

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 55/MP/2015

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

Date of Order: 3rd of March, 2020

In the matter of

Petition for relinquishment of the Long-term Open Access under the Bulk Power Transmission Agreement dated 13.5.2010 under the Regulation 18 read with Regulation 32 of the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in inter-State Transmission and related matters) Regulations, 2009.

And

In the matter of

M/s Jindal India Thermal Power Limited (JITPL)
Plot No. 12,
Sector B – 1, Pocket – 1,
Local Shopping Complex,
Vasant Kunj, New Delhi - 110070

.....Petitioner

Vs

- 1) Power Grid Corporation of India Limited
B-9, Qutab Industrial Area
Katwaria Sarai
New Delhi-110016
- 2) Central Electricity Authority
Sewa Bhawan
Rama Krishna Puram
New Delhi-110066

.....Respondents

Parties present:

- 1) Shri Matrugupta Mishra, Advocate for JIPTL
- 2) Ms. Shikha Ohri, Advocate for JIPTL



- 3) Ms. Pratiksha Chaturvedi, Advocate for JIPTL
- 4) Ms. Suparna Srivastava, Advocate, PGCIL
- 5) Mr. Tushar Mathur, Advocate for PGCIL
- 6) Shri Swapnil Verma, PGCIL
- 7) Shri Dwaipayan Sen, PGCIL

ORDER

The Petitioner, M/s Jindal India Thermal Power Limited (JITPL), has filed the present Petition under the Regulation 18 read with Regulation 32 of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (hereinafter referred to as 'Connectivity Regulations') seeking relinquishment of 1044 MW of Long-term Access granted to the Petitioner under the Bulk Power Transmission Agreement (BPTA) dated 13.5.2010. The Petitioner filed the present petition with the following prayers:

“(a) direct relinquishment of Long Term Open Access under the Bulk Power transmission Agreement dated 13.3.2010, without an liability to the Petitioner;

(b) direct Respondent No. 1, being PGCIL, to return the bank guarantee bearing no. 2164ILG010910 dated 4.5.2010 of an amount of Rs. 52,20,00,000/- (Rupees Fifty Two Crores Twenty Lacs Only) issued by Punjab National Bank, on behalf of the Petitioner.”

Brief Facts of the Case

2. The Petitioner has set up a 1200 MW (2x600) coal based thermal power plant near Dereng Village in District Angul in the State of Odisha. For evacuation of power from the project, the Petitioner made an application on 23.11.2007 to PGCIL in its capacity as CTU for LTA of 1044 MW with target regions as Northern Region and Western Region. LTA was granted by PGCIL vide letter dated 29.4.2009 as amended vide letter dated 14.5.2009. The Petitioner entered into a BPTA dated 13.5.2010 with PGCIL for 1044 MW (210 MW in WR and 834 MW in NR). As per the BPTA, the

timeframe for CoD of Unit 1 and Unit 2 of the generating station of the Petitioner were March 2012 and June 2012 respectively. The Petitioner was required to implement Jindal-Angul Pool 400 kV D/c transmission line with associated line bays and PGCIL was required to implement the transmission systems mentioned in Annexure 3 of the BPTA. In the terms of the BPTA, the Petitioner submitted a Bank Guarantee of ₹52,20,00,000/- (Rupees Fifty Two Crore Twenty Lac Only) on 4.5.2010 to PGCIL which was valid till 31.12.2013 and was subsequently extended from time to time.

3. The Petitioner signed Connection Agreement with PGCIL on 26.3.2013 for maximum export capacity of 1044 MW. The Petitioner vide its letter dated 9.1.2014 intimated PGCIL that since its plant after commissioning would be operating on full load capacity i.e. 1200 MW, the export capacity be enhanced to 1200 MW.

4. The Petitioner vide its letter dated 24.11.2014 addressed to PGCIL gave an intimation for force majeure under Article 9.0 of the BPTA to relinquish the LTA granted to the Petitioner and return of the bank guarantee. The reasons cited by the Petitioner were: (1) major technical snag/accident causing severe damage to rotor and stator of the generator; (2) cancellation of Mandakini-A captive coal block subsequent to the judgement dated 25.8.2014 and order dated 24.9.2014 passed by the Hon'ble Supreme Court in Manohar Lal Sharma Vs. The Principal Secretary & Others; (3) uncertainty due to lack of long term bids being called for by the utilities. In the said letter, the Petitioner informed PGCIL that as soon as force majeure events ceased to exist, the Petitioner would make a fresh application to PGCIL for grant of LTA. PGCIL vide its letter dated 2.1.2015 rejected the claim of the Petitioner for force majeure and also refused the

request of the Petitioner to return the bank guarantee. Thereafter the Petitioner filed the present petition seeking to relinquish 1044 MW without any liability.

