.0 of the BPTA allows the petitioner to relinquish the access rights only on payment of the relinquishment charges and also with prior approval of the Commission and the CTU. Again there is no correlation between payment of relinquishment charges and force majeure. The petitioner cannot cast the responsibility on others for their own faults / failures.

38. The Petitioner's contention of change in demand-supply position in western region cannot be a reason for waiver of transmission / relinquishment charges. The responsibility of ensuring long term PPA tie-up with buyers by the generators cannot be cast on others under any circumstances and the petitioners cannot escape from their contractual obligations and liabilities



Submissions during the hearing

39. 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 companies 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.

40. The 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.

(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 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.



41. Learned Counsel for TANGEDCO submitted that as per Regulation 8(5) of the Sharing Regulations, the generators are liable to pay the transmission charges irrespective of force majeure clause.

42. The Learned Senior Counsel for the Petitioner has 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 firm 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.

(f) TANGEDCO's reliance on Regulation 8(5) of the Sharing Regulations with regard to the liability of generators to pay the transmission charges irrespective of the force majeure clause is misplaced. Regulation 13(1)(l) of the Sharing Regulations provides that "force majeure clause" shall be inserted

in the TSA which means that in case of an event beyond the control of a generator, the said clause will be applicable and the generators are not bound to pay the transmission charges on account of force majeure events. Since the liability to collect the transmission charges has been subjected to TSA which is a statutory contract, the Sharing Regulations will have to be implemented as per the provisions of the TSA. Accordingly, the Regulation 8(5) of the Sharing Regulations cannot be independently invoked. In the event of occurrence of force majeure, the liability to pay transmission charges by the generator is discharged.

Analysis and Decision

43. 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:

- (a) 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?**
- (b) Issue No.2: Whether the case of the Petitioner is covered under clause 9 of the BPTA??**
- (c) Issue No 3: What is the date of relinquishment of LTA ?**
- (d) Issue No 4: What are the reliefs admissible to the Petitioner in terms of its prayers in the Petition?**



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?

44. The Petitioner has set up a 1200 MW (2x600) power project at Cuddalore in the State of Tamil Nadu. It applied for and was granted LTA of 1150 MW to target region by CTU. The Petitioner entered into a BPTA with CTU on 24.12.2010 which envisaged 575MW LTA to Southern Region and 575 MW LTA to Western Region. The Petitioner has furnished a Bank Guarantee of Rs.57.5 crore to CTU pursuant to the BPTA. The Petitioner tied up for sale of 540 MW power with TANGEDCO on long term basis and informed the CTU for operationalisation of LTA for 540 MW vide its letter dated 15.8.2015. Unit I and Unit II of the generating station of the Petitioner achieved COD on 29.9.2015 and 30.4.2016 respectively. CTU in view of the Petitioner's request part operationalized the LTA of 540 MW with effect from 29.9.2015. The Petitioner also opened the Letter of Credit for Rs. 17.65 crore. The Petitioner has been making payment of the transmission charges for the said LTA capacity of 540 MW. CTU vide its letter dated 23.10.2016 informed the Petitioner that the Common Transmission Scheme associated with ISGS Projects in Nagapattanam/Cuddodore area of Tamil Nadu has been put into commercial operation with effect from 23.10.2016 and hence, the transmission charges for the said assets have become payable.. Further, CTU in the 21st Meeting of Southern Region constituents on connectivity and long term access held on 19.11.2016 decided to operationalize the balance LTA capacity of 610 MW on the basis that all the transmission systems planned under common transmission system have been commissioned except Salem (New)-Madhugiri 765 kV S/C transmission line and as per the study conducted by CTU, the commissioned elements are capable of



evacuating the entire capacity of 1150 MW of power (575 MW to Southern Region and 575 MW to Western Region) from the generation project of the Petitioner. In the same meeting, the Petitioner requested PGCIL to revise the quantum of LTA from 1150 MW to 1080 MW as both Units have been commissioned and full load capacity was found to be 557 MW of each unit, thus reducing ex bus capacity to 557 x 2 i.e. 1114 MW. Further, as per direction of MoEF in the letter dated 14.8.2012, the obligation to establish FGD has increased the auxiliary power consumption, thereby reducing Ex-bus capacity to 1080 MW. CTU vide its letter dated 23.11.2016 has reduced the LTA quantum from 1150 MW to 1080 MW subject to payment of relinquishment charges.

