

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 117/MP/2015

Coram:

**Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M. K. Iyer, Member**

Date of Order : 20th of March, 2017

In the matter of

A petition under Sections 79(1)(f) and 79(1)(k) of the Electricity Act, 2003 seeking refund of relinquishment charges paid by the Petitioner company to PGCIL for relinquishment of Medium Term Open Access of 208 MW.

And in the matter of

D. B. Power Ltd.,
3rd Floor, Naman Corporate Link,
Opp. Dena Bank, C-31, G-Block,
Bandra-Kurla Complex,
Bandra (E), Mumbai-400 051

.....Petitioner

Vs.

Power Grid Corporation of India Ltd.,
"Saudamini" Plot No.-2, Secor-29,
Gurgaon-122 001

.....Respondent

For Petitioner : Shri Sanjay Sen, Sr. Advocate, DB Power Ltd.
Shri Hemant Singh, Advocate, DB Power Ltd.
Shri Matrugupta Mishra, Advocate, DB Power Ltd.
Shri Tushar Nagar, Advocate, DB Power Ltd.
Shri Vikas Adhia, DB Power Ltd.
Shri H. Sharma, DB Power Ltd.

For Respondents : Ms. Suparna Srivastava, Advocate, PGCIL
Ms. Swapnil Verma, PGCIL
Ms. Jyoti Prasad, PGCIL

ORDER

DB Power Ltd., the Petitioner herein is a generating company which has established a 1200 MW (2x600 MW) thermal Power Plant at Village Baradarha, Tehsil Dabhra, in District Jajgir-Champa of Chhattisgarh.

2. The Petitioner has filed, the instant petition under Sections 79(1)(f) and 79(1)(k) of the Electricity Act, 2003 seeking refund of relinquishment charges paid by the Petitioner company to Power Grid Corporation of India Limited (hereinafter referred to as "PGCIL") for relinquishment of Medium Term Open Access of 208 MW. The Petitioner has submitted that the Petitioner was granted MTOA by PGCIL for transfer of 208 MW of power from the Western Region to the Southern Region. After grant of MTOA, the Petitioner sought relinquishment of the same and on payment of relinquishment charges to the PGCIL, relinquishment was allowed. The Petitioner has submitted that the Commission vide order dated 8.8.2014 in Petition No. 92/MP/2014 declared the grant of MTOA by the PGCIL to the Petitioner to be illegal/ null and void, and was in violation of the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term and Medium Term Open Access in inter-State transmission and related matters) Regulations, 2009 (hereinafter referred to as "Connectivity Regulations") read with the Detailed Procedure. As the grant of MTOA has been held to be null and void since its very inception, the Petitioner has prayed that the PGCIL be directed to refund the amount of ₹3,87,79,189/- paid by the Petitioner to the respondent as relinquishment charges along with interest at 18% per annum.

3. The Petitioner has made following submissions seeking refund of the charges paid to PGCIL for relinquishment of MTOA granted to the Petitioner:-

(a) TANGEDCO had invited bids for supply of power for a period commencing from 1.10.2013 to 3.9.2028. On 7.5.2013 the Financial Bid was opened by TANGEDCO and the Petitioner was declared as the L-1. The Petitioner submitted its application for grant of MTOA on 24.5.2013 to the PGCIL for transfer of 208 MW of power from WR to SR. The Petitioner, vide letter dated 29.5.2013, informed PGCIL that in the long term tender invited by TANGEDCO for supply of power for a period commencing 1.10.2013 to 30.9.2028, the Petitioner was selected/declared as the L-1 Bidder and that TANGEDCO was in the process of completing all necessary formalities with respect to issuing a Letter of Intent (LoI). The Petitioner also informed that it would submit the requisite documents within 30-60 days and requested PGCIL to process its application for MTOA and to grant the same;

(b) Subsequently, the Petitioner vide its letter dated 30.6.2013 informed the Respondent that TANGEDCO had initiated the process of negotiation with all the developers and that the LoI would be issued only after completion of the negotiation process with all the selected bidders and hence TANGEDCO in all probability would take further time in issuing the LoI and signing the PPA. The Petitioner, vide letter dated 9.7.2013, further informed PGCIL that the process of obtaining the LoI from TANGEDCO was taking some time and the LoI and the PPA would be submitted shortly;