5. Subsequent to filing of the petition, the Petitioner signed a long term PPA with Kerala State Electricity Board for supply of 100 MW on 29.12.2014 and made afresh application for LTA of 95 MW for supply of power to KSEB. The Petitioner filed IA No.15/2015 seeking to bring the above facts on record and to amend the petition to seek relinquishment to the extent of 949 MW without any liability. During hearing of the petition on 27.8.2015, the Commission sought a categorical statement from the learned counsel for the Petitioner whether it intended to relinquish 1044 MW or 949 MW. Learned counsel for the Petitioner on instruction sought to withdraw the IA and confirmed that the Petitioner was seeking relinquishment of 1044 MW. The IA was allowed by the Commission to be withdrawn.

6. PGCIL vide its letter dated 17.7.2015 asked the Petitioner to open a letter of credit for an amount of Rs. 46.99 crore. The Petitioner vide its letter dated 14.8.2015 requested PGCIL to defer opening of LC in view of the pendency of the present petition before the Commission. PGCIL vide its letter dated 9.10.2015 reiterated its request to open the letter of credit. The Petitioner filed IA No. 31/2015 for quashing of the said letter dated 9.10.2015. The Commission vide its order dated 16.12.2015 in the said IA held that in view of the relinquishment of the LTA by the Petitioner, there was no requirement for the Petitioner to open the LC. However, the Petitioner was directed to keep the bank guarantee alive till the issue of relinquishment charges is decided in Petition No. 92/MP/2015. The Commission also directed PGCIL to consider the

capacity of 1044 MW relinquished by the Petitioner for calculation of ATC/TTC for allocation of capacity under LTA to the pending applicants. Accordingly, the IA No. 31/2015 was disposed of.

7. The Commission vide order dated 20.9.2017 disposed of the petition holding that the Petitioner's case was not covered under force majeure in terms of the BPTA and hence, the Petitioner was liable to pay the relinquishment charges in terms of Regulation 18 of the Connectivity Regulations. The Petitioner challenged the said order in Appeal No. 82/2018 before the Appellate Tribunal for Electricity (ATE). ATE in its order dated 29.1.2019 remanded the matter to the Commission to reconsider the matter afresh and pass appropriate order in accordance with law after giving the parties an opportunity of being heard. After the remand, the petition was heard with the participation of the Petitioner and Respondents.

Submissions of the Petitioner

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

(a) The Petitioner has faced severe technical issues with regard to its machinery being tube linkages. A major technical snag/accident in the month of August 2014 caused severe damage to the rotor and stator of the generator, thereby causing complete shutdown of the unit for an uncertain period.

(b) The primary source of fuel for the generating station was to be sourced from Mandakini-A coal block. Consequent to the cancellation of the coal block on

account of the judgement of the Hon'ble Supreme Court in Manohar Lal case, the entire project is suffering from severe coal supply shortage.

(c) The Petitioner had executed BPTA with PGCIL with intention to enter into the Long Term PPAs with various State Utilities. However, in the year subsequent to the execution of the BPTA, there have been very limited opportunities for the Petitioner to enter into long term PPAs as very few long term bids have been called for by various State Utilities. Further, change in the conditions precedent for entering into and giving effect to FSAs requiring power utilities to enter into long term PPAs with Discoms effected by the Ministry of Coal vide its letter dated 17.2.2012 and the fact that no long term PPA bids have been called for by the State Utilities have severely crippled the Petitioner's power project and rendered Unit-2 of the power project non-functional.

(d) Unless the LTA granted to the Petitioner pursuant to the BPTA is relinquished, the Petitioner would be subjected to payment of transmission charges and would continue to make payment towards renewal of the bank guarantee of Rs. 55.20 crore.