45. CTU operationalized the balance 540 MW of LTA out of 1080 MW with effect from 1.12.2016 and asked the Petitioner to establish the payment security mechanism. The Petitioner vide its letter dated 30.12.2016 sought to relinquish 540 MW (505 MW to Western Region and 35 MW to Southern Region) with effect from 1.12.2016 without liability for payment of any relinquishment charges on the ground that it has been affected by force majeure under Clause 9 of the BPTA on account of absence of long term procurement bids by the distribution companies. CTU vide its letter dated 7.2.2017 rejected the claim of the Petitioner on the ground that non-availability of long term procurement bids is not covered under Clause 9 of the BPTA and the Petitioner could relinquish only on payment of relinquishment charges as may be determined by the Commission in Petition No.92/MP/2015. The Petitioner vide its letter dated 28.4.2017 while seeking the relinquishment of 540 MW of LTA has furnished an undertaking to the CTU that it would bear the relinquishment charges levied in terms of the decision in Petition No. 92/MP/2015. CTU vide its letter dated 22.5.2017 has revised the LTA quantum from 1080 MW to 540 MW with



effect from 3.5.2017 subject to payment of relinquishment charges for 540 MW. The Petitioner in the present petition has sought a declaration that the LTA of 540 MW (505 MW in Western Region and 35 MW in Southern Region) under BPTA dated 24.2.2010 stands relinquished with effect from 1.12.2016 without any liability to pay the relinquishment charges on account of force majeure reasons due to increase in auxiliary consumption of 70 MW for implementing FGD as per the directions of MOEF and LTA capacity of 540 MW due to non-availability of long term bids.

46. 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. Therefore, 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.

47. 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 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.



48. 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.

49. 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.

50. 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, as envisaged in Clauses 3 and 5 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.

51. 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 there 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. The developer 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."

52. 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.

53. The parties 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.

54. 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 open 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.

55. 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.”

56. 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.”

57. 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?

(a) Relinquishment of LTA on account of MoEF Notification dated 14.8.2012

58. The Petitioner has submitted that the MoEF vide letter dated 14.8.2012 directed the Petitioner to establish Flue Gas Desulpharization Plant (FGD), which has resulted into increase in Auxiliary Power Consumption of the generating station of the Petitioner and thereby, resulted into reduction in ex-bus capacity of the generating station, which is an unforeseeable condition beyond the reasonable control of the Petitioner. Consequently, during 21st Meeting of Southern Region Constituents regarding LTA and Connectivity application in Southern Region, the

Petitioner requested for reducing the LTA quantum from 1150 MW to 1080 MW and the Committee accepted the request. The Petitioner has submitted that the Petitioner vide its letter dated 21.11.2016 requested PGCIL to revise the quantum of LTA from 1150 MW to 1080 MW and the Petitioner also gave its consent for the relinquishment charges as per the final outcome of Petition No. 92/MP/2015. Further, PGCIL vide its letter dated 23.11.2016 reduced LTA capacity from 1150 MW to 1080 MW. The Petitioner has submitted that reduction in ex-bus capacity of the generating station, on account of the directions of MoEF, is an unforeseeable condition beyond the reasonable control of the Petitioner. The Petitioner has sought declaration that the LTA of 70 MW under the BPTA dated 24.12.2010 stands relinquished with effect from 19.11.2016, pursuant to establishment of FGD plants as per the directions of MoEF, without any liability upon the Petitioner.