(c) PGCIL vide its letter dated 10.7.2013 granted MTOA to the Petitioner from 1.6.2014 to 31.10.2016 as per the Connectivity Regulations and requested the Petitioner to sign the TSA for sharing of transmission charges and to furnish the requisite Letter of Credit (LC) in line with the applicable provisions of the Connectivity Regulations and the approved Detailed Procedure;

(d) TANGEDCO vide letter dated 18.7.2013 issued Lol in favour of the Petitioner. Subsequently, the Petitioner requested PGCIL to prepone the commencement date of the MTOA from 1.6.2014 to 1.10.2013 as the date of commencement of supply to TANGEDCO was 1.10.2013 and informed that it was signing the TSA and MTOA Agreement;

(e) The Petitioner entered into a Medium Term Open Access Agreement (MTOA Agreement) on 10.8.2013 with the PGCIL and into a PPA with TANGEDCO on 19.8.2013;

(f) The Petitioner vide letter dated 23.8.2013 informed the PGCIL that although the scheduled supply date as per the PPA was 1.2.2014, TANGEDCO was ready to procure power from 1.12.2013 and accordingly requested PGCIL to prepone the commencement date of the MTOA from 1.6.2014 to 1.12.2013;

(g) The Petitioner vide its letter dated 25.11.2013 made an application for the grant of LTA with respect to wheeling of 208 MW of power from the Petitioner's Project in Chhattisgarh to TANGEDCO and requested the PGCIL to replace the MTOA granted with LTA from the date of commencement of such LTA;

(h) PGCIL vide letter dated 28.11.2013 informed the Petitioner that there was no provision in the Connectivity Regulations to replace one type of access with another type of access and advised the Petitioner to relinquish the MTOA granted so that the Petitioner application for LTA with respect to the same quantum of power could be considered. Accordingly, the Petitioner vide letter dated 2.12.2013 relinquished the MTOA granted to it and requested PGCIL not to impose relinquishment charges on it. However, PGCIL vide its letter dated 30.6.2014 informed the Petitioner that as per Clause 24 of the Connectivity Regulations, on MTOA customer relinquishing MTOA has to pay transmission charges for the quantum of relinquishment for the period of relinquishment or 30 days whichever is less. Accordingly, a bill bearing no. B21312DBPOWLR0 dated 30.6.2014 was raised for an amount of ₹4,39,31,472/- being relinquishment charges for one month. The Petitioner disagreed with the levy of relinquishment charges. However, the Petitioner made a payment of ₹3,87,79,189/-, vide a pay order dated 7.7.2014, under protest. The said amount was arrived at after the deduction of applicable and appropriate taxes; and

(i) In the meanwhile, KSEB filed Petition No. 92/MP/2014 alleging arbitrary denial of MTOA by the PGCIL violating the provisions of the Connectivity Regulations. As the reliefs claimed by KSEB directly and substantially affected the interests of the Petitioner, the Petitioner filed IA Nos. 25/2014 and 27/2014 seeking impleadment, which was allowed by the Commission. The Commission vide order dated 8.8.2014 held that the MTOA granted to the Petitioner was invalid/illegal as it violated the provisions of the Connectivity Regulations, 2009

and the Detailed Procedure. As the MTOA granted to the Petitioner was held invalid, the Petitioner has sought refund of the relinquishment charges by the PGCIL. However, PGCIL declined to refund the relinquishment charges as the MTOA was cancelled on the specific request of the Petitioner and that there were no provisions in the Connectivity Regulations for refund of the relinquishment charges.

4. The Petitioner has submitted that the relinquishment charges were collected for a service (MTOA) which has been held to be null and void from the inception. As the service has been held to be null and void, PGCIL cannot retain the relinquishment charges collected from the Petitioner and the same should be refunded as it was wrongfully collected. PGCIL cannot hold on to the money which otherwise is not entitled to it and prayed that PGCIL may be directed to refund the amount of ₹3,87,79,189/- alongwith interest @18% per annum.