Reply of the Respondent

9. PGCIL in its reply dated 7.7.2015 has submitted as under

(a) Reading of Clause 9 of the BPTA makes its amply clear as to the nature of events contemplated to constitute an event of force majeure under the BPTA such as war, rebellion, fire, flood etc. which are clearly beyond the control of the

parties. The events stated by the Petitioner are in the nature of commercial/business risks and hardships at best and are not covered within the scope of force majeure. The only provision which the Petitioner has sought to rely upon read into the words “or any other causes beyond the control of the defaulting party”. These general words following the specific instances of force majeure in a force majeure clause in a contract ought to be read following the ejusdem generis principle of interpretation. Relying on the judgment of the Hon’ble Odisha High Court in Md. Serajuddin v. State of Orissa (AIR 1969 Ori 152), it has been submitted that it is completely incorrect and impermissible to read any and every event allegedly beyond the control of the parties to constitute a force majeure event under the BPTA without regard to the preceding words used in the force majeure clause.

- (b) The Petitioner has failed to comply with the provisions of Clause 9 of the BPTA to notify PGCIL about the occurrence of the force majeure event. The Petitioner has issued a letter dated 24.11.2014 allegedly being a force majeure notice under Clause 9 of the BPTA. Force majeure is a concept engrained in specificity of time, event and procedure, all of which are missing in the said notice.
- (c) The force majeure is not an automatic relinquishment of LTA without payment of relinquishment charges under Connectivity Regulations. As per Regulation 18 of the Connectivity Regulations, a long term customer has the right to relinquish long term access rights fully or partly before expiry of the full term of long term access, by making payment of compensation for stranded capacity as provided

therein. The Connectivity Regulations do not envisage any exemption from payment of compensation in case of relinquishment of long term access on any ground.

(d) Assuming without admitting that any or all of the events claimed to be force majeure event by the Petitioner is covered within the ambit of force majeure under Clause 9 of the BPTA, the only relief that the Petitioner would be entitled to is relief of payment of transmission charges during the period that the force majeure event subsist, and upon the said force majeure event ceasing to exist, drawal of power is required to be started immediately. Therefore, the prayers sought by the Petitioner to relinquish LTA capacity without payment of relinquishment charges on the alleged ground of force majeure is completely unsustainable under the Connectivity Regulations as well as the BPTA.

(e) The Bank Guarantee cannot be returned on account of alleged force majeure in the light of the observations and directions of the Appellate Tribunal in its judgment dated 15.4.2015 in Appeal No. 197 of 2014 (Jayaswal Neco Urja Limited v. Power Grid Corporation of India Ltd and another).

Rejoinder of the Petitioner

10. The Petitioner in its rejoinder dated 17.8.2015 has submitted as under

(a) Once an LTA is granted to a generator, the same does not guarantee flow of power/operationalisation. For effecting flow of power/operationalisation of LTA, firm long term PPA is required as a condition precedent which is evident from

Clause 7.1 of the BCD Procedure issued by the Commission under the Sharing Regulations. Further, the Commission in its order dated 2.12.2013 in Petition No. 244/MP/2012 has held that execution of long term PPA is a necessary condition for availing long term access.

(b) At the time of signing the BPTA, the Petitioner had provided Northern Region and Western Region as target region and accordingly, for availing LTA, the Petitioner was required to enter into firm long term PPAs. Since 2009, the commissioned capacity of coal based IPPs in the country has gone upto around 42471 MW till March 2014 and 78000 MW is expected to be commissioned by March 2017. As against the generation capacity, since the year 2009, there have been only three successful long term bids floated by the distribution companies in the target regions of the LTA of the Petitioner till December 2014. The total number of power requisitioned under the long term bids came to around 10000 MW. Therefore, the inability of the Petitioner to enter into long term PPAs is a glaring event of force majeure rendering the LTA impossible to perform/operationalize.

(c) Ministry of Coal vide its letter dated 17.2.2012 has made entering into long term PPAs with a distribution companies as a condition precedent for giving effect to the FSA. In the absence of long term PPAs, the FSA executed by the Petitioner with Mahanadi Coalfield Limited has become impossible to perform for the reasons which are beyond the control of the Petitioner.

(d) Subsequent to the Hon'ble Supreme Court judgment, cancelling the coal blocks, the Coal Mines (Special Provisions) Ordinance 2014 and the Coal Mines (Special

Provisions) Second Ordinance 2014 were promulgated and rules were framed thereunder for auction and allotment of coal blocks. The Petitioner had participated in the tender by forming a joint venture company with M/s Monnet Power Company Limited in the name of Mandakini Exploration and Mining Limited. Though the said company was declared as the successful bidder and was reallocated the Mandakini-A coal block, the Petitioner is not entitled to exploit the coal block for generation of electricity in the absence of long term PPA.