59. CTU has submitted that during 21st Meeting of Southern Region Constituents regarding LTA and Connectivity applications in Southern region held on 19.11.2016, the Petitioner agreed that reduction in the LTA quantum would be subject to payment of relinquishment charges as determined by this Commission in Petition No. 92/MP/2015. In furtherance of the decision taken in said meeting, the Petitioner vide its letter dated 21.11.2016 gave an unequivocal consent for the payment of relinquishment charge. Consequently, CTU vide its letter dated 23.11.2016 reduced the LTA quantum from 1150 MW to 1080 MW and it was also reiterated that the revision in LTA quantum is subject to payment to applicable relinquishment charges as per the Connectivity Regulations and as determined by this Commission in Petition No. 92/MP/2015.



60. We have heard the submissions of the parties. The Petitioner is seeking declaration that the LTA quantum of 70 MW stands surrendered/relinquished with effect from 19.11.2016, pursuant to the establishment of the FGD plant as per the directions of MoEF, without any liability upon the Petitioner. On the other hand, PGCIL has submitted that the Petitioner vide its letter dated 21.11.2016 has already given an unequivocal consent for the payment of relinquishment charge on account of revision in LTA quantum from 1150 MW to 1080 MW.

61. The issue of relinquishment of LTA by the Petitioner on account of MoEF Notification dated 14.8.2012 was discussed in the 21st Meeting of SR for Connectivity/LTA Applications. The relevant portions of Minutes of 21st Meeting of SR for Connectivity/ LTA Application is extracted as under:

“3.5 Representative from IL&FS informed that they have already sent a request for (a) reduction in L TA quantum from 1150 MW to 1080 MW on account of enhanced auxiliary consumption due to establishment of Flue Gas Desulphurization plant as per the directions of Hon'ble National Green Tribunal which was not envisaged earlier in the project, (b) change in the target region from WR to SR on account of unlikelihood of getting firm PPA in WR as WR is already in surplus.

....

3.7 Representative from IL&FS agreed that they would apply for reduction of LTA quantum and would give in writing their unequivocal concurrence for payment of relinquishment charges as determined by CERC.”

Perusal of the Minutes of the Meetings reveals that the Petitioner had agreed to make the application for the relinquishment of LTA on account of MoEF Notification dated 14.8.2012 subject to unequivocal concurrence for payment of relinquishment charges as determined by CERC.

62. In accordance with 21st Meeting of SR for Connectivity/ LTA Application, the Petitioner vide its letter dated 21.11.2016 requested CTU for the revision of its LTA capacity. The relevant extracts of Petitioner's letter dated 21.11.2016 addressed to PGCIL is reproduced as under:

“Sub: Agreement for Long Term Access dated 24th December, 2010 between IL&FS Tamil Nadu Power Company Limited (ITPCL) and POWERGRID - Request for reduction in LTA capacity

Dear Sir,

In continuation to our letter dated Nov 15,2016 on the said subject and discussions held in the 21st meeting of Southern Region constituents regarding L TA and Connectivity applications in Southern Region on Nov 19,2016 at Hyderabad, as change of target region was not possible it is informed as follows;

1. Out of revised LTA capacity of 1080 MW, LTA - 575 MW will be for SR (540 MW LTA has since been operationalized with PPA to TANGEDCO). For the balance 505 MW, it may continue to be in WR as target region till we tie up PP A.

2. We hereby unequivocally give our consent for payment of relinquishment charges as determined by CERC in Petition No. 92/MP/2015.”

63. PGCIL reduced the LTA quantum from 1150 MW to 1080 MW. The Commission vide Order dated 8.3.2019 in Petition No. 92/MP/2015 has issued the following directions with regard to the relinquishment on account of the implementation of the revised environmental norms as under:

“150. In the light of the above decision, the Commission is of the view that relinquishment on account of auxiliary consumption and overload capacity shall not require payment of compensation payable towards such relinquishment.”

In the light of the above decision, it is directed that relinquishment of 70 MW on account of Auxiliary Power Consumption shall not attract relinquishment charges.