5. The petition was admitted and notice was issued to PGCIL.

6. The Petitioner was directed to submit the reasons for changing the MTOA to LTA. In response, the Petitioner vide affidavit dated 1.2.2016 has made following submissions:-

(a) The Bulk Power Transmission Agreement (BPTA) dated 24.2.2010 was executed between the Petitioner and PGCIL for 705 MW with target region as 175 MW in Northern Region and 530 MW in Western Region. The Petitioner in its letter dated 18.7.2013 to PGCIL sought modification of LTA in terms of 297

MW in Northern Region and 408 MW in Southern Region, in order to supply power to TANGEDCO in Southern Region. The said modification was sought as the Petitioner had emerged as L-1 bidder in TANGEDCO tender and in order to ensure timely availability of the transmission corridor;

(b) At the time of applying and grant of MTOA, there was no clarity as to the availability of the LTA for transmission of power to SR as the Petitioner was not aware as to when new transmission line (Solapur-Raichur) was coming up and in the absence of any credible information pertaining to ATC sought MTOA;

(c) PGCIL in the agenda note dated 23.9.2013 for the meeting with WR and SR constituents on 3.10.2013 with respect to the ATC from NEW grid to Southern grid, confirmed that ATC would be available to SR from July, 2014 onwards. PGCIL also circulated another note dated 18.11.2013 wherein it was confirmed that the application of the Petitioner for grant of LTA to SR will be considered based upon the revised TTC, ATC and TRM; and

(d) Pursuant to the above declaration of ATC, the Petitioner made a formal application for grant of LTA vide an application dated 25.11.2013.

7. PGCIL in its reply, vide affidavit dated 29.2.2016, has submitted as under:-

(a) The Petitioner is seeking refund of relinquishment charges of ₹3,87,79,189/- paid at the time of surrendering MTOA of 203 MW on the ground that MTOA granted by the PGCIL was found by the Commission to be invalid and

illegal and thus null and void. Accordingly, the payment of relinquishment charges with respect to surrendering such MTOA would also be invalid;

(b) MTOA i.e. the right to use the transmission system for a period exceeding three months but not exceeding three years was granted under the provisions of the Connectivity Regulations. The Connectivity Regulations also provides for an exit option for MTOA customers as under:-

“24. Exit option for medium-term customers

A medium-term customer may relinquish rights, fully or partly, by giving at least 30 days prior notice to the nodal agency;

Provided that the medium-term customer relinquishing its rights shall pay applicable transmission charges for the period of relinquishment or 30 days whichever is lesser.”

(c) As per Regulation 21(2) of the Connectivity Regulations the RLDCs/SLDCs are required to take the allocated MTOA quantum into account while processing applications for STOA transactions, meaning thereby that STOA is granted only for the corridor remaining available after excluding the quantum of MTOA already allocated to various medium term customers;

(d) While the MTOA is valid, the MTOA grantee continues to have a statutory lien over transmission corridor and the short term open access transactions are scheduled subject to such lien. In accordance with the provisions of the Connectivity Regulations read with the Detailed Procedure and terms of the MTOA agreement, the grantee continues to pay transmission charges to PGCIL. The position regarding corridor availability, allocation of STOA after taking into account the allocated MTOA, payment of transmission charges by the grantee- all operates

in real time so far as power transmission under validly existing MTOA by use of transmission system of PGCIL and remains unchanged even if subsequently the validity of such MTOA is set aside;

(e) There can be no "relation back" of setting aside of MTOA on real time transmission operations. Most importantly, when an MTOA grantee has exercised the exit option during the period when the MTOA has been validly subsisting in its favour, then the question of "relation back" upon subsequent setting aside of such MTOA becomes completely inapplicable;

(f) The Petitioner was granted MTOA as per the Connectivity Regulations vide letter dated 10.7.2013 and the MTOA Agreement was signed on 10.8.2013. The Petitioner agreed, inter alia, to pay all the applicable charges from the date of the grant and also to furnish LC as required under the Detailed Procedure;