- (e) The Petitioner has also been subject to serious technical issues with regard to its machinery which resulted in technical snag/accident in the month of August 2014 causing severe damage to the rotor and stator of the generator. This has resulted in the unit being shut down for an uncertain period till the snags are rectified by BHEL.
- (f) The force majeure events cited by the Petitioner have constrained the Petitioner from performing its obligations under the BPTA and such events were beyond the reasonable control and contemplation of the Petitioner which could not be cured even after making all reasonable efforts to mitigate the same. The reliance placed by PGCIL on the case of Md. Serajuddin is misplaced as the facts and circumstances in both the cases are different.
- (g) The captioned petition is based on two limbs of argument. The first argument is that it is the right of the Petitioner to seek relinquishment of LTA as per the provisions of the Connectivity Regulations. The second limb of argument rests

on the fact that in case of force majeure events, there shall not be any liability on the Petitioner to pay the relinquishment charges. In other words, the Petitioner is seeking relinquishment of the BPTA and LTA as a matter of right under Regulation 18 of the Connectivity Regulations and/or on account of force majeure events that have transpired.

(h) Under Regulation 18 of the Connectivity Regulations, determination of stranded capacity is a pre-requisite before any determination of relinquishment charges under the said Regulation. The transmission system as planned by PGCIL was a skeleton system of 3000 MW which is 50% of the LTAs granted by PGCIL in High Capacity Power Transmission Corridor (HCPTC)-I. After relinquishment of 1044 MW LTA by the Petitioner, there will be 4236 MW which is beyond the plant transmission/evacuation capacity. Therefore, the question of stranded capacity does not arise on account of relinquishment of LTA by the Petitioner.

(i) The bank guarantee furnished by the Petitioner to PGCIL is an obligation under the BPTA entered into between the Petitioner and PGCIL. The very moment the Petitioner has complied with its obligation under the BPTA for the purpose for which the bank guarantee had been furnished, the bank guarantee ought to be returned to the Petitioner. The judgment relied upon by PGCIL has no bearing in the present case in so far as retention of bank guarantee is concerned.

11. PGCIL vide its Supplementary Affidavit dated 17.11.2015 has submitted that during the hearing on 2.11.2015, it was clearly stated by the Petitioner that it has been using the transmission system for drawal of power to the tune of 800 MW on short term

basis. Further, ERPC's data on bilateral transactions for the month of September 2015 clearly shows that about 300 MU of power was being transferred by the Petitioner on short term basis. Therefore, these facts may be taken note of qua the Petitioner's claim for exemption from payment of relinquishment charges on the ground of force majeure.

12. The Petitioner vide its affidavit dated 8.5.2019 has placed on record certain documents such as 37th Report of the Parliamentary Standing Committee on Energy, the circular dated 12.2.2018 issued by Reserve Bank of India regarding referring the stressed assets to NCLT for initiating the proceedings under IBC and judgement dated 27.8.2018 passed by the Hon'ble High Court of Judicature at Allahabad which held that the major reason for stress in the power sector is non-availability of PPAs by the distribution licensees. The Petitioner has submitted that the inability of the Petitioner to execute long term PPAs in the target region is not a mere business call but a sectoral reality which has subjected the Petitioner as well as many other generators in the country in enormous hardship and unviability.

Submissions during the hearing

13. 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 events 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.

(e) The Petitioner has suffered force majeure event on account of cancellation of the coal block. ATE in its judgement in Appeal No.241/2016 (Adani Power Maharashtra Ltd. Vs. MERC & Ors) and Appeal No.193/2017 (GMR Kamalanga

Energy Limited Vs. Central Electricity Regulatory Commission & Ors) has held cancellation coal blocks as events of force majeure as well as change in law.

14. Learned Counsel for CTU submitted as under

(a) The Commission in its order dated 8.3.2019 in Petition No. 92/MP/2015 has decided the issue of stranded capacity and payment of relinquishment charges. The Commission has held that Regulation 18 of the Connectivity Regulations was in conformity with the provisions of the Act and in advancement of the objects of the Act with regard to Open Access. Further, the Commission has held that the Relinquishment Charges were in the nature of the compensation which a long term customer was obliged to pay as transmission charges in accordance with the mechanism envisaged in the Regulation 18 of the Connectivity Regulation. Therefore, the issue as regards the liability of payment of relinquishment charges has been settled by the Commission which is binding on the petitioner being a party in the Petition No. 92/MP/2015.

