

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 280/MP/2019

**Coram:
Shri P.K. Pujari, Chairperson
Shri I. S. Jha, Member**

Date of Order: 21st of July 2020

In the matter of:

Petition under Sections 73(n), 79(1)(c) and 79(1)(f), and other applicable provisions of the Electricity Act, 2003 and in terms of reference from the Hon'ble High Court of Calcutta under Article 226 of Constitution of India vide order dated 10.6.2019 in C.A.N No. 11255/2006 along with M.A.T. No.1981/2016 read with order dated 23.9.2016 in Writ Petition No. 17044 of 2015.

And

In the matter of

Eastern Coalfields Limited
Sanctoria, P.O. Dishergarh,
District – Burdwan,
West Bengal- 713333

.....Petitioner

Vs

1. Eastern Regional Power Committee,
Ministry of Power, through its Member Secretary
14, Golf Club Road,
Tollygunj,
Kolkata – 700 033.
2. NTPC Limited,
through its Chairman,
NTPC Bhawan, Core – 7, Scoop Complex,
Institutional Area, Lodhi Road,
New Delhi – 110 003.
3. Jharkhand Urja Sancharan Nigam Limited (JUSNL)
formerly JSEB,
through its Chairman cum Director,
Kusai Colony, Doranda,
Ranchi – 834002.
4. Jharkhand Bijli Vitran Nigam Limited (JBVNL),
through its Secretary, Engineer's Building, Dhurwa,
Ranchi-834001, Jharkhand

5. Farakka Super Thermal Power Station,
Through General Manager Operation and (Maintenance)
NTPC Limited, P.O. Nabarun,
Murshidabad,
West Bengal– 742 236.

6. Power Grid Corporation of India Limited
Through its Chairman
B-9, Qutab Institutional area, Katwaria sarai
New Delhi-110016

....Respondents

7. Union of India,
Ministry of Power,
Shram Shakti Bhavan,
New Delhi – 110 001

...Proforma Respondent

Parties present:

For Petitioner: Shri K. Shukla, Advocate, ECL
Shri G. Sengupta, ECL
Shri S. Jana, ECL
Shri A. Verma, Advocate, ECL

For Respondents: Shri Aabhas Parimal, Advocate, JUSNL
Shri Himanshu Shekhar, Advocate, JUSNL
Ms. Suparna Srivastava, Advocate, PGCIL
Shri Anand K. Ganesan, Advocate, NTPC
Ms. Swapna Seshadri, Advocate, NTPC
Shri Ashwin Ramnathan, Advocate, NTPC
Ms. Ritu Apurva, Advocate, NTPC
Shri Amol Nair, Advocate, NTPC
Shri Tushar Mathur, Advocate, PGCIL
Shri K.K. Jain, PGCIL
Shri Sukhvinder Singh, NTPC
Shri Rohit Chhabra, NTPC
Shri S. Singh, NTPC
Shri S. Kejriwal, ERPC

ORDER

The present petition has been filed by Eastern Coalfields Limited (ECL), the Petitioner herein, under Sections 73(n), 79(1)(c) and 79(1)(f), and other applicable provisions of the Electricity Act, 2003 (hereinafter referred to as “the Act”) and in terms of the reference from the Hon’ble High Court of Calcutta under Article 226 of

Constitution of India in order dated 10.6.2019 in M.A.T. No.1981 of 2016 with C.A.N. 11255 of 2016 (NTPC Limited Vs Eastern Coalfields Ltd. & Ors.) and the order dated 23.9.2016 in WP No.17044/2015.

Brief Background of the Case:

2. The Petitioner, Eastern Coalfield Ltd. is fully owned subsidiary of Coal India Limited owning 105 operating mines (both underground and opencast). Majority of mines of the Petitioner are located in the States of West Bengal and Jharkhand. The present dispute relates to the transmission line built by the Petitioner from the Farakka Super Power Thermal Station (Farakka STPS) of NTPC to the mines of Rajmahal area located in the State of Jharkhand.

3. Mines of the Rajmahal area of the Petitioner were receiving supply of electricity at 33 kV from the Sabour Sub-Station of the erstwhile Bihar State Electricity Board. The Petitioner decided to augment the coal lifting and production from the Rajmahal mines in the year 1985 in order to meet the growing demand of coal for the Farakka STPS of NTPC for which need was felt for additional reliable, steady and better quality of supply of power. In a meeting held under the aegis of the then Union Minister of Steel, Mines and Coal on 30.3.1985, Secretary, Department of Coal emphasized the need for direct power supply from the Farakka STPS of NTPC to Rajmahal coal mines through an independent transmission line in order to ensure uninterrupted supply of coal to Farakka STPS. As regards the cost of the independent transmission line, Secretary, Department of Coal stated that the it could be on the account of the Petitioner provided that power tariff is suitably adjusted to take into account the investment made. Union Minister of Steel, Mines and Coal stated that power must be made available to the coal mine if coal supply to Farakka

STPS has to be assured. This was followed up by a letter dated 24.6.1985 from Union Minister of Steel, Mines and Coal to Minister of State for Power for expediting the construction of the transmission line from Farakka STPS to Rajmahal coal mines and sub-station at NTPC's project end. NTPC constructed the Farakka-Lalmatia Transmission (FLT) system on deposit work basis at the cost of the Petitioner. Though power from Farraka STPS was evacuated through the FLT system, the Petitioner continued as a consumer of Bihar State Electricity Board (subsequently from Jharkhand State Electricity Board on creation of the State of Jharkhand) and the Petitioner did not receive any direct supply of power from NTPC. In the meeting dated 23.10.1991 held under the aegis of Additional Secretary (Coal), Government of India to sort out the issues regarding Farakka Lalmatia (Rajmahal) Project, it was decided that the ownership of FLT system would continue with the Petitioner; O&M of the FLT system would continue to be done by NTPC for which charges would be borne by the Petitioner; and Ministry of Coal would take up with the Department of Power for direct supply of power from Farakka STPS to the Petitioner through FLT system.

4. Bihar State Electricity Board (BSEB) in its letter dated 7.10.1992 took up the matter with Ministry of Coal, Government of India for handing over the FLT system to it. Ministry of Coal vide its letter dated 2.11.1992 clarified that the circumstances under which decision was taken in 1985 to construct the FLT system were still valid and therefore, it would not be possible for the Petitioner to hand over the said FLT system to BSEB.

5. After the Electricity Act, 2003 (the Act) came into force and introduction of open access, the Petitioner intended to avail the benefit of direct supply of electricity

from Farakka STPS of NTPC through the FLT system. For that purpose, the Petitioner approached the Jharkhand State Electricity Regulatory Commission (JSERC) for grant of open access. JSERC by order dated 9.5.2011 directed the Petitioner to approach NTPC for power availability as per its demand and thereafter to approach State Load Despatch Centre and Regional Load Despatch Centre to find out whether the network has the capacity to transmit the power from NTPC's Farakka STPS to the premises of the Petitioner and once this is done, then JSERC would be in a position to consider the matter. The Petitioner took up the matter with NTPC vide its letter dated 27.5.2011 and in response, NTPC vide its letter dated 5.8.2011 advised the Petitioner to approach Ministry of Power for necessary allocation of power from its generating stations. The Petitioner took up the matter with Ministry of Power (MoP) vide its letters dated 14.11.2012, 19.12.2012 and 4.2.2013 for necessary allocation of power from Farakka STPS of NTPC. MoP vide its letter dated 4.4.2013 informed the Petitioner that allocation of power from Farakka III STPS has been made to the States vide MoP letter dated 9.12.2010 based on the existing guidelines for allocation of power as approved by the Cabinet and no power can be made available to ECL directly by NTPC.

6. NTPC had been carrying out maintenance of the FLT system since the commissioning of the said transmission line on payment of O&M charges by the Petitioner. However, around 2014, NTPC (Respondent No.2) expressed difficulty for maintenance of the FLT system as it is not having expertise in the field of transmission and requested PGCIL (Respondent No.6)/JSEB (predecessor of JUSNL/Respondent No.3) to take over operation and maintenance work of FLT system. In the meeting held between the Petitioner and NTPC on 16.6.2014, the Petitioner agreed to hand over the maintenance of the FLT system to PGCIL/JSEB.