(g) The Petitioner applied for grant of LTA on 25.11.2013 for the same 208 MW quantum of power and requested that the existing MTOA be replaced with LTA from the date of commencement of such LTA. The Petitioner was informed that there was no provision in the existing Connectivity Regulations to replace one type of access with another type of access and each kind of access was to be treated separately;

(h) As the Petitioner had a long-term PPA with TN-DISCOMs and MTOA was required to be applied afresh after expiry of every three years, the Petitioner was

advised to relinquish the MTOA granted to it so that LTA application for the same power could be considered;

(i) The Petitioner relinquished the MTOA granted to it on 2.12.2013 and requested not to levy relinquishment charges. The Petitioner's prayer was completely misplaced as there could not have been two accesses granted for transmission of the same power. Hence, it was necessary for the Petitioner to relinquish the existing MTOA in order to seek LTA. Further, relinquishment of MTOA requires payment of relinquishment charges as prescribed under Regulation 24 of the Connectivity Regulations. The Petitioner was informed that the MTOA granted on 10.7.2013 stood withdrawn and requested to deposit relinquishment charges of ₹4,39,31,472/-. The relinquishment of MTOA took place when MTOA was subsisting in favour of the Petitioner. The Petitioner wrongly denied its liability for payment of relinquishment charges and paid the said amount, after adjustments, "under protest";

(j) The Commission vide order dated 8.8.2014 in Petition No. 92/MP/2014, set aside the grant of 208 MW MTOA to the Petitioner as the MTOA was granted from a date which was beyond one year from the last day of the month of application and there had been no valid PPA at the time of grant of MTOA based on the application made in that behalf;

(k) The Petitioner cannot be now heard to contend that the setting aside of the grant of MTOA by this Commission was on account of PGCIL's default and as such, any financial implication of the wrongful grant was to be borne by PGCIL;

(l) After the order dated 8.8.2014 in Petition No.92/MP/2014, the Petitioner demanded refund of the relinquishment charges paid by it for relinquishing the MTOA while it was still in force. The relinquishment charges were paid by the Petitioner in compliance of the mandatory provisions of the Connectivity Regulations and the relinquishment of the MTOA was made during the period the MTOA was subsisting. PGCIL cannot accept the Petitioner's request for refund of relinquishment charges and there is no provision in the Connectivity Regulations for such refund;

(m) The Petitioner was a MTOA customer of the PGCIL's transmission system and the Petitioner surrendered MTOA before the MTOA was held to be invalid by the Commission. All the rights and obligations of both parties under the grant had existed, were exercised and then surrendered before the issue of the order by the Commission. The restoration in the context of power transmission under real time operations was impossibility. As such, the question of any restoration of benefits does not arise as the MTOA granted was declared to be void much after its surrender.

8. The Petitioner in its rejoinder, vide affidavit dated 13.4.2016, has submitted as under:-

(a) The Commission in the order dated 8.8.2014 in Petition No. 92/MP/2014, came to the conclusion that the grant of MTOA to the Petitioner was not in accordance with statute and therefore, declared the grant itself as illegal. It was categorically held that PGCIL is at fault in not adhering to the regulations and

detailed procedure and further in not informing the Petitioner about the deficiency in the application for grant of MTOA. Therefore, PGCIL cannot take benefit of the said established default and claim relinquishment charges as per the Connectivity Regulations. When the MTOA was wrongly granted to the Petitioner, the said Regulations do not give any right to PGCIL for claiming or retaining the relinquishment charges;

(b) Relinquishment charges were paid under the presumption of law that the MTOA was validly granted and the Petitioner is liable to make such payment. The Commission held that the MTOA granted to the Petitioner was wrongly granted and hence is void *abinitio*. Therefore, MTOA was not valid when the payment was made. PGCIL cannot unjustly enrich itself thereby taking benefit of its own default;

(c) Regulation 24 of the Connectivity Regulations provides for relinquishing the MTOA rights by paying the transmission charges for the period of relinquishment or 30 days whichever is less. According to the Commission's order, the Petitioner was wrongly granted the MTOA and was not a valid medium term customer. As such, the Petitioner cannot be subjected to the said Regulation. Therefore, there is no need for any Regulation to refund the relinquishment charges;