(b) In line with the direction of the Commission in order dated 8.3.2019 in Petition No. 92/MP/2015, CTU has computed the stranded capacity and relinquishment charges of the various generators including the Petitioner. The Petitioner is liable to pay Rs. 44.12 Crs. as Relinquishment Charges.

(c) The allegations made by the Petitioner as regards the responsibility of the CTU to execute the transmission corridors taking into account the actual long term PPAs entered by the Petitioner has been dealt with by the Commission in Para

94 of the Order dated 8.3.2019 in the Petition No. 92/MP/2015. Since, signing of the PPAs is not a pre-condition for implementation of transmission corridors, the same cannot be pleaded as a Force Majeure event relieving the Petitioner from paying the relinquishment/transmission Charges under the BPTA.

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

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

(f) While interpreting a contract what is of essence is the intention of the parties in the context 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.

(h) The Commission in its order dated 18.7.2017 in Petition No. 293/MP/2015 (Jaiprakash Power Ventures Limited Vs. Power Grid Corporation of India Limited) has held that de-allocation of coal block is not an event of force majeure affecting the obligation of a party under the BPTA as the generator has the option to source coal from other sources.

15. Learned Senior Counsel for the Petitioner 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) The last sentence of Clause 9 of the BPTA does not control the existence of force majeure and extinguishment of liability for any claim for any loss or damage arising out of failure to carry out the terms of the agreement. The said sentence only provides that should the force majeure event come to an end, the transmission/drawal of power shall start as soon as possible. The force majeure clause cannot be temporary in nature for the reason that the definition of force majeure includes war, rebellion, mutiny, fire, flood, change in law etc. It is possible that some of these events create a permanent disability which jeopardize the ability of the Petitioner to start operation again.

Analysis and Decision

16. After hearing the learned counsels for the parties on 21.1.2020, the Commission reserved the order in the matter. 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 shall be the date of relinquishment?**
- (d) Issue No.4: What are the reliefs admissible to the Petitioner in terms of its prayers in the Petition?**

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

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

17. The Petitioner has set up a 1200 MW (2x600) power project at village Dereng in District Angul in the State of Odisha. It applied for and was granted LTA of 1044 MW to target region by CTU and as required under the Connectivity Regulations, it entered into a BPTA with CTU on 13.5.2010 which envisaged 210 MW LTA for Western Region and 834 MW LTA to Northern Region. The Petitioner has entered into a PPA with KSEB for 100 MW for supply of power for a period of 25 years. The Petitioner has not been able to enter into long term PPA with any of the beneficiaries in the target regions i.e. Western Region and Northern Region. The Petitioner vide its letter dated 24.11.2014 sought to relinquish 1044 MW (210 MW to Western Region and 834 MW to Northern Region) without any relinquishment charges on the ground that it is affected by force

majeure events, namely, major technical damage to the rotor and stator of the generator causing a complete shutdown of the unit for an uncertain duration; Mandakini-A coal block allotted to the Petitioner being reallocated on the directions of the Hon'ble Supreme Court; and inability of the Petitioner to enter into long term PPAs in the Northern Region and Western Region. CTU rejected the claim of the Petitioner that these events are covered under Clause 9 of the BPTA. The Petitioner in the present petition has sought a declaration that the LTA of 1044 MW under BPTA dated 13.5.2010 stands relinquished without any liability to the Petitioner and direction for return of the bank guarantee.

18. 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.

19. 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.

20. 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 Petitioner cannot now contend that it is 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 has 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.

21. 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. In other words, 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.

22. 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.

23. The relevant provisions of the BPTA dated 13.5.2010 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 time 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 not withstanding 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."

24. 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.

25. 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.

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.

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

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

“6.0 (a) In case any of the developers fail to construct the generating station/dedicated transmission system or makes an exit or abandon its project, POWERGRID shall have

the right to collect the transmission charges and/ or damages as the case may be in accordance with the notification/regulation issued by CERC from time to time.....”

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

Further in order dated 12.4.2017 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 form 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.”

27. 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?