In the 105th OCC Meeting of ERPC (respondent No.1) held on 16.6.2014, NTPC informed that the Petitioner intended to hand over the maintenance of the FLT system to PGCIL and would sit with PGCIL to decide the same. However, the OCC decided that since the FLT system was an important transmission line for catering to the load of Jharkhand, the issue needed to be discussed in the 29th TCC meeting with the Petitioner as an invitee. In the 29th TCC Meeting and ERPC Meeting held on 13.2.2015 and 14.2.2015 respectively, TCC advised the Petitioner to hand over the O&M part of the line along with the bay to JUSNL (Respondent No.3) on chargeable basis keeping the ownership with the Petitioner and advised both the Petitioner and JUSNL to discuss the commercial and technical issues in the lower forums of ERPC which was concurred by ERPC. Accordingly, a special meeting was convened on 11.3.2015 to discuss the issue of handing over of O&M of FLT system. In the said meeting, the Petitioner raised certain commercial issues for resolution before handing over the FLT system for maintenance namely, the Petitioner should be charged tariff at Farakka STPS/ Kahalgaon STPS rates; should get wheeling charges for use of the FLT system; reversal of JBVNL (respondent No. 4) bill for contract demands extension to the tune of Rs.5 crore; and reversal of penalty to the tune of Rs.0.32 crore and voltage rebate of 3% of electricity charges. It was however decided that the commercial issues would be discussed in a high level meeting convened at MD/Chairperson level and the Petitioner should enter into an O&M agreement with JUSNL for maintenance of the FLT system for which the Petitioner would seek decision from its higher authorities. A meeting was held on 24.3.2015 under the chairmanship of Principal Secretary, Energy Department, Government of Jharkhand. In the said meeting, the Petitioner was requested to raise the commercial issues bilaterally with JBVNL. With regard to the FLT system, ERPC Secretariat

suggested for handing over of the entire FLT system to JUSNL instead of only O&M as that would save the Petitioner from the O&M expenses of Rs.5.6 crore per annum. It was accordingly decided that the Petitioner would hand over the whole assets of FLT system to JUSNL within three months and on completion of handing over, JUSNL would file petition before JSERC for determination of tariff of FLT system. After determination of tariff, JBVNL would be charged at the approved tariff of JUSNL and the Petitioner would be charged at the approved tariff of JBVNL.

7. Aggrieved by the decision of ERPC taken in the meeting held on 24.3.2015, the Petitioner filed Writ Petition No. 17044 of 2015 before the Hon'ble High Court of Calcutta seeking a declaration that ERPC has no authority or jurisdiction under the Act to direct the Petitioner to hand over the FLT system to JUSNL and that the Petitioner was entitled to its commercial claims outlined in the writ petition among other prayers. Hon'ble Single Judge of the High Court of Calcutta in order dated 23.9.2016 partly allowed the prayers of the Petitioner and left other prayers open as under:

"In my opinion, the decision taken by them in the meeting dated 24th March, 2015 directing ECL to hand over the system to JUSNL is totally de hors the law. Therefore, the said decision dated 24th March, 2015 is quashed.

We should also remember that it is an accepted position that operation and maintenance of a transmission system can be contracted out. It is in these circumstances NTPC is operating and maintaining the system upto this day. Since NTPC does not want to continue, there is an option to contract out these functions to an organization. In this regard JUSNL may be considered.

In that event, ECL may expect a return for building this line. They are entitled to, in my opinion, a special regulated rate of tariff for electricity, to recompense them for the money spent in laying the line.

Since the transmission is inter-state and it also provides an alternative system to provide electricity to the entire region in case of National Grid failure, any dealing with the said transmission system should not be taken lightly by the authorities. The entire modalities and paraphernalias of ensuring that there is a lawful transfer of this transmission line or the functions of maintenance and operation of it to an authority or body are to be carefully worked out by ECL, the various authorities under the Electricity Act, 2003, the Central and the respective State governments. In my opinion

this impasse has to be resolved expeditiously. Till it is done, NTPC will continue to operate and manage the transmission system under the ownership of ECL. JUSNL will continue with the distribution of this electricity to the coal mines of ECL.

Therefore, this writ application is allowed only to the extent of the declarations claimed in prayers (a) and (b) of the writ petition. Other points not decided here are kept open.”

8. Against the order dated 23.9.2016 of the Hon'ble High Court of Calcutta in W.P. No. 17044 of 2015, NTPC filed C.A.N. No. 11255 of 2016 along with M.A.T No.1981 of 2016 before Division Bench of the Hon'ble High Court seeking stay of the operation of the above judgment on the ground that NTPC having no expertise in the operation and maintenance of transmission system, it would suffer irreparable loss, injury and danger to public safety and security with the operation of the order dated 23.9.2016. Hon'ble Division Bench of the High Court of Calcutta vide order dated 10.6.2019 issued the directions as under:

“The issues which arose for consideration before the learned Single Judge and which continue to arise for decision in this appeal relate to different aspects touching the Eastern Coalfield Limited which is a consumer and transmission company and generating institution.

The appellant before us is NTPC Limited which is a generating company and is also involved in the activity of transmission and providing energy. With the passage of time and change in the laws governing the field, different practical issues arose regarding the modality of operation and maintenance of the transmission lines by the different institutions. We see that the issues relate to the State of Jharkhand as well as NTPC.

Therefore, we are of the firm view that nothing will stand in the way of the Central Electricity Regulatory Commission which is represented before us by the learned Additional Solicitor General being made the platform for consideration of the disputes including eligibility of the Distribution and Generating Company which is involved in this litigation. This will also enable the consumer, namely, Eastern Coal fields Limited and others to appropriately utilize that platform to have the issues settled.

The appeal in hand cannot be treated as one of the usual adversarial litigations. It has to be considered as a matter which deserves to be liquidated through requisite negotiations and decision making in exercise of statutory power by the Central Electricity Regulatory Commission. Since there was some debate at the bar during the course of hearing of this matter as to whether the Central Electricity Regulatory Commission has the power under the Act to adjudicate on this issue, we clarify that this order be treated as a reference to it by this Court in exercise of power under Article 226 of the Constitution of India to enable the Central Electricity Regulatory Commission to consider all aspects of the disputes and decide on them and place its decision before this court within a period of four months from the date of receipt of this order.

It is clarified that the proceeding before the Central Electricity Regulatory Commission will be without prejudice to the rights and contentions of the parties so that the writ appeal can be further prosecuted in the event the proceedings before the Central Electricity Regulatory Commission fails.”

9. Pursuant to the directions of the Hon'ble High Court of Calcutta, the matter was listed before the Commission on 11.7.2019, whereby vide Record of Proceedings (ROP) of the even date, the Commission directed the Petitioner to file a Petition covering all the issues and making all the necessary parties as respondents, including PGCIL. Accordingly, the Petitioner has filed the present Petition impleading ERPC, NTPC Ltd., Jharkhand Urja Sancharan Nigam Limited (JUSNL), Jharkhand Bijli Vitaran Nigam Limited (JBVNL), Farakka Super Thermal Power Station (Farakka STPS), Power Grid Corporation of India Limited (PGCIL) as Respondents and Union of India (UOI) as a Proforma Respondent.

Submissions of the Petitioner (ECL)

10. The Petitioner has submitted that it had made the following commercial claims in the Writ Petition No. 17044 of 2015 Before the Hon'ble High Court of Calcutta:

(a) From Jharkhand Bijli Vitaran Nigam Limited (JBVNL):

(i) Refund of additional demand charge paid by ECL to JBVNL towards consumer point LM-46 and LM-47 of Rajmahal area: The Petitioner has submitted that Rajmahal mine is receiving HT power through JBVNL at two metering points LM-46 and LM-47. Contract demand for these 2 points were 3000 kVA since inception. Maximum demand exceeded the contract demand at LM-46 from March 2003 and at LM-47 from October 1996. Up to November 2011, JSEB was not imposing any additional demand charge for LM-46 and LM-47 but was asking for submission of additional security deposit only. December 2011 onwards, JSEB started

imposing additional demand charge for the two points which the Petitioner paid under protest. The Petitioner's contention is that since the cost of construction of the FLT system and its maintenance was being borne by the Petitioner and JSEB has been allowed to utilize the FLT system for distribution out of ECL area, the Petitioner should not be made to bear the additional demand charge and additional security deposit. Since the issue could not be sorted out even after taking up the case with JSEB, the Petitioner made a claim of Rs.1.87 crore which it had paid to JBVNL up to April 2015.

(ii) JSEB (predecessor of JBVNL) stopped granting 3% voltage rebate for LM-46 consumers from June 2014 and claimed Rs. 55.29 lakh which they had paid during March 2013 to April 2014. The Petitioner claimed an amount of Rs. 0.45 crore that it had paid till the month of April 2015.