(d) The argument of 'relation back' refers to the operational dynamics or the physics of transmission of alternate current. The said operational dynamics of transmission of power cannot be an excuse for illegal collection and retention of transmission charges. When the very basis of collection of relinquishment

charges, under Regulation 24 of the Connectivity Regulations, was non-existent as the Petitioner was not a medium term customer to be liable for payment of transmission charges, then any commercial impact of the wrongful grant of MTOA has to be borne by PGCIL with no liability on the Petitioner;

9. During the hearing on 26.5.2016, the learned senior counsel for the Petitioner referring to the judgement of the Hon'ble Andhra Pradesh High Court and Supreme Court submitted that under Section 65 of the Indian Contract Act, 1872 (1872 Contract Act) a benefit received under a void agreement has to be returned to the person from whom the benefit is received. As the MTOA granted to Petitioner has been held to be invalid and void, PGCIL has to refund the relinquishment charges. In response, the learned counsel for the PGCIL submitted that Section 65 of the 1872 Contract Act relates to bi-party contracts wherein there are mutual rights and obligations and in the instant case, there are a host of other parties whose priorities, rights and obligations are also involved. Therefore, Section 65 of the 1872 Contract Act is not applicable in the instant case.

10. The Petitioner vide affidavit dated 10.6.2016 has submitted that the Petitioner disagreed with the levy of relinquishment charges and under protest made a payment of ₹3,87,79,189/-. The said amount was arrived at after deduction of Tax Deducted at Source (TDS) to the tune of ₹43,08,799/-. Thus, the relinquishment charges included the TDS amount of ₹43,08,799/- in addition to ₹3,87,79,189/- paid by way of a pay order. After the order dated 8.8.2014, PGCIL is not entitled to retain amount of

₹43,08,799/-. Under the provisions of Income Tax Act, 1961, PGCIL can claim set off of ₹43,08,799/- against its tax liability for the relevant financial year.

Analysis and decision

11. We have heard the parties and have also perused the submissions made by the Petitioner and the Respondent. The issue before us is whether the Petitioner is entitled to refund of the relinquishment charges paid by the Petitioner for relinquishing the MTOA in view of the Commission's order dated 8.8.2014 in Petition No.92/MP/2014.

12. The Petitioner applied for MTOA for 208 MW vide its application dated 24.5.2013. The Petitioner was granted MTOA by PGCIL on 10.7.2013 for transfer of 208 MW of power from Western Region to Southern Region for the period from 1.6.2014 to 31.10.2016 from its project in Chhattisgarh. The MTOA agreement was entered into by the Petitioner with PGCIL on 10.8.2013. Subsequently, the Petitioner vide letter dated 25.11.2013, made an application for grant of LTA and requested PGCIL to replace the MTOA with LTA from the date of commencement of LTA. PGCIL informed the Petitioner that there is no provision in the Connectivity Regulations to replace one type of access with another type of access and advised the Petitioner to first relinquish the MTOA granted to it by paying relinquishment charges as provided in Regulation 24 of the Connectivity Regulations, to enable PGCIL to consider the Petitioner's application for grant of LTA. The Petitioner relinquished the MTOA on 2.12.2013, PGCIL also raised a bill for ₹4,39,31,472/- as relinquishment charges for MTOA relinquished by the Petitioner. The Petitioner paid ₹3,87,79,189/- as relinquishment charges under protest

after adjustment of ₹43,08,799/- towards TDS. On receipt of the relinquishment charges from the Petitioner, PGCIL allowed relinquishment of the MTOA to the Petitioner.