(b) Relinquishment of LTA of 540 MW under BPTA dated 24.12.2010 due to non- availability of Long- Term bids in the Western Region

64. The Petitioner has also submitted that the Petitioner has been unable to tie up long term power purchase agreements for 505 MW in the WR and 35 MW in the SR. The Petitioner has contended that Petitioner identified Western & Southern Region for 575 MW each as the target beneficiaries in its LTA application on the basis of 17thEPS of CEA for peak load & long term demand forecast scenario. The said Report indicated that the target regions were power deficient. However, the power demand scenario has undergone a sea change and the western region is no more



power deficit region and has instead become power surplus and has started supplying power to Southern Region. Therefore, the Petitioner has been compelled to surrender LTA of 540 MW (505 in WR and 35 MW in the SR) on account of events beyond its control, which are in the nature of force majeure event under Article 9 of the BPTA. The Petitioner has contended that Article 9 of the BPTA discharges the aggrieved contracting party from its obligations under BPTA, including any liability for the payment of relinquishment charges. Thus, the Petitioner has sought a declaration that LTA of 540 MW stands relinquished from 1.12.2016, without any liability upon the Petitioner.

65. 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.

66. We have considered the submissions of the Petitioner and the Respondent CTU. The subject transmission system based on which LTA was granted to the Petitioner was executed on the basis of the regulatory approval granted by the Commission vide its order dated 13.12.2011 in Petition No.154/MP/2011. 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 13.12.2011 is extracted as under:

“44. The transmission system for which the Petitioner has approached the Commission for Regulatory Approval are covered under the provision quoted above since PPA's have not been signed by all the beneficiaries. Accordingly, we accord in principal approval for implementation of the transmission system as per details given in the annexures.....”

67. 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, 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 540 MW and the Petitioner's failure to enter into PPA for the balance capacity cannot be considered as force majeure.

68. 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. 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 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.

Issue No. 3: What is the date of relinquishment of LTA?

69. The Petitioner has submitted that vide its letter dated 21.11.2016, it requested PGCIL to revise LTA capacity to 1080 MW having LTA - 575 MW for SR (540 MW LTA operationalized with PPA to TANGEDCO) and balance 505 MW continued in WR as target region till the Petitioner ties up a long term PPA. Further, the Petitioner also gave its consent for payment of relinquishment charges as determined by this Commission in Petition No. 92/MP/2015. PGCIL vide its letter dated 23.11.2016 reduced the LTA from 1150 MW to 1080 MW (575 MW for SR and 505 MW for WR).The Petitioner has submitted that despite the best efforts, the Petitioner has



been unable to tie up the quantum of 505 MW in the Western Region and 35 MW in the Southern Region, on account of inadequate number of bid, which is a force majeure event. Therefore, the Petitioner vide its letter dated 30.12.2016 relinquished the LTA quantum of 540 MW (505 MW to WR and 35 MW to SR), w.e.f 1.12.2016, without accepting any liability towards the relinquishment charges. PGCIL vide its letter dated 7.2.2017 and 24.4.2017 refused to accept the request of relinquishment on account of force majeure conditions and advised the Petitioner to relinquish the LTA in the manner of Regulation 18 of the Connectivity Regulations. The petitioner vide its letter dated 28.4.2017 submitted the declaration as under Regulation 18 of the Connectivity Regulations and PGCIL vide its letter dated 22.5.2017 revised the LTA quantum from 1080 MW to 540 MW subject to the payment of applicable relinquishment charges, as may be determined by this Commission in Petition No. 92/MP/2015.

70. PGCIL has submitted that PGCIL did not accept the Petitioner's request for the relinquishment of LTA clarifying that any relinquishment of LTA has to be with unequivocal consent of payment of relinquishment charges as per Connectivity Regulations and as may be determined by this Commission in Petition No. 92/MP/2015. Petitioner has relinquished 540 MW as per the Connectivity Regulations only vide its undertaking received on 3.5.2017 and it is only therefrom that the relinquishment can be said to have taken place, subject to the payment of relinquishment charges as may be decided by the Commission in Petition No. 92/MP/2015.

71. We have considered the submissions of the Petitioner and PGCIL. The Petitioner has stated that it has relinquished the LTA of 70 MW vide its letter dated

21.11.2016 and 540 MW vide its letter dated 30.12.2016. The relevant portion of the Petitioner's letter dated 30.12.2016 is extracted as under :

"In consideration of the existing and persisting power scenario and non-availability of Long Term PPAs, MoP, Gol has been extending the cut-off date for meeting the criteria of Mega Power status of IPP's. Earlier, the stipulation was obtaining Long Term PPA for 85% of power within 36 months from receiving in provisional approval which has been extended to 60 months. In spite of this, the situation has not improved. Now, there are requests from IPP's as well as APP, CII and other industry bodies to MoP for extending the time by another 36 months. We understand that MoP has acknowledged this fact and is extending the time.

In spite of our willingness and readiness, grossly insufficient opportunities for tie-up of power under long term PPAs have left the developers, including ITPCL, with no long term PPA to the required capacity. The developers have no control over the Long term power procurement process of the utilities.

In view of the current scenario, we would like to mention that concluding the power procurement process and securing the Long term PPA with Utilities are beyond the control of ITPCL and this amount to Force Majeure as per Clause No. 9 of the BPTA signed between POWERGRID (CTU) & ITPCL on 24th December 2010.

"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 causes 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."

In view of the foregoing, we hereby relinquish 540 MW (505 MW to WR & 35 MW to SR) of LTA granted to ITPCL w.e.f. 1st December 2016. This will not entail levy of relinquishment charges. We will take steps to avail this LTA facility when the power scenario improves and Long Term PPA is available."

Perusal of the Petitioner's letter dated 30.12.2016 reveals that the Petitioner sought to relinquish LTA of 540 MW w.e.f 1.12.2016.

72. The Commission vide Order dated 8.3.2019 in Petition No. 92/MP/2015 has directed as follows with respect to 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.”

73. As per above, the date of relinquishment for 70 MW shall be considered as 21.11.2016.

74. The Petitioner vide its letter dated 30.12.2016 has sought to relinquish 540 MW w.e.f. 1.12.2016. CTU vide Ref: C/CTU/E/04/LTA-REL dated 20.5.2019 has uploaded relinquishment charges calculated for various entities in terms of the Commission's order dated 8.3.2019 in Petition No. 92/MP/2015. As per the said document for 540 MW relinquishment, “Notice to CTU/CERC” has been considered as 30.12.2016 and “relinquishment date” has been considered as 3.5.2017. We have issued the following directions in our order dated 8.3.2019 in Petition No. 92/MP/2015:

“138. Regulation 18(1)(a) and 18(1)(b) provide that the long term customer intending to relinquish long term access rights shall have to make an application to CTU one year prior to the date it desires to relinquish the LTA. If the notice period is less than one year, then it has to pay the transmission charges (net present value) for the period falling short of one year. Therefore, the cases of LTA relinquishment prior to date of start of LTA or after date of start of LTA shall be considered in accordance with Regulation 18 of the Connectivity Regulations. In certain cases (through Orders in respective petitions), the Commission has directed the CTU to accept the LTA relinquishment subject to the payment of relinquishment charges to be determined in the instant petition. In such cases, notice period shall be considered from the date the application was made to CTU for relinquishment of access rights and if no application was made, then from the date from which the Commission directed the CTU to accept the relinquishment.

139. Cases with treatment of notice period under alternative scenarios, namely, (i) LTA relinquishment prior to date of start of LTA, and (ii) LTA relinquishment after date of start of LTA are analysed below with illustrative examples.

(a) LTA relinquishment prior to date of start of LTA

Suppose, Customer A's scheduled date of start of LTA was 1.1.2014. However, the associated transmission system was commissioned on 1.12.2014. So, the effective date of start of LTA is 1.12.2014. Customer A issues notice to CTU on 1.4.2013 relinquishing its entire LTA without specifying any notice period. Thus, the notice date is 1.4.2013. However, relinquishment charges shall be calculated only from 1.12.2014, as on the effective date of start of LTA. In such case, since the transmission charge liability for such customer does not arise till date effective date of LTA i.e. 1.12.2014, no transmission charges shall be paid for the notice period

falling short of 1 year i.e. for 1.4.2013 to 31.3.2014. Relinquishment charges shall be calculated from 1.12.2014 as per the specified methodology in this Order.

(b)LTA relinquishment after date of start of LTA

Suppose, Customer A issues relinquishment notice on 1.12.2014, wishing to relinquish with effect from 1.12.2014 itself. In such case, it shall be liable to pay 66% of the estimated transmission charges (net present value) for one (1) year. The estimated transmission charges shall be transmission charges for the stranded transmission capacity for the period falling short of a notice period of one (1) year. Further, it shall be liable to pay transmission charges for stranded capacity for 12 years as per the specific methodology in this Order. Suppose, Customer A relinquishes LTA as per notice dated 1.12.2014 with relinquishment effective from 1.12.2015. In this case, it shall pay POC charges for period from 1.12.2014 to 30.11.2015 since relinquishment starts from 1.12.2015. Since it has availed transmission facility for 1 year from 1.12.2014 to 30.11.2015, the relinquishment charges for stranded capacity shall be calculated for 11 years period starting 1.12.2015 as Notice period and availing of LTA for one year have run concurrently from 1.12.2014 to 1.12.2015.”

In the light of the direction above, the Petitioner’s 540 MW LTA shall be considered relinquished from the date it made an application to CTU, which is without any notice period. Thus, the date of relinquishment shall be 30.12.2016. We do not agree with CTU that the date of relinquishment shall be 3.5.2017, because it gave undertaking on 3.5.2017. We direct CTU to calculate relinquishment charges as per above quoted 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

75. In the light of the above discussion, the prayers of the Petitioner are disposed of as under:

- (a) With regard to first prayer of the Petitioner seeking declaration that the LTA of 70 MW under the BPTA dated 24.12.2010 stands surrendered/relinquished with effect from 19.11.2016, pursuant to the establishment of the FGD plant as per the directions of MoEF, without any liability upon the Petitioner, we are of the view that 70 MW shall be considered relinquished from 21.11.2016 when Petitioner made an application to CTU in terms of our order dated

8.3.2019 in Petition No. 92/MP/2015. As decided at para 63 of this order, no relinquishment charges is payable for this quantum of relinquishment.

(b) With regard to second prayer seeking that the LTA of 540 (505 MW in WR and 35MW in the SR) under BPTA dated 24.12.2010 stands surrendered/ relinquished with effect from 01.12.2016, without any liability upon the Petitioner, we are of the view that the events cited by the Petitioner are not covered under relevant clause of the BPTA and therefore, we are not inclined to grant any relief under force majeure. The date of relinquishment for 540 MW shall be considered as 30.12.2016. The Petitioner shall pay relinquishment charges for 240 MW as calculated by CTU in line with order dated 8.3.2019 in Petition No. 92/MP/2015.

(c) With regard to third prayer seeking return of Bank Guarantee dated 15.4.2011 for an amount of ₹57.5 crore, we are of the view that since the Petitioner is liable to make payment of relinquishment charges for 540 MW as calculated by CTU in terms of this Order and the Order dated 8.3.2019 in Petition No. 92/MP/2015, the Petitioner is directed to keep BG alive 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. CTU shall return the balance amount of encashed BG, if any, after adjusting against relinquishment charges.

(d) With regard to the fourth and fifth prayer i.e. direction to CTU not to raise any demand upon the Petitioner for opening of Letter of Credit pertaining to 610

MW and further direction to CTU not to raise any invoice pertaining to transmission or PoC charges for 610 MW, the prayers of the Petitioner have become infructuous as the LTA of 610 MW stands relinquished and the Petitioner is liable to pay relinquishment charges under Regulation 18 of the Connectivity Regulation in terms of order dated 8.3.2019 in Petition No 92/MP/2015.

76. Petition No. 164/MP/2017 is disposed of in terms of the above.

sd/-
(I.S. Jha)
Member

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

sd/-
(P. K. Pujari)
Chairperson