28. The Petitioner has submitted that pursuant to the execution of the BPTA, it made best efforts but could not succeed in entering into PPAs with the beneficiaries in the target regions. Since the long term power procurement by the distribution licensees in the target regions is substantially disproportionate to the commissioned IPPs, the situation is beyond the control of the Petitioner. The Petitioner has submitted that the lack of long term PPAs has been recognized by the Parliamentary Standing Committee on Energy and the High Court of Judicature at Allahabad as one of the factors responsible for stressed assets in the power sector. The Petitioner has submitted that its inability to enter into long term PPAs is a sectoral problem and is an event of force majeure rendering the LTA impossible to perform. The Petitioner has further submitted that the cancellation of the coal block by the Hon'ble Supreme Court is an event of force majeure as well as change in law. Clause 9 of the BPTA includes change in law in the ambit of force majeure. Therefore, cancellation of coal block has made the power project of the Petitioner unviable. The Petitioner has further submitted that even though it has been reallocated Mandakini-A coal block on the basis of the auction, it cannot

utilize the coal from the said block in the absence of long term PPA. The Petitioner has further submitted that Unit-I of the generating station suffered technical snags to the rotor and stator and this event is also beyond the control of the Petitioner. The Petitioner has further submitted that these events are covered under the definition of force majeure in terms of Clause 9 of the BPTA and relieves the Petitioner from its obligation under the BPTA including payment of transmission charges or relinquishment charges.

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

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

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

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

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

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

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

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

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

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

30. CTU has submitted that the events claimed by the Petitioner to be force majeure such as failure to enter into long term PPA, de-allocation of coal block and non-materialisation of FSA are all in the nature of commercial/business risks and hardship at best, which only make the performance onerous for the Petitioner. Since these events are not such that render the BPTA impossible or unlawful to perform, they cannot constitute force majeure events under the BPTA. As regards the encumbrances on account of technical difficulties in the machinery provided by BHEL, PGCIL has submitted that the BPTA is not a contingent contract. The performance of the BPTA is not contingent upon BHEL delivering proper on non-faulty equipment and therefore, cannot be avoided on such a ground. PGCIL has submitted that none of the events are actually in the nature of force majeure and the Petitioner's only intention is to wriggle out of its statutory obligations based on the erroneous premise of force majeure.

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

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

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

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

Therefore, the Petitioner is aware that the regulatory approval was granted for execution of the transmission system for evacuation of power from the generating stations of the Project Developers including the Petitioner on the basis of the LTA and without linking it to PPAs. It was left to the Project Developer for tie-up with the beneficiaries for PPA. When availability of PPA was not a condition precedent either for applying for LTA or for regulatory approval, therefore, it cannot be pleaded at this stage that PPA is a necessary pre-condition of the LTA and hence its absence of PPA cannot be considered as force majeure frustrating the operation of the LTA. The Petitioner has in fact entered into long term PPA for 100 MW and the Petitioner’s failure to enter into PPA for the balance capacity cannot be considered as force majeure.

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

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

term PPA cannot be considered as the reasons beyond the control of the Petitioner and hence, is not covered under Clause 9 of the BPTA.

33. As regards cancellation of the coal blocks, the Commission has already taken a view that the said event cannot be treated as force majeure in terms of Clause 9 of the BPTA. The Commission in order dated 18.7.2017 in Petition No.293/MP/2015 (Jaiprakash Power Ventures Limited Vs. Power Grid Corporation of India Limited) has observed as under:

“14.....

(b) Both units of the generating station of the Petitioner have been commissioned and the Petitioner has been generating and supplying power on short term basis. Cancellation of coal block by the Hon'ble Supreme Court cannot be treated as force majeure event, as the very basis of allocation of coal block to the allottees including the Petitioner was found to be illegal and hence terminated. After the judgment, the Central Government carried out auction of coal block and admittedly the Petitioner participated in the auction process and has been allocated Amelia (North) coal block. As regards the balance requirement of coal, the Petitioner has other avenues such as import of coal, e-auction coal and participation in bidding process for allocation of new coal block. Therefore, cancellation of coal block has not resulted in non-availability of coal, as the Petitioner has to arrange coal from alternative source to produce power and supply the same. In fact, the Petition is supplying electricity in the short term.”

Further, the Commission in its order dated 27.2.2018 in Petition No.167/MP/2016 has observed as under:

“34.....

(b) Both units of the generating station of the Petitioner have been fully operational and the Petitioner has been using 200 MW LTA to supply 100 MW power to WBSEDCL and 100 MW power to TANGEDCO. Cancellation of coal block by the Hon'ble Supreme Court cannot be treated as Force Majeure event, since subsequent to the Supreme Court's judgment, the Central Government carried out auction of coal block and even though the Petitioner participated in the auction process but failed to secure the bid while on the basis of an e-Auction, GMR Chhattisgarh Energy Limited was allotted Ganeshpur Coal Block. As regards the balance requirement of coal, the Petitioner has other avenues such as import of

coal, e-auction coal and participation in bidding process for allocation of new coal block. It is noted that the Petitioner is supplying 200 MW power to the States of Tamil Nadu and West Bengal for which the Petitioner is procuring coal. Therefore, cancellation of coal block has not resulted in non-availability of coal, as the Petitioner could have arranged coal from alternative source to produce power and supply the same.”

34. In the light of the above decisions, we hold that cancellation of coal blocks cannot be considered as an event of force majeure in terms of Clause 9 of the BPTA. The Petitioner has relied on the judgements of the ATE in Appeal No.241/2016 (Adani Power Maharashtra Ltd. Vs. MERC & Ors) and Appeal No.193/2017 (GMR Kamalanga Energy Limited Vs. Central Electricity Regulatory Commission & Ors) in which it has held that cancellation of coal blocks are events of force majeure as well as change in law. We have gone through the judgements. The said findings have been rendered in the context of the Change in Law and force majeure provisions in the respective PPAs which are different from the provisions of Clause 9 of the BPTA. In our view, since the obligations under the BPTA was not contingent upon the availability of continued fuel supply to the Petitioner or entering into FSAs, cancellation of coal block allotted to the Petitioner cannot be considered as a force majeure in terms of Clause 9 of the BPTA.

35. The Petitioner has submitted that it is affected by force majeure on account of technical difficulties in the machinery, specifically rotor and stator provided by BHEL. We observe that both units of the Petitioner’s power project have been commissioned and the Petitioner has been supplying power to KSEB and in the short term, the technical difficulties have ceased to exist. In any case, technical difficulties due to manufacturing defects in the rotor and stator cannot be considered as force majeure.

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

36. The Petitioner vide its letter dated 24.11.2014 has sought relinquishment of 1044 MW of LTA. While implementing the order dated 8.3.2019 in Petition No.92/MP/2015, PGCIL has taken 27.1.2016 as the relinquishment date. The Commission in order dated 8.3.2019 in Petition No. 92/MP/2015 has issued the following directions with regard to the 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.”

We are of the view that since the Petitioner vide letter dated 24.11.2014 relinquished LTA of 1044 MW, the date of relinquishment shall be considered as 24.11.2014 in terms of our order dated 8.3.2019 in Petition No. 92/MP/2015.

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

37. The first prayer of the Petitioner is for a direction for relinquishment of 1044 MW under BPTA dated 13.5.2010, without any liability to the Petitioner. In terms of our order dated 8.3.2019 in Petition No.92/MP/2015, the Petitioner has a statutorily permissible right to relinquish its LTA subject to payment of compensation determined under Regulation 18 of the Connectivity Regulations. The date of relinquishment shall be considered as 24.11.2014. CTU is directed to calculate relinquishment charges accordingly in terms of our Order dated 8.3.2019 in Petition No. 92/MP/2015.

38. In the second prayer, the Petitioner has prayed for return of BG for amount of Rs. 52.20 crore. The Commission in its order dated 16.12.2015 in I.A. No.31/2015 in the present petition had directed the Petitioner to keep the BG alive till the issue of relinquishment charges is decided in Petition No.92/MP/2015. We are of the view that since the Petitioner has to make payment of relinquishment charges as calculated by CTU in terms of this order and the order dated 8.3.2019 in Petition No. 92/MP/2015, BG shall be kept alive by the petitioner till it makes payment of relinquishment charges as calculated by CTU. In case the Petitioner does not make payment of relinquishment charges to CTU in accordance with timeline provided in order dated 8.3.2019 in Petition No. 92/MP/2015, CTU shall encash the BG and adjust the same against relinquishment charges and return the balance amount, if any, to the Petitioner.

39. Petition No.55/MP/2015 is disposed of in terms of the above.

Sd/-
(I.S. Jha)
Member

sd/-
(P.K. Pujari)
Chairperson