13. In the meanwhile, KSEB filed Petition No. 92/MP/2014 alleging denial of MTOA to KSEB in violation of the provisions of Connectivity Regulations. One of the issues discussed and decided in the said petition was whether the application of DB Power made in May 2013 was complete in all respects as per the Connectivity Regulations and Detailed Procedure. The Commission after considering all relevant documents came to the conclusion that the application of DB Power made in 2013 was not complete as per the Connectivity Regulations and Detailed Procedure. The Commission, vide order dated 8.8.2014 in Petition No. 92/MP/2014, decided the issue as under:-

“38. It is apparent from the above that while submitting the MTOA application to CTU on 24.5.2013, DB Power has not submitted the copy of the PPA or Sale Purchase Agreement. DB Power has while submitting the application for MTOA merely stated that it has been selected as L-1 bidder in the long term tender invited by TANGEDCO for supply of power for a period for 15 years commencing from 1st October, 2013 to 30th September, 2028. In its letter dated 29.5.2013, DB Power has stated that TANGEDCO is in the process of completing the formality which will take 30 to 60 days and has requested CTU to process its application for MTOA. TANGEDCO in its letter dated 29.5.2013 has intimated DB Power that on review of its financial bid, the same was found to be on the higher side compared to other State's Case 1 bidding and invited DB Power for a negotiation on 4.6.2013. Neither DB Power nor CTU have placed on record what was the outcome of the negotiation dated 4.6.2013. However, from the letter of DB Power dated 30.6.2013, it emerges that TANGEDCO has initiated the process of negotiation with all project developers and the LOI will be issued after completion of the negotiation with selected bidders. From these letters, it can be safely inferred that the bidding process was still continuing as on 30.6.2013 and TANGEDCO was in the process of negotiating with all project developers. Therefore, the claim of DB Power that it has emerged as L-1 bidder in its letter dated 24.5.2013 is not supported by documentary evidence. If DB Power had emerged as L-1 bidder, it could have produced a certificate to that effect from TANGEDCO. In our view, TANGEDCO could not have declared DB Power as L-1 bidder when the bidding process was still on. The very fact that DB Power in its letter dated 9.7.2013 has relied upon the newspaper reports in Business Line dated 1.7.2013 and in The Hindu dated 9.7.2013 in support of its claim that it had emerged as L-1 bidder clearly shows that no official communication was available with DB Power with regard to the outcome of its bid. In fact, TANGEDCO

officially communicated the acceptance of the bid of DB Power in its letter dated 18.7.2013.

39. It is the contention of DB Power that the financial bids were opened by TANGEDCO on 7.5.2013 and DB Power was selected as L-1 bidder and hence, a contract by operation of law has taken place on that date. We do not agree with the contention of DB Power. Under Indian Contract Act, 1872, a proposal and a communicated acceptance would constitute a concluded contract. Section 8 of the Indian Contract Act, 1872 provides that acceptance of a proposal can also be by conduct or by performance of the condition by the acceptor. DB Power by responding to the tender of TANGEDCO has made a proposal to supply electricity for a period of 15 years at a specified rate. The financial bids were opened on 7.5.2013 which has not been disputed. Even though DB Power claims that it was declared as L-1 bidder on 7.5.2013, no documentary evidence has been placed on record to this effect. On the contrary, vide letter dated 29.5.2013, TANGEDCO has invited DB Power for negotiation of price on 4.6.2013. Therefore, neither by its conduct nor by performance, TANGEDCO has accepted the proposal of DB Power as on 31.5.2013 which is the last date for receipt of the applications for MTOA during May 2013. In our view, there was no agreement in existence between TANGEDCO and DB Power as on 31.5.2013 for supply of power. We are not in agreement with CTU or DB Power that in a Case 1 bidding, emergence of a bidder as L-1 in the bidding process results in a binding contract and the process of price negotiation, issue of LOI, submission of Contract Performance Guarantee and signing of PPA etc. are mere formalities. In this connection, para 5.15 of the competitive bidding guidelines notified by Ministry of Power, Government of India provides as under:

“5.15 The bidder who has quoted lowest levelised tariff as per evaluation procedure, shall be considered for the award. The evaluation committee shall have the right to reject all price bids if the rates quoted are not aligned to the prevailing market prices.” The above provisions clearly show that even though the bidder who has quoted the lowest levelised tariff shall be considered for the award, the Evaluation Committee has the discretion to reject all price bids including the lowest bidder if the rates quoted are not aligned to the prevailing market prices. Therefore, lowest bidder at the opening of the financial bid does not have a vested right for award of the contract unless the Evaluation Committee certifies that its bid is in alignment with prevailing market prices and the bidder has been issued the Lol. The acceptance of the bid of DB Power based on the recommendations of the Evaluation Committee has been communicated by TANGEDCO in its letter dated 18.7.2013 and therefore, the Sale Purchase Agreement can technically come into existence from 18.7.2013 only. It is noteworthy to mention that the Case-I bidding recognizes only the Power Purchase Agreement between the seller and procurer and there is no separate provision for Sale Purchase Agreement. Therefore, in case of Case-I bidding, the Power Purchase Agreement can be considered as synonymous with Sale Purchase Agreement. Moreover, after the Lol is issued, the seller has to submit unconditional acceptance of the Lol, provide Contract Performance Guarantee and sign the Power Purchase Agreement. If these conditions are not satisfied, there can be no PPA. In our view, a contractual relationship between a seller and the procurer in case of Case-I bidding can only come into existence after the signing of the PPA. Moreover, the operationalisation of the PPA is also subject to the approval by the State Commission. Reliance by DB Power on the judgement dated 17.2.2012 of Appellate Tribunal for Electricity in Appeal No.106 of 2011 is not applicable to the present case as the

Appellate Tribunal in the said judgement had disapproved the decision of the State Commission to adopt under section 63 of the Act the quantum in the original PPA and the rate in the Addendum to the PPA negotiated after the PPA was signed. In the present case, the negotiation was carried out by TANGEDCO before issue of LOI and signing of the PPA. The mere fact that the negotiation did not result in any alteration of the rates quoted in the bid as DB Power is stated to have refused to negotiate with TANGEDCO, the process of negotiation cannot be termed as mere formality. The undisputed fact is that the LOI was issued on 18.7.2013 and PPA was signed on 19.8.2013 and no Sale Purchase Agreement could be in existence between DB Power and TANGEDCO prior to signing of the PPA.”

40. From the available records, it is clear that CTU had not informed DB Power about deficiency in the application i.e. it is not accompanied by either a PPA or Sale Purchase Agreement before the closing date for receipt of MTOA applications in May 2013 i.e. by 31.5.2013. If MTOA applications are entertained without the PPA or Sale Purchase Agreement but in anticipation of the same, fictitious applications would creep in and corridor would be blocked by applicants who are not genuine. Para 14.4 of the Detailed Procedure provides that "incomplete applications shall be rejected mentioning reason for rejections to the applicant.”

In our view, the application of DB Power was not complete as on 31.5.2013 and ought to have been rejected by CTU in accordance with the Detailed Procedure. It is pertinent to mention that the MTOA applications are considered month wise, and the application of DB Power received in May 2013 should have been closed, being incomplete. If DB Power still wanted MTOA, it was at liberty to apply in any subsequent months. In the light of the above discussion, we are of the view that the grant of MTOA by CTU to DB Power on the basis of its application filed on 24.5.2013 is not in accordance with the provisions of the Connectivity Regulations and the Detailed Procedure.

41. In the light of our above discussion, we are of the view that the processing of the application of DB Power for the month of May 2013 without proper documents and grant of MTOA with effect from 1.6.2014 are in violation of the Connectivity Regulations and Detailed Procedure and hence are held to be invalid. Since the corridor was available with effect from 1.6.2014, PGCIL should consider the applications received for MTOA during June 2013 and decide the allocation of MTOA within a period of one week if the applicants otherwise meet the requirements of the Connectivity Regulations and Detailed Procedure.”

14. On perusal of the above order, it emerges that the application made by DB Power in May 2013 was not complete as per the Connectivity Regulations and Detailed Procedure and accordingly, it was held that processing of application of DB Power for the month of May 2013 without proper documents and grant of MTOA with effect from 1.6.2014 were in violation of the Connectivity Regulations and Detailed Procedure.

Resultantly, the MTOA granted to DB Power based on the application dated 24.5.2013 was held to be invalid.

15. After the issue of the above order, the Petitioner vide letter dated 24.11.2014 requested PGCIL to refund the relinquishment charges paid by it for relinquishing the MTOA. PGCIL declined the Petitioner's demand for refund of the relinquishment charges on the ground that there is no provision in the Connectivity Regulations for such refund and the relinquishment of the MTOA was made during the period when the MTOA was validly subsisting.