(b) From Jharkhand Urja Sancharan Nigam Limited (JUSNL):

(i) JUSNL has been supplying bulk power to the districts of Dumka and Godda in the State of Jharkhand by using the FLT system installed and maintained by the Petitioner. Since 80% of the load is being supplied by JUSNL through the FLT system, the Petitioner claimed Rs.32.97 crore which is 80% of the O&M cost borne by the Petitioner up to April 2015.

(ii) The Petitioner also claimed lease rent from JUSNL for using a part of Lalmatia sub-station.

11. The Petitioner has submitted that as per the directions of Hon'ble High Court of Calcutta (quoted in para 7 above), it took up the matter with JUSNL and JBVNL

several times. In the meeting held on 18.1.2018 in the office of MD, JUSNL, the Petitioner placed its commercial claims such as 3% voltage rebate for LM-46 consumer point at Rajmahal area, additional demand charge for LM-46 and LM-47, waiver of additional security deposit for enhancement of contract demand of LM-46 and LM-47, payment of wheeling charge for use of FLT system to Petitioner, sharing part of O&M expenditure on FLT system and competitive tariff for ECL points etc. The Petitioner was advised to approach JBVNL since these claims were related to JBVNL. JUSNL expressed its willingness to take over the O&M of FLT system on the same terms and conditions as with NTPC. The Petitioner took up the case with JBVNL with regard to the enhancement of contact demand and other claims and after discussion, deposited the additional security deposit for LM-46 and LM-47 in the form of bank guarantee and made payment of arrear up to May 2019 against LM-46 for enhancement of load under protest.

12. The Petitioner has further submitted that a meeting was held on 13.12.2018 at the instance of ERPC to discuss the implementation of protection audit report of ERPC in connection with repeated interruption of power supply from 220/132/33 kV Lalmatia sub-station. In the said meeting, the Petitioner agreed to hand over the maintenance of the FLT system to JUSNL with the same terms and conditions as they are having with NTPC, provided that JUSNL agrees to bear the transmission charges to the extent of use including arrears to the Petitioner. The Petitioner further agreed to hand over the FLT system to JUSNL at some mutually agreed cost taking into consideration the depreciation of the assets and the increased utilization of the assets by Jharkhand over the years for meeting its distribution load. JUSNL agreed to take over the maintenance of the FLT system as per the terms and conditions that the Petitioner was having with NTPC. JUSNL also agreed to take over the FLT

system for which the financial modalities and intricacies for transfer of the assets needed to be worked out. It was decided that if the Petitioner and JUSNL agree on the decision in writing, a committee of experts may be constituted by ERPC for necessary computation. A meeting was held between the Petitioner, JUSNL and NTPC on 28.1.2019 in which the Petitioner agreed in principle to hand over the assts of FLT system to JUSNL based on necessary cost computation by ERPC taking into consideration the depreciation of assets and the increased utilization of the 220 kV FLT system by JUSNL for meeting its distribution load over the years. NTPC reiterated its desire to be relieved from its responsibility of O&M of the FLT system. However, JUSNL did not agree to the proposal of the Petitioner. JUSNL agreed to take over the O&M of the FLT system on the same terms and conditions as existed between the Petitioner and NTPC. JUSNL further agreed to take over the FLT system if the cost required for upgradation of the system would be borne by the Petitioner.

13. In the 40th TCC and ERPC Meetings held on 15th and 16th March 2019 at Jodhpur, it was pointed out that since the Petitioner is not a transmission licensee, as such the Petitioner may not be entitled to transmission charges under the prevailing regulations. The Petitioner proposed to transfer the ownership of the FLT system to JUSNL at zero cost on as is where is basis provided necessary investment for upgradation as recommended by protection audit team of ERPC are made by the Petitioner and JUSNL should also ensure uninterrupted supply of power to the coal mine of the Petitioner at Lalmatia. JUSNL representative agreed to look into the proposal and convey acceptance after consulting the higher authorities. The Petitioner also raised the issue of refund of additional O&M charges by NTPC and was advised to settle the issue bilaterally with NTPC. JUSNL vide its letter dated

12.6.2019 informed the Petitioner that considering the gravity of the situation deliberated in the 40th ERPC and TCC meeting, JUSNL is in principle agreeable to take over the FLT system at zero cost on “as is where is” basis. As regards the uninterrupted power supply, JUSNL would make its best efforts but the same is possible after necessary upgradation. JUSNL proposed to sort out the modalities of transfer of assets of FLT system and its O&M after consultation with NTPC and the Petitioner.

14. The Petitioner has made the following claims in the present petition.

(a) From JUSNL:

- (i) Payment of transmission charge to ECL to the extent of use of FLT system in past years.
- (ii) Payment of written down value of the FLT system.

(b) From JBVNL:

- (i) Special tariff for ECL taking into consideration the investment made by ECL for developing FLT system.
- (ii) Refund of additional security deposit already submitted by ECL in the form of BG.
- (iii) Refund of additional demand charge paid by the petitioner to JBVNL from Dec. 2011 to May 2019 for LM 46 and Dec. 2011 to June 2019 for LM 47.
- (iv) Refund of arrear deposited by the Petitioner in June 2019 comprising principal and interest amount towards the additional demand charge for the period from August 2011 to November 2011 and 3% voltage rebate for the period from March 2013 to April 2014.

(c) From NTPC:

- (i) Refund of Rs. 4.48 crore. paid in excess to NTPC as O&M charges for maintaining the FLT system.

15. The Petitioner, in support of its contention and prayers in the petition, has submitted as under:

- (a) With introduction of open access for use of electricity, the Petitioner is entitled to receive supply of electricity directly from Farakka STPS of NTPC

through its FLT system as Section 10(2) read with Section 42(3) of the Act entitles the Petitioner for wheeling such electricity in accordance with the regulations of JSERC upon payment of the wheeling charges.

(b) FLT system is an inter-State transmission system passing through the States of West Bengal and Jharkhand. ERPC has no jurisdiction under Section 29(5) of the Act to decide any dispute in regard to the integrated operation of the regional grid. It is the Central Commission which has power under Section 79(1)(c) of the Act to regulate the inter-State transmission of electricity. Therefore, ERPC has no authority to call upon and direct the Petitioner to hand over the assets of the FLT system to JUSNL and accordingly, the directions passed by ERPC vide its minutes dated 24.3.2015 are illegal, arbitrary and de hors of the provisions of the Act.

(c) With operation of directions given by ERPC, the Petitioner would suffer huge loss in respect of capital investment incurred for installation of the FLT system as well as payment of wheeling charges, reversal of JBVNL bill for contract demand extension upto Rs. 1.87 crore and reversal of penalty already paid i.e. Rs. 0.45 crore for stoppage of voltage rebate of 3% electricity charges and electricity charges at the tariff rate of Farakka STPS/ Kahalgaon STPS of NTPC.

(d) Unless and until the operation of the impugned minutes/resolution adopted in the meeting of ERPC dated 24.3.2015 is stayed, the Petitioner is going to suffer irreparable loss. Hon'ble High Court of Calcutta has made a reference under Article 226 of the Constitution of India to the Commission to consider all

aspects of the disputes and decide them and place them before the Hon'ble High Court.

16. The Petitioner has made the following prayers in the Petition:

a. Declare that the amount claimed by JSEB Rs. 10,66,050.00 by supplementary bill towards additional demand charge for maximum demand exceeding contract demand for the period: August 2011 to Nov 2011 is unjust and illegal and is without substance.

b. Declare that the amount of Rs 1.87 Crore may be refunded back to the Petitioner which the Petitioner had paid to JBVNL upto April 2015 and the interest on the same may be awarded till realisation.

c. Declare that amount of Rs 0.45 Crore may be refunded back to the Petitioner which the Petitioner has paid to JBVNL upto April 2015 i.e., 3% voltage rebate for LM-46 and the interest on the same may be awarded till realisation.

d. Declare that the amount of Rs 32.97 Crore (up to April 15) and cost thereafter up to date may be refunded back to the Petitioner which is 80% of the O&M cost borne by Petitioner upto April 2015 for O&M of the said line up to that date, i.e. Share of Revenue for using FLTS by JUSNL and the interest on the same may be awarded till realisation.

e. Declare that the Petitioner is entitled for lease rent from JUSNL for using a part of Lalmatia Sub-Station as awarded by Order dated 23.09.2016 in WP No.17044 of 2015 by High Court of Calcutta.

f. Declare that the total wheeling charge claimable by the Petitioner to JUSNL amounting to Rs.76.03 Crore and cost thereafter up to date maybe awarded.

g. Costs incidental thereto;

h. Pass any such other reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case."

Reply of the Respondent No. 3 (JUSNL)

17. The Respondent No. 3 (JUSNL) vide affidavits dated 27.9.2019 and 28.1.2020 has submitted the following:

(a) As per minutes of 40th ERPC & TCC meeting held on 15th & 16th March 2019, the Petitioner proposed to hand over the ownership of 220 kV FLT

system to JUSNL at zero cost on as is where is basis provided necessary investment for upgradation as recommended by protection audit team of ERPC are made by JUSNL and that JUSNL should also ensure uninterrupted supply of power to ECL coal mines at Lalmatia. JUSNL in its letter dated 12.6.2019 has given its consent to take over the 220 kV FLT system of ECL at zero cost on as is where is basis and requested the Petitioner for a meeting to decide the modalities of transfer of assets, its O&M and other necessary formalities with NTPC and the Petitioner. The response from Petitioner is still awaited.

(b) NTPC is neither a transmission licensee nor has experience for O&M of transmission assets and it only undertook operation of transmission assets and never maintained it due to which the complete FLT system is in very poor condition which is obvious from the protection audit report of ERPC. The Petitioner had illegally authorized NTPC for O&M and paid for it arbitrarily. Further, calculation of wheeling charge by the Petitioner is illegal since the Petitioner is neither a transmission licensee nor its claim is supported by an order of the appropriate Regulatory Commission.

(c) As per Clause 3.2.4 of the Jharkhand State Electricity Regulatory Commission (Electricity Supply Code), Regulations, 2005 and Clause 3.2.5 of Jharkhand State Electricity Regulatory Commission (Electricity Supply Code), Regulations, 2015, the service line/or dedicated distribution facility, even though paid for by the consumer, shall remain the property of the licensee who shall maintain it and who shall use it for the supply of electricity to any other person provided that such supply should not adversely affect the supply to the consumer who has paid for it. Therefore, the distribution licensee may use the

FLT system for power supply to other consumers without affecting supply to the Petitioner adversely.

(d) The erstwhile BSEB, JSEB and presently JUSNL used FLT system as per the provisions of the Indian Electricity Act, 1910, the Indian (Supply) Act, 1948, the Electricity Act, 2003, the Jharkhand State Electricity Regulatory Commission (Electricity Supply Code), Regulations, 2005 and the Jharkhand State Electricity Regulatory Commission (Electricity Supply Code), Regulations, 2015.

Reply of the Respondent No. 1 (ERPC)

18. The Respondent No.1 (ERPC), vide affidavit dated 17.10.2019 has submitted the following:

(a) 220 kV FLT system is a major part of National Grid and it supplies reliable power to various parts of Jharkhand such as Lalmatia, Sahebganj, Dumka, Pakur, Deoghar etc. The FLT system has a crucial role in successful islanding of Farakka STPS with matching load of Jharkhand, as per the defence plan formulated on the recommendations of the Enquiry Committee after the grid disturbance of 2012, in the event of severe grid contingency. If there is total blackout of Kahalgaon STPS or Farakka STPS, FLT system would play a vital role in extending start-up power from one station to the other. Due to the bad condition and continuous tripping of the 220/132/33 kV Lalmatia substation, Protection Committee of ERPC, in its 69th meeting decided to conduct a protection audit of the substation, where it found that due to the lack of O&M, the entire switchyard was in shabby condition and human safety is endangered

due to improper earthing, ageing equipment, lack of graveling and plain cement concrete.

(b) As regards the O & M of FLT system, NTPC contented that being a generating company, it lacked the expertise and was facing problems in O&M of the FLT system. In the meeting held on 13th and 14th February 2015, the Petitioner was advised to hand over O&M part to JUSNL on chargeable basis while retaining the ownership of the FLT system with them. Aggrieved by this decision of EPRC, the Petitioner filed writ petition No. 17044(W) of 2015 before the Hon'ble High Court of Calcutta. Hon'ble High Court of Calcutta in its Judgment dated 23.9.2016 directed NTPC to continue the O&M till the lawful transfer of the assets and O&M activity of FLT system to any other authority. Aggrieved by the judgment of the Hon'ble High Court, NTPC filed C.A.N No. 11255 of 2016 in Writ Petition No. 17044 of 2015 before the Hon'ble High Court of Calcutta for stay of the said judgment. Pending the appeal of NTPC, in view of repeated and uncoordinated disturbance in FLT system, meetings were held at ERPC Secretariat on 13.12.2018 and at JUSNL Headquarters at Ranchi on 28.1.2019. In 40th TCC meeting on 15.3.2019, the Petitioner proposed to handover the FLT system to JUSNL at zero cost on "as is where is basis" provided necessary investment for up-gradation as recommended by production audit of EPRC was made by JUSNL and JUSNL ensured uninterrupted supply of power to the Petitioner's coal mines at Lalmatia. JUSNL on 12.6.2019 agreed to take over the FLT system at zero cost on "as is where is" basis and requested the Petitioner for a meeting to discuss about the transfer of the assets of FLT system and its O&M.

(c) ERPC in the interest of the stability and security of the integrated grid took the aforesaid actions as the facilitator for resolution of the issues considering the criticality of ISTS in the regional as well as national grid.

Submissions by Respondent No.2 & 5 (NTPC and Farakka STPS)

19. The Respondent No.2 (NTPC) and Respondent No.5 (Farakka Super Thermal Power Station) vide written submissions dated 27.9.2019 have submitted as under:

(a) NTPC is not the owner of the FLT system and had constructed the FLT system to give supply to the Petitioner with effect from 14.6.1990. However, the Petitioner was never a direct consumer of NTPC and was being supplied electricity by the then BSEB. It was in the year 1985 that a decision at high level was taken for NTPC to construct the FLT system. At that time, NTPC had the responsibility of developing the generation as well as transmission assets at national level. In 1989, NTPC was bifurcated and it retained only generation business. In 1992 PGCIL was formed to take over the transmission business. From 1990 onwards, NTPC has been raising the issue of takeover of the FLT System and has only been carrying on the O&M for the FLT system. In several meetings, NTPC expressed its inability to undertake the O&M activities of the FLT system. In the 29th TCC Meeting of ERPC held on 13.12.2014, it was decided to handover the FLT system to JUSNL for the purpose of O&M on chargeable basis. A special meeting of ERPC was convened on 24.3.2015 when it was decided that O&M of FLT system would be handed over to JUSNL within three months.

(b) The above decision was challenged by the Petitioner before the Hon'ble High Court of Calcutta. Hon'ble High Court vide its order dated 23.9.2016 directed all parties to work out the modalities for transfer of the ownership and O&M of FLT system to an authority by the process of consultation and till such time NTPC was directed to operate and manage the FLT system. Since NTPC does not have the expertise nor the personnel to maintain 82.11 km of FLT system, it challenged the decision of the Hon'ble High Court dated 23.9.2016 in C.A.N. No.11255 of 2016 from which a reference has been received by the Commission.

(c) FLT system is passing through the State of West Bengal and Jharkhand. Since the Petitioner is a customer of JUSNL, in so far as tariff is concerned, it would be better if JUSNL takes over the O&M of the FLT system. In the alternative, PGCIL which is the inter-State transmission licensee can be asked to take over the O&M. The ownership of the line can either remain with ECL or be handed over to JUSNL/PGCIL subject to working out of the commercial arrangement.

(d) The Petitioner has a claim for refund of Rs.4.48 crores by NTPC as excess O&M charges paid to NTPC for maintaining the FLT system. Since this issue was never raised before the Hon'ble High Court in Writ Petition No.17044 of 2015 and the grounds before the Hon'ble High Court was for quashing the decision dated 24.3.2015 taken by ERPC for handing over FLT system to JUSNL, the only issue which is to be decided by the Commission in terms of the reference is that who should take over the ownership and maintenance of

FLT system. Any other issue with regard to charges paid by the Petitioner to NTPC for the past period cannot be gone into in the context of the reference.

Rejoinder by the Petitioner

20. The Petitioner in its rejoinder vide affidavit dated 12.12.2019 to the reply of JUSNL has reiterated its submissions made in the main petition along with other claims which are not repeated for the sake of brevity.

21. The Petitioner in its rejoinder to the reply of NTPC and Farakka STPS has submitted that Hon'ble Division Bench of the High Court of Calcutta vide its order dated 10.6.2019 has referred the issues to this Commission to consider all aspects of the disputes and decide on them. Further, the Commission in its RoP dated 11.7.2019 directed the Petitioner to file a petition covering all issues and making all necessary parties as respondents. Therefore, there is no bar on the Petitioner to refer the issues of refund of Rs.4.48 crore by NTPC. The Petitioner has submitted that since 1991 till 2009 (3 months), the Petitioner had paid the O&M charges @2% considering the capital cost of Rs.22.63 crore whereas the Petitioner is paying @2% considering the actual capital cost of Rs.17.864 cr. Therefore, the Petitioner is seeking refund of Rs. 4.48 Crore which was paid by the Petitioner.

Analysis and Decision

22. The factual matrix of the case in brief leading to the reference by the Hon'ble High Court of Calcutta under Article 226 of the Constitution of India is that in a meeting held on 30.3.1985 attended by representatives of NTPC, CEA, Department of Coal, Department of Power under the chairmanship of the then Union Minister for Coal, Steel and Mines, it was decided that NTPC would construct the FLT system on

deposit basis which would be funded by the Petitioner in order to facilitate supply of power directly from Farakka STPS to the Lalmatia mines (Rajmahal area) of the Petitioner. Though the Petitioner had demanded for supply of power at concessional tariff in lieu of the cost of the FLT system built by it, no decision in this regard is available on record. FLT system consists of the Farakka-Lalmatia transmission line, 220/132/33 kV sub-station at Dhankunda (Lalmatia) and sub-station at the end of Farakka STPS. The transmission line is 82.11 km long which traverses through the States of West Bengal (9.5 km) and Jharkhand (erstwhile Bihar) (73.6 km). FLT system was built at a cost of Rs.17.864 crore and was commissioned on 14.6.1990. NTPC has been operating and maintaining the FLT system since its construction in June 1990 in accordance with the O&M contract entered into with the Petitioner. As per the decision taken in the meeting dated 23.10.1991 under the Chairmanship of the then Additional Secretary (Coal), the ownership of the FLT system would rest with the Petitioner whereas operation and maintenance of the FLT system would continue to be carried out by NTPC on payment of O&M charges by the Petitioner. After the transmission works were hived off from NTPC consequent upon creation of PGCIL in 1992, NTPC lacked the required manpower and expertise to maintain FLT system. Though attempts were made in the year 1992 to hand over the O&M to BSEB, it did not materialize as BSEB insisted on transfer of ownership of FLT system to it which the Petitioner did not agree. It is pertinent to mention that even though the Petitioner built FLT system at its own cost with a purpose to transfer power directly from Farakka STPS of NTPC to its mines in Lalmatia, it continued to be the consumer of BSEB/ JSEB/ JBVNL. FLT system helped JUSNL to evacuate its share of power from Farakka STPS of NTPC and also to supply power to the consumer load of the Petitioner. Subsequently, the Petitioner made attempt to avail

power through open access from Farakka STPS after coming into force of the Electricity Act, 2003. However, in the absence of allocation of power to the Petitioner from Farakka STPS of NTPC by the Ministry of Power, the Petitioner could not utilize FLT system to avail power through open access. In a meeting held on 16.6.2014 between the Petitioner and NTPC, the Petitioner agreed to hand over the maintenance of FLT system to PGCIL/ JUSNL. Subsequently the matter was discussed in ERPC and it was decided that FLT system would be handed over to JUSNL and accordingly the Petitioner was asked to hand over FLT system to JUSNL.

23. The Petitioner challenged the said direction before the Hon'ble High Court of Calcutta in Writ Petition No.17044 of 2015. Hon'ble Single Judge in order dated 23.9.2016 issued the following directions:

“Since the transmission is inter-state and it also provides an alternative system to provide electricity to the entire region in case of National Grid failure, any dealing with the said transmission system should not be taken lightly by the authorities. The entire modalities and paraphernalias of ensuring that there is a lawful transfer of this transmission line or the functions of maintenance and operation of it to an authority or body are to be carefully worked out by ECL, the various authorities under the Electricity Act, 2003, the Central and the respective State governments. In my opinion this impasse has to be resolved expeditiously. Till it is done, NTPC will continue to operate and manage the transmission system under the ownership of ECL. JUSNL will continue with the distribution of this electricity to the coal mines of ECL.”

Hon'ble Single Judge had directed the Petitioner, various authorities under the Electricity Act, 2003, the Central Government and respective State governments to work out the modalities and paraphernalia for a lawful transfer of FLT system or the functions of maintenance and operation of FLT system to an authority or body. NTPC was directed to continue to maintain and operate FLT system till the impasse with respect to the O&M or transfer of ownership of FLT system is resolved.

24. NTPC filed C.A.N. No.11255 of 2016 before the Division Bench of the Hon'ble High Court of Calcutta challenging the directions of the Hon'ble Single Judge. Hon'ble Division Bench of the High Court has not stayed or set aside the order of the Hon'ble Single Judge including the directions to NTPC to continue to maintain and operate FLT system. The Hon'ble Division Bench in its order dated 10.6.2019 has made the following observations:

"The issues which arose for consideration before the learned Single Judge and which continue to arise for decision in this appeal relate to different aspects touching the Eastern Coalfield Limited which is a consumer and transmission company and generating institution.

The appellant before us is NTPC Limited which is a generating company and is also involved in the activity of transmission and providing energy. With the passage of time and change in the laws governing the field, different practical issues arose regarding the modality of operation and maintenance of the transmission lines by the different institutions. We see that the issues relate to the State of Jharkhand as well as NTPC."

Further, Hon'ble High Court has made reference to the Commission with the following directions:

"Therefore, we are of the firm view that nothing will stand in the way of the Central Electricity Regulatory Commission which is represented before us by the learned Additional Solicitor General being made the platform for consideration of the disputes including eligibility of the Distribution and Generating Company which is involved in this litigation. This will also enable the consumer, namely, Eastern Coal fields Limited and others to appropriately utilize that platform to have the issues settled.

The appeal in hand cannot be treated as one of the usual adversarial litigations. It has to be considered as a matter which deserves to be liquidated through requisite negotiations and decision making in exercise of statutory power by the Central Electricity Regulatory Commission. Since there was some debate at the bar during the course of hearing of this matter as to whether the Central Electricity Regulatory Commission has the power under the Act to adjudicate on this issue, we clarify that this order be treated as a reference to it by this Court in exercise of power under Article 226 of the Constitution of India to enable the Central Electricity Regulatory Commission to consider all aspects of the disputes and decide on them and place its decision before this court within a period of four months from the date of receipt of this order."

25. From the above order of the Hon'ble Division Bench read with the order of the Hon'ble Single Judge of the Calcutta High Court, it emerges that the Commission is

required to deal with the following disputes involving the Petitioner, JUSNL and NTPC through adjudication, negotiation and decision making:

- (a) Transfer of the transmission assets of FLT system from the Petitioner to an appropriate authority or body; or
- (b) Transfer of O&M of FLT system from NTPC to an appropriate authority or body; and
- (c) Other claims of the Petitioner qua JUSNL/JBVNL and NTPC.

26. The present petition has been instituted by the Petitioner, Eastern Coalfield Limited, on the directions of the Commission passed on 11.7.2019 on the basis of the reference received from the Hon'ble High Court of Calcutta under Article 226 of the Constitution of India vide the order dated 10.6.2019 in M.A.T. No.1981 of 2016 in C.A.N. No.11255 of 2016. In response to the petition, replies have been filed by JUSNL, NTPC, ERPC and the Petitioner has filed its rejoinders. The Petitioner's claims vis-à-vis JUSNL, NTPC and JBVNL and the prayers to that effect made in the Petition are extracted in paragraph 14 of this order.

27. The Commission held hearings on 27.9.2019, 25.11.2019, 18.12.2019 and 25.2.2020. The Commission also explored the possibility of resolving the outstanding issues between the parties through discussion and negotiation by holding a meeting on 17.12.2019 under the aegis of Member (Technical) of the Commission with the participation of the representatives of the Petitioner, JUSNL, NTPC, PGCIL and ERPC. In the said meeting, NTPC expressed its inability to maintain FLT system any further. JUSNL expressed its consent to accept transfer of FLT system at "zero cost" without any liability in terms of the decision in the 40th ERPC and TCC meetings held on 15.3.2019 and 16.3.2019 at Jodhpur. The Petitioner was allowed to submit its proposal after consulting the management of ECL. The Petitioner vide its letter dated

28.12.2019 expressed its willingness to hand over FLT system to JUSNL on “as is where is basis” at zero cost.

28. In the light of the above, the Commission is proceeding to deal with the various issues arising out of the reference of the Hon’ble High Court as have been outlined in para 25 of this order.

(A) Transfer of the transmission assets of FLT system from the Petitioner to an appropriate authority or body

29. Hon’ble Single Judge of the High Court of Calcutta in order dated 23.9.2016 observed that since FLT system is an inter-State line and provides an alternative system for transmission of electricity in case of national grid failure, the said FLT system should not be taken lightly by the authorities. Hon’ble Single Judge directed that the entire modalities and paraphernalia for lawful transfer of FLT system or the functions of its maintenance and operation to an authority or body are to be carefully worked out by the Petitioner, the various authorities under the Act, the Central and State Governments expeditiously. Hon’ble Division Bench of the High Court has directed that the Commission shall consider all issues and give its decision thereon and place it before the Hon’ble High Court.

30. FLT system is connected to Farakka STPS of NTPC at one end and Dhankunda (Lalmatia) sub-station of JUSNL at the other end. FLT System traverses through the States of West Bengal and Jharkhand. Section 2(36)(i) of the Electricity Act, 2003 defines inter-State transmission system as under:

*“(36) “inter-State transmission system” includes-
(i) Any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;”*

In terms of the above provisions of the Act, FLT system which is used for conveyance of electricity from Farakka STPS of NTPC located in the State of West Bengal to the Dhankunda (Lalmatia) sub-station which is located in the State of Jharkhand is an inter-State transmission system.

31. FLT system was built by the Petitioner through NTPC on deposit basis which was commissioned in the year 1990. FLT system is operated and maintained by NTPC on payment of O&M charges by the Petitioner. However, FLT system is being used by JUSNL (and its predecessors such as JSEB and BSEB) for evacuation of power from Farakka STPS to Dhankunda (Lalmatia) sub-station. It is the case of the Petitioner that it should be paid the transmission charges or wheeling charges by JUSNL for use of FLT system.

32. Let us consider the legal provisions in the Act with regard to the ownership, maintenance and operation of a transmission system. Section 12 of the Act provides that no person shall transmit electricity unless he is authorized to do so by a license issued under Section 14 of the Act or is exempt under Section 13 of the Act. Section 13 pertains to any local authority, Panchayat Institution, user's association, co-operative societies, non-governmental organisations or franchisees. The Petitioner does not fall under any of the categories. Under Section 14 of the Act, the Appropriate Commission may on an application made under Section 15 of the Act grant any person license to transmit electricity as a transmission licensee. Transmission licensee has been defined in the Act "as a licensee to establish or operate transmission lines". Therefore, the Petitioner cannot own or operate or maintain transmission lines unless it is authorized by a license issued by the appropriate Commission to transmit electricity.

33. FLT system also does not fulfill the conditions of a dedicated transmission line. Dedicated transmission line has been defined in Section 2(16) of the Act as under:

“dedicated transmission lines” means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations, or the load centre, as the case may be;”

Further, Section 10(1) of the Act provides as under:

“(1) Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made thereunder”.

The generating company under the above provision is authorized to establish, operate and maintain dedicated transmission lines. In accordance with Electricity (Removal of Difficulty) (fifth) Order, 2005 issued by the Central Government in exercise of its power under Section 183 of the Act, a generating company or a person setting up a captive generating plant shall not be required to obtain license under the Act for establishing, operating or maintaining a dedicated transmission line. FLT system of the Petitioner emanating from Farakka STPS of NTPC cannot be considered as a dedicated transmission line, as it is neither owned by NTPC nor the Petitioner is a generating company.

34. Thus, FLT system cannot be owned, maintained or operated by the Petitioner without obtaining a transmission license under the Act. Therefore, the ownership of FLT system by the Petitioner is de hors the provisions of the Act. The Petitioner should either seek a license for the FLT system or should hand over the FLT system to a suitable body or agency who is authorized under the Act to undertake the business of transmission of electricity.

35. Under the Act, the Central Transmission Utility, State Transmission Utility and the appropriate Government undertaking transmission of electricity are deemed transmission licensees and are not required to obtain a license. Therefore, FLT system could be transferred to either Central transmission Utility or State Transmission Utility or an appropriate Government which transmits electricity or to a transmission licensee. However, neither the Central Government nor the Jharkhand Government undertakes transmission of electricity. Further, a transmission licensee has to be selected through the process of competitive bidding, which is time consuming and involves long process, which is not ideal or desirable considering the condition of the FLT system. The functions of Central Transmission Utility and State Transmission Utility of Jharkhand are currently being discharged by Power Grid Corporation of India Limited (PGCIL) and Jharkhand Urja Sancharan Nigam Limited (JUSNL) respectively. Under Section 38(2)(a) of the Act, Central Transmission Utility has been vested with the functions to undertake transmission of electricity through inter-State transmission system. Similarly, under Section 39(2)(a), State Transmission Utility has been vested with the function to undertake transmission of electricity through intra-State transmission system. Since Central Transmission Utility has been vested with the function to undertake transmission of electricity through inter-State transmission system, Central Transmission Utility can be one choice for transfer of FLT system, which is an inter-State transmission system in terms of Section 2(36)(i) of the Act. JUSNL that is the State Transmission Utility for the State of Jharkhand, is another choice for such transfer. We have not considered the State Transmission Utility of the State of West Bengal for such transfer since FLT system is not connected to any sub-station in West Bengal. In this regard, we note that the matter has been discussed by the constituents of the Eastern Region in the meetings

of Eastern Regional Power Committee (ERPC) and the members of ERPC are of the view that the FLT system should be transferred to the State Transmission Utility whose function is being currently discharged by JUSNL.

36. Section 2(55) of the Act defines Regional Power Committee as “a committee established by resolution by the Central Government for a specified region for facilitating the integrated operation of the power systems in that region.” Central Government has demarcated the whole country into five regions and ERPC is one of them consisting of the States of Bihar, Jharkhand, Odisha, Sikkim and West Bengal. Section 29(4) of the Act deals with the role of Regional Power Committee as under:

“(4) The Regional Power Committee in the region may, from time to time, agree on matters concerning the stability and smooth operation of the integrated grid and economy and efficiency in the operation of the power system in that region.”

Therefore, the Regional Power Committees evolve consensus among the constituents on matters concerning stability and smooth operation of the integrated grid and economy in the operation of the power system in the concerned region. In discharge of those functions, ERPC has discussed the issue of transfer of FLT system as a facilitator in the interest of the stability and security of the integrated grid for resolution of the issue considering the criticality of FLT system in the regional and national grid.

37. The crucial role played by FLT system has been explained by ERPC in its reply dated 17.10.2019 which is extracted as under:

“220 kV Farakka-Lalmatia transmission system plays an important role in the National Grid. With an ISGS like Farakka STPS at one end, this line provides a very reliable source of power supply to Lalmatia, Sahebganj, Dumka, Pakur and Deoghar etc. loads of Jharkhand. This line has a crucial role in successful islanding of Farakka STPS with matching load of Jharkhand, as per the defence plan formulated, in the event of severe grid contingency. This islanding scheme is designed on recommendation of the enquiry committee formed after the grid disturbance of 2012. Moreover, if there is a total blackout of Farakka STPS or Kahalgaon STPS, under

exceptional conditions, this line would play a vital role in extending start-up power from one station to the other.”

Thus, FLT system, apart from playing crucial role in the national grid and islanding scheme for Farakka STPS with matching load from Jharkhand in the event of severe grid contingency, also provides reliable power supply to load centers of Jharkhand, namely, Lalmatia, Sahebganj, Dumka, Pakur and Deoghar.

38. After taking all relevant factors into consideration, the Commission is of the view that FLT system should be transferred to JUSNL which is the State Transmission utility of Jharkhand for the following reasons:

(a) FLT system passes through the territories of West Bengal and Jharkhand. However, it is not connected to any sub-station in West Bengal. It is connected to the sub-station of Lalmatia in the State of Jharkhand and is used for transmission of electricity for meeting the loads of Lalmatia, Sahebganj, Dumka, Pakur and Deoghar in the State of Jharkhand. The distribution companies of Jharkhand will be the beneficiaries of the FLT system and shall bear the transmission charges after the assets are transferred to JUSNL. In other words, FLT system shall be utilized for evacuation of power for exclusive use by the State of Jharkhand.

(b) Under Section 79(1)(c) of the Act, this Commission is vested with the power to regulate inter-State transmission of electricity and under Section 79(1)(d) of the Act, it is vested with the function to determine the tariff of the inter-State transmission system. However, an exception has been carved out to the exercise of power by the Central Commission with regard to inter-State transmission of power under Section 64(5) of the Act which provides as under:

“(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply or transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.”

Section 79 of the Act appears in Part X. By virtue of the non-obstante clause in Section 64(5) of the Act, notwithstanding the transmission line being an inter-State line, its tariff can be determined by Jharkhand State Electricity Regulatory Commission on a joint application filed by JUSNL and the concerned distribution licensees of Jharkhand who are supplied with the electricity on FLT system. It is pertinent to note that FLT system is being used for exclusively meeting the load of Jharkhand.

(c) JUSNL is planning and implementing a second 220 kV Farakka-Lalmatia transmission line as per the planning of the Jharkhand System. In this connection, para 6 of the minutes of the Special Meeting on *“Implementation of Protection Audit Report of ERPC in connection with Repeated Interruption of Power Supply from 220/132/33 kV Lalmatia sub-station”* held on 13.12.2018 is extracted as under:

“6. JUSNL expressed that they are agreeable to take the maintenance of the Farakka-Lalmatia system as per the present terms and conditions that ECL is having with NTPC. JUSNL is also agreeable to take over the asset from ECL. JUSNL informed that as per the transmission planning of the Jharkhand system, a second 220 kV Farakka-Lalmatia line is programmed to be commissioned by Jharkhand in immediate future. Owning the existing infrastructure of Farakka-Lalmatia system would be an added advantage for JUSNL and to ECL as well as this will ensure reliable supply to ECL coal mines. However, the financial modalities and intricacies for transfer of the asset needs to be worked out in details and should be mutually agreed upon.”

Since JUSNL is constructing another 220 kV Farakka-Lalmatia transmission line as part of the transmission planning of Jharkhand, it will be appropriate to transfer FLT system to JUSNL in the interest of smooth operation of the grid.

39. The protection audit of the Lalmatia sub-station carried out by ERPC has come to the conclusion that the sub-station is in an extremely poor condition due to lack of maintenance, which exposes the human life in the switchyard to threat due to improper earthing, aging equipment, lack of gravelling and PCC etc. and needs complete renovation. However, this requires resolution of the ownership issue. The matter was discussed in the Protection Audit Meeting held on 13.12.2018 at ERPC wherein the Petitioner agreed in principle to transfer FLT system to JUSNL and that JUSNL also agreed to take over the same subject to mutually agreed financial modalities and intricacies for transfer of the assets.

40. Thus, it is observed that the Petitioner and JUSNL have been exploring the modalities of transfer of the FLT system. The matter was further discussed with the participation of NTPC and the Petitioner under the Chairmanship of Managing Director, JUSNL on 28.1.2019, wherein the Petitioner agreed in principle to hand over the assets to JUSNL based on necessary cost computation by ERPC, taking into consideration the depreciation of the assets and the increased utilization of FLT system by Jharkhand for meeting its distribution load over the years. However, the proposal was not acceptable to JUSNL, which wanted that the Petitioner should hand over the assets and agree to bear the cost required for upgradation of the system. The matter was further discussed in the 40th TCC and ERPC meeting held on 15.3.2019 and 16.3.2019. Following deliberations and decisions were taken in the said meeting:

“There were detailed deliberations in the TCC meeting. During deliberation it was pointed out that ECL is not a transmission licensee as such they may not be entitled to collect the transmission charges under any prevailing regulation. Therefore, collecting transmission charges may lead to legal challenges.

Thereafter ECL proposed to hand over the ownership of 220 kV FLTS to JUSNL at zero cost on as is where is basis provided necessary investment for upgradation as

recommended by protection audit team of ERPC are made by JUSNL and JUSNL should also ensure uninterrupted supply of power to ECL coal mines at Lalmatia.

JUSNL representative agreed to look into this proposal and agreed to convey their acceptance after consulting the higher authorities.

ECL raised the issue of refund of additional O&M charges by NTPC. ECL was advised to settle the issue bilaterally with NTPC.”

41. Subsequently, JUSNL vide its letter dated 12.6.2019 agreed in principle to take over the FLT system at zero cost on “as is where is basis”.

42. In the instant Petition, the Petitioner has projected its claims against JUSNL, JBVNL and NTPC. The Petitioner has projected the following claims qua JUSNL:

- (a) Payment of transmission charge to ECL to the extent of use of FLT system in past years; and
- (b) Payment of written down value of FLT system.

43. The Commission vide Record of Proceedings dated 18.12.2019 had directed the Petitioner to submit proposal after consulting its management. The Petitioner vide its letter dated 28.12.2019 has conveyed the following:

“1. ECL shall hand over the asset of FLTS on “AS IS WHERE IS BASIS” at Zero Cost i.e. without its claim towards transmission charge for past use of FLTS by JUSNL and depreciation charge of line. However, this is subject to final approval by CIL/Ministry as transferring of asset of FLTS includes transfer of land as well.

2. Except the claim towards transmission charge for past use of FLTS by JUSNL and depreciation charge of line, ECL shall not compromise with any of its claims from JUSNL/JBVNL and NTPC as prayed before Hon’ble CERC vide petition no.280/MP/2019. However, as pointed out in different meetings of ERPC, protection audit report of NTPC and as serious concern is expressed by CERC regarding importance of the FLTS at Eastern part of the country and as the condition of FLTS is poor and need immediate upgradation for further operation, ECL is agreed to handover the line immediately to JUSNL on “AS IS WHERE IS BASIS” at zero cost (without ECL’s claim towards transmission charge and depreciation cost) after approval of CIL/Ministry. JUSNL shall bear the necessary cost for overhauling/ upgradation/ replacement of FLTS and shall maintain the line at their cost thereafter. However, ECL’s claim on different aspects from JUSNL/JBVNL and NTPC (as already prayed in Petition No.280/MP/2019 before CERC by ECL) is to be adjudicated by CERC as the Hon’ble Division Bench referred the matter to Hon’ble Central Electricity regulatory Commission (CERC) to consider all aspects of the disputes and decide on them.”

44. The Commission has taken into consideration the submission of the Petitioner and JUSNL with regard to handing over of FLT system to JUSNL. The Petitioner vide its letter dated 28.12.2019 has confirmed that it is prepared to hand over the FLT system on “as is where is basis” at zero cost i.e. without its claims towards transmission charges for past use of FLT system by JUSNL and depreciation charge of the line. The Petitioner has clarified that since the transfer of assets includes transfer of land as well, transfer is subject to final approval by Coal India Limited/ Ministry of Coal. Since the Petitioner has given up its claims for transmission charges for past use of the FLT system and the depreciation charge of the FLT system based on written down value of the assets as a pre-condition for transfer of the FLT system to JUSNL, the Commission is of the view that the major area of divergence between the Petitioner and JUSNL with regard to transfer of the FLT system stands resolved. Since JUSNL is the State Transmission Utility having experience in planning, development, management and operation of the transmission system within the State and there is no statutory bar in the Act to transfer the FLT system to JUSNL, the direction of the Hon’ble High Court to carefully work out an authority or body for transfer of the FLT system is duly complied with.

45. In the light of the above analysis, the Commission decides the following for resolving the dispute with regard to the transfer of the ownership of FLT system:

- (a) FLT system traverses through the States of West Bengal and Jharkhand and therefore, in terms of Section 2(36)(i) of the Act, is an inter-State transmission system.

(b) Since the Petitioner is not a transmission licensee, the Petitioner cannot own or operate FLT system unless it obtains a transmission license in accordance with the provisions of the Act. Therefore, the ownership, maintenance and operation of the FLT system needs to be transferred forthwith to a transmission licensee or Central Transmission Utility or State Transmission Utility.

(c) Considering the fact that FLT system is being used only for transmission of electricity from Farakka STPS to Lalmatia sub-station of JUSNL, its utility in serving the load of Jharkhand, and a parallel transmission line being built from Farakka STPS to Lalmatia sub-station, it is in the interest of smooth operation of the grid that FLT system should be transferred to JUSNL. Further, even though FLT system is an inter-State transmission system, JSERC is empowered to determine the tariff of the FLT system in terms of Section 64(5) of the Act on the basis of a joint application made by JUSNL and concerned distribution licensee(s) of the State of Jharkhand who is or are receiving electricity through FLT system.

(d) Both the Petitioner and JUSNL have agreed that FLT system be transferred by the Petitioner to JUSNL on “as is where is basis” at zero cost i.e. without the Petitioner’s claim towards transmission charge for past use of FLT system by JUSNL and depreciation charge of FLT system. Accordingly, FLT system be transferred from the Petitioner to JUSNL on “as is where is basis” at zero cost without the Petitioner’s claim towards transmission charge for past use of FLT system by JUSNL and depreciation charge of FLT system.

- (e) The management of the Petitioner and JUSNL shall jointly work out a transfer plan containing preparation of inventories, inspection of assets, legal transfer of title and physical transfer of FLT system and execute the same within a period of six months from the date of this Order.
- (f) After transfer, JUSNL shall have the ownership of FLT system.
- (g) JUSNL shall bear the necessary cost for overhauling/upgradation/replacement of FLT system.
- (h) After the transfer, JUSNL shall file tariff petition before JSERC for determination of the tariff of FLT system.

(B) Transfer of O & M of FLT system from NTPC to an appropriate authority or body

46. FLT system was built by the Petitioner through NTPC on deposit basis. It was decided in a meeting dated 23.10.1991 taken by the then Additional Secretary (Coal), Government of India that O&M of FLT system would continue to be done by NTPC for which O&M charges would be borne by the Petitioner. NTPC has been carrying out O&M of FLT system since the commissioning of FLT system on payment of O&M charges by the Petitioner. NTPC has time and again expressed its inability to carry out O&M of FLT system on account of lack of expertise in the field of transmission. In the meeting held between the Petitioner and NTPC on 16.6.2014, the Petitioner agreed to hand over the O&M of FLT system to PGCIL/ JUSNL. However, in the meeting of ERPC held on 24.3.2015, it was decided that the Petitioner would hand over assets of FLT system to JUSNL which will also save it from payment of O&M charges. Hon'ble Single Judge of the Calcutta High Court in the order dated 23.9.2016 quashed the decision of ERPC and directed the Petitioner

and various authorities under the Act, the Central and State Government to work out the modalities and paraphernalia for lawful transfer of FLT system or its O&M to an authority or body. Pending decision on transfer of asset or O&M to an authority or body, NTPC was directed to maintain and operate FLT system under the ownership of the Petitioner. Accordingly, NTPC has been maintaining and operating FLT system. Hon'ble Division Bench of the High Court has directed that the Commission shall consider all issues and give its decision thereon and place it before the Hon'ble High Court.

47. O&M of FLT system is an issue between NTPC and the Petitioner. NTPC has been representing that the O&M of FLT system should be transferred to a suitable body or agency by the Petitioner, as NTPC is finding it difficult to maintain FLT system due to lack of requisite expertise in the transmission sector. Since we have decided that FLT System shall be transferred by the Petitioner to JUSNL on "as is where is" basis at zero cost within a period of six months from date of this order, the responsibility for operation and maintenance of FLT system shall vest in JUSNL. NTPC will be relieved from the responsibility of O&M of FLT System, once FLT System is transferred to JUSNL.

48. The Commission is of the view that pending actual transfer of FLT system to JUSNL, O&M of FLT system should be transferred to JUSNL forthwith, keeping in view the observations of the Protection Audit Report with regard to poor state of FLT system.

(C) Claims of the Petitioner

(i) Claims qua JBVNL

49. In the present petition, the Petitioner has made the following claims qua JBVNL:

- (i) Special tariff for ECL taking into consideration the investment made by ECL for developing FLT system.
- (ii) Refund of additional security deposit already submitted by ECL in the form of BG.
- (iii) Refund of additional demand charge paid by the petitioner to JBVNL from December 2011 to May 2019 for LM-46 and December 2011 to June 2019 for LM-47.
- (iv) Refund of the arrear deposited by the Petitioner in June 2019 comprising principle and interest amount towards the additional demand charge for August 2011 to November 2011 and 3% voltage rebate for March 2013 to April 2014.

50. JBVNL has not filed any reply to the claims of the Petitioner. We have gone through the documents placed on record by the Petitioner. The first claim of the Petitioner qua JBVNL is that it should get special tariff by taking into consideration the investment made by the Petitioner for developing FLT system. The Petitioner is a consumer of JBVNL and its predecessors, JSEB and BSEB. We do not find any agreement between the Petitioner and JBVNL which provides that the Petitioner is entitled for any special tariff from JBVNL on account of the use of the FLT system. Though the Petitioner had raised the issue of concessional tariff with NTPC at the time of construction of FLT system, no decision or agreement exists to that effect. Further, the Petitioner was never allocated any power from Farakka STPS of NTPC. In view of the above, the Commission cannot render any decision on this issue. Other claims raised by the Petitioner qua JBVNL pertain to refund of additional security, additional demand charge and arrear deposited by the Petitioner. On perusal of the correspondences placed on record by the Petitioner, it appears that the Petitioner has deposited the security amount and additional demand charge after discussion with the officials of JBVNL. But the Petitioner claims that the said deposits/payments were made by the Petitioner under protest. These claims pertain to consumer load governed by the regulations of JSERC. Since all relevant records including the applicable regulations have not been placed on record and JBVNL has

not filed any response to the claims of the Petitioner, the Commission cannot render any decision on these claims.

51. The Commission is of the view that the Petitioner may approach JSERC for resolution of disputes with regard to its claims qua JBVNL.

(ii) Claims qua NTPC

52. The Petitioner has claimed a refund of Rs.4.48 crore which has been stated to have been paid by the Petitioner as excess O&M charges to NTPC for maintaining FLT system. According to the Petitioner, NTPC is undertaking O&M of FLT system in accordance with O&M contract since June 1990 according to which the Petitioner is liable to pay the monthly O&M charges @2% of capital cost of erection of FLT system per annum with an escalation 10% on cumulative basis. The Petitioner has submitted in its rejoinder that it has paid the monthly O&M charges @2% considering the capital cost as Rs.22.63 crore from 1991 till March 2009. The Petitioner has submitted that since the actual cost of FLT system is Rs.17.864 crore, the Petitioner has been calculating and making payment of O&M charges to NTPC since April 2009 based on the actual capital cost. The Petitioner has claimed refund of Rs.4.48 crore from NTPC which was paid in excess from 1991 till March 2009. NTPC in its reply has submitted that this issue of excess O&M charges paid by the Petitioner was not raised before the High Court and hence, it is outside the scope of reference to the Commission. However, NTPC has not denied the claim for refund of excess O&M expenses.

53. The Commission does not agree with NTPC that the Petitioner cannot raise its claim for refund of excess O&M since the same issue was not raised before the Hon'ble High Court. It is pertinent to mention that Hon'ble High Court in its reference

to this Commission under Article 226 of the Constitution has permitted the Petitioner and others to utilize the platform of the Commission to get the issues settled and directed the Commission to consider all aspects of the disputes and decide on them. Therefore, in our view, the Petitioner is entitled to raise the claim for refund of excess O&M charges which is an outstanding issue between the Petitioner and NTPC. It is noticed that the Petitioner took up the matter with NTPC and the claim was discussed in a meeting held on 16.6.2014 with NTPC. The issue was also discussed in the 40th TCC and ERPC meeting held on 15.3.2019 and 16.3.2019 in which the Petitioner was advised to settle the issue bilaterally with NTPC. The Petitioner also took up the matter with NTPC vide its letter dated 16.4.2019 for refund of the said amount of Rs.4.48 crores.

54. We note that the Petitioner has paid O&M charges at the agreed rate based on the capital cost of Rs.22.63 crore till March 2009. The Petitioner has paid the O&M charges at the agreed rate based on actual capital cost of Rs.17.864 crore from April 2009 onwards. NTPC has accepted the O&M charges based on the actual capital cost from April 2009. Further, NTPC has not disputed the claims of the Petitioner in its reply to the present petition.

55. Therefore, the Commission is of the view that NTPC is liable to refund the excess O&M charges paid by the Petitioner.

56. Hon'ble Division Bench of the High Court has directed the Commission to consider all aspects of the disputes and decide on them and place its decision before the Hon'ble High Court. The Commission has recorded its decisions on the various aspects of the issues and disputes between the Petitioner and JUSNL/ JBVNL/ NTPC in paragraphs 45, 48, 51 and 55 of this order.

57. Secretary of the Commission is directed to transmit this order to the Registrar General of Hon'ble High Court of Calcutta with a request to place the decisions of the Commission before the appropriate Bench of Hon'ble High Court in terms of the reference from the Hon'ble High Court under Article 226 of Constitution of India in order dated 10.6.2019 in M.A.T. No.1981 of 2016 with C.A.N. 11255 of 2016 (NTPC Limited Vs Eastern Coalfields Ltd. & Ors.) and the order dated 23.9.2016 in WP No.17044/2015.

58. Petition No.280/MP/2019 is disposed of in terms of the above.

sd/-
(I.S. Jha)
Member

sd/-
(P.K. Pujari)
Chairperson