16. The Petitioner has sought refund of the relinquishment charges in the petition on the following grounds: -

(a) Relinquishment charges were collected by CTU for a service which has been held to be null and void from its inception and, therefore, CTU cannot retain the relinquishment charges collected from the Petitioner.

(b) As per Section 65 of the Indian Contract Act, 1872, where an agreement is decided to be void or when a contract becomes void, any person who has received any advantages under such agreement or contract is bound to restore it or make compensation for it to the person from who he received it.

17. As regards the first ground, it is noticed that the Petitioner was granted MTOA on 10.7.2013. During the subsistence of the MTOA, the Petitioner relinquished the MTOA to apply for LTA. Relinquishment of MTOA requires payment of relinquishment charges

for one month as per Regulation 24 of the Connectivity Regulation which is extracted as under:-

“24. Exit Open for medium-term customers

A medium-term customer may relinquish rights, fully or partly, by giving at least 30 days prior notice to the nodal agency.

Provided that the medium-term customer relinquishing its rights shall pay applicable transmission charges for the period of relinquishment or 30 days whichever is lesser”

Thus there is a statutory requirement to pay the relinquishment charges for the period of 30 days or the period of relinquishment whichever is lesser. In compliance with the above provision, the Petitioner paid the relinquishment charges and relinquished the MTOA on 2.12.2013. At that point of time, the MTOA granted to the Petitioner was not under challenge and the MTOA was valid and subsisting. The Petitioner exercised its right to relinquish the MTOA with full knowledge of its consequence i.e. it has to pay the relinquishment charge. The order of the Commission in Petitioner No. 92/MP/2014 holding the MTOA granted to the Petitioner as invalid was issued on 8.8.2014 which is much after the relinquishment of MTOA by the Petitioner. Therefore, the order dated 8.8.2014 holding the MTOA granted to the Petitioner as invalid does not vest any right on the Petitioner to seek refund of the relinquishment charges, particularly when the Petitioner on its own had relinquished the MTOA during the validity of the MTOA. In our view, the Petitioner is not entitled for refund of the relinquishment charges.

18. The second ground of seeking the relief is that as per Section 65 of the Indian Contract Act, 1872, PGCIL has to refund the relinquishment charges paid by the

Petitioner for relinquishment of MTOA when the said grant of MTOA has been held to be void. Section 65 of the Indian Contract Act, 1872 provides as under:

“65. Obligation of Person who has received advantage under the void agreement, or contract that becomes void: when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it.”

The above Section is applicable to cases where an agreement is discovered to be void or when the contract becomes void. According to the Petitioner, its case falls under “when an agreement is discovered to be void” as the Commission in its order dated 8.8.2014 held that the MTOA granted to the Petitioner was invalid. In our view, the above section is not applicable to the present case for the following reasons:

- (a) The relinquishment charges were paid by the Petitioner in satisfaction of statutory requirements under Regulation 24 of the Connectivity Regulations for relinquishing the MTOA. PGCIL cannot be said to have received any advantage on account of payment of relinquishment charges under the MTOA Agreement. In fact, PGCIL has disbursed relinquishment charges to the DICs.
- (b) The Commission in the order dated 8.8.2014 in Petition No. 92/MP/2014 observed that the application of the Petitioner was incomplete for want of PPA and could not have been considered and CTU by considering the incomplete application of the Petitioner and granting MTOA to the Petitioner acted in violation of the provision of the Connectivity Regulations and Detailed Procedures. Therefore, the cancellation of MTOA granted to the

Petitioner was attributable to PGCIL as well as the Petitioner. Since, the Petitioner was a beneficiary of a wrong decision by PGCIL which was set aside by the Commission, the Petitioner cannot claim restitution of the relinquishment charges in terms of Section 65 of the Contract Act, 1872.

19. In the light of the above discussions, the Commission is of the view that the Petitioner is not entitled for the refund of the relinquishment charges.

20. The petition is disposed of in terms of the above.

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

sd/-
(A.S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson