

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.136/MP/2014

Coram:

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

Date of Order: 20.3.2017

In the matter of

Petition under Section 79(1) (c) & (f) of the Electricity Act, 2003 and 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

Power Grid Corporation of India Limited
Corporate Office: "Saudamini",
Plot No.2, Sector – 29,
Gurgaon – 122001, Haryana

.....Petitioner

Vs

1. Corporate Power Limited
6th Floor, Landmark Building,
Wardha Road,
Nagpur – 440010

2. National Load Despatch Centre
1st Floor, NLDC Office,
B-9, Qutab Institutional Area,
Katwaria Sarai,
New Delhi-110016

.....Respondents

Parties Present:

Shri S.B. Upadhyay, Senior Advocate, PGCIL
Ms. Suparna Srivastava, Advocate, PGCIL
Shri V. Srinivas, PGCIL
Shri A.M. Pavgi, PGCIL
Shri R.P. Padhi, PGCIL
Shri Aryaman Saxena, PGCIL
Ms. Meghana Aggarwal, Advocate, CPL
Shri Hemant Singh, Advocate, CPL
Ms. Supriya Singh, Advocate, NRLDC
Ms. Abiha Zaidi, NLDC



ORDER

The Petitioner, Power Grid Corporation of India Limited (PGCIL) has filed this petition under Section 79 (1) (c) & (f) of the Electricity Act, 2003 and 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 with the following prayers:

- a) *Allow the Petitioner to bill to other Designated ISTS Consumers (DICs), the outstanding dues against the medium term open access of Respondent No.1 amounting to `18.89 crore, as the Yearly Transmission Charges (YTC) are to be primarily recovered from long-term open access charges and the credit for medium term open access charges is given to DICs making payment of long-term open access charges;*
- b) *Direct Respondent No.1 to pay to the Petitioner aforesaid dues towards transmission charges amounting to `18.89 crore and surcharge thereupon towards grant of medium term open access to Respondent No.1 for the period from 16.6.2013 to 31.1.2014 and on receipt of the said payment from Respondent No.1, permit the Petitioner to give credit of the same to the other DICs;*
- c) *Initiate appropriate penal proceedings against Respondent No.1 under Section 142 of the 2003 Act for willfully violating the provisions 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 by failing and refusing to pay to the Petitioner transmission charges imposed there under towards the medium term open access granted to it for the period from 16.6.2013 to 31.1.2014;*
- d) *Any future exchange of power (in any format STO/MTOA/LTOA) from any project of Respondent No.1 with the Central Grid may be permitted only when Respondent No.1 has cleared all dues payable by it under the applicable Regulations of the Commission;*

Background

2. The Petitioner, a Central Transmission Utility (CTU), is a deemed transmission licensee under Section 14 of the Electricity Act, 2003 (the 2003 Act) and is required to build, maintain and operate an efficient, coordinated and economic Inter-State Transmission System (ISTS) for smooth flow of electricity from generating stations to the load centers. The connectivity and open access in the transmission system of the Petitioner is granted in terms 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 (“the Connectivity Regulations”) under which the Petitioner is the designated Nodal Agency for grant of connectivity and open access and for collection of transmission charges and related issues.



3. The Respondent No.1, Corporate Power Limited ('referred to as CPL') is a generating company engaged in developing a 2 x 270 MW Coal based power plant in the State of Jharkhand. The AP Discoms through their lead procurer, Central Power Distribution Company of Andhra Pradesh Limited (APCPDCL) invited bids under Case 1 bidding route for procurement of an aggregate quantum of 2000 MW +/- 20% for a period of three years. CPL participated in the bidding and was selected as successful bidder for supply of 480 MW power from its under construction power plant and was issued Letter of Intent on 31.7.2012. Subsequently, AP Discoms entered into a PPA dated 31.7.2012 for supply of power for a period of three years starting from 16.6.2013 to 15.6.2016 at a levelized tariff of Rs. 4.3197/kWh. In accordance with Article 3.1.1 of the PPA, CPL has the responsibility to obtain the permission for medium term open access from the transmission system from the injection point upto the delivery point and executed Transmission Service Agreement with the transmission licensee for that purpose.

4. CPL had applied for Medium Term Open Access (MTOA) to CTU on 1.8.2012 for evacuation of 480 MW for a period of three years under 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 "Connectivity Regulations"). However, the Petitioner on 5.10.2012 granted MTOA to CPL for 150 MW from 16.6.2013 till 15.6.2016 for scheduling of power from the plant of CPL, situated in the State of Jharkhand (Eastern Region) with injection point at Namkum to the periphery of the State Transmission Utility in Andhra Pradesh (Southern Region). CPL further executed an MTOA and a Transmission Service Agreement (TSA) with the Petitioner on 30.10.2012 for evacuation of 150 MW of power. Subsequently, CPL and the AP Discoms amended the original PPA on 15.2.2013 wherein the quantum of supply of 480 MW was reduced to 150 MW.

5. As the generating station of CPL was not ready for commissioning, CPL, in accordance with Clause 4.6.1 of the PPA proposed to supply power to the discoms of AP from an alternative source and accordingly tied up with M/s KSK Mahanadi Power Company Ltd situated in W3 area in the Western Region for supply of 150 MW to AP DISCOMS from 16.6.2013 to 15.6.2014. The AP SLDC and the AP Discoms had conveyed their acceptance/no objection for the proposed arrangement for



supply of power from alternative sources. CPL took up the matter with Petitioner in its letter dated 27.4.2013 with the request for transfer of MTOA corridor granted to CPL in favour of KSK Mahanadi Limited. CTU in its letter dated 9.5.2013 clarified that the Connectivity Regulations do not permit transfer of medium term open access rights and accordingly, the request of CPL for transfer of MTOA from CPL to KSK Mahanadi Power Company Limited from 16.6.2013 to 15.6.2014 cannot be accommodated. The Petitioner further sought confirmation whether CPL was relinquishing the MTOA right on account of the delay of its generation project for taking action as per Regulation 27 of the Connectivity Regulation as otherwise CPL would be liable to pay the transmission charges as per the Transmission Service Agreement. CPL approached certain generating stations in the Eastern Region for supply of power to AP Discoms and issued LOI to Sterlite Energy Limited on 14.5.2013 located in the State of Odisha. CPL in its letter dated 14.5.2013 approached the Petitioner for transfer of MTOA corridor in favour of Sterlite Energy Limited for the period 16.6.2013 to 15.6.2014.

6. Thereafter, CPL filed Petition No. 93/MP/2013 before the Commission seeking operationalization of its proposed alternative source of supply under the PPA executed with the AP discoms. This was objected to by the Petitioner and it was submitted that the issue of transfer rights had been dealt with in the Statement of Reasons for the Connectivity Regulations, wherein, in the event of CPL surrendering the granted MTOA, then the vacated capacity was necessarily to be offered to the applicants whose applications for grant of MTOA were pending. CPL by interlocutory Application IA No. 21/2013 to the said petition, suggested to take Short Term Open Access from an alternative generator situated in the Eastern Region till the injection point under the existing MTOA and then evacuate power under the said MTOA which was also objected to by the Petitioner.

7. Meanwhile, as the MTOA granted to CPL for the period from 16.6.2013 to 15.6.2016 was to become operational, the Petitioner vide letter dated 5.4.2013 requested CPL to comply with the requirements of opening of a Letter of Credit for POC charges agreed under the MTOA agreement and as per the Connectivity Regulations. The Petitioner by reminder letters dated 18.6.2013 and 23.6.20123 requested CPL to submit the LC immediately failing which the Petitioner was



constrained to take appropriate action as per the Connectivity Regulations. As CPL failed to open the requisite LC, the Petitioner raised POC charges on CPL under MTOA for the months of June, 2013 to November, 2013 which were not discharged by CPL. Thereafter, by letter dated 20.9.2013 CPL was informed by the Petitioner that the dues amounting to Rs 5.23 crore had accumulated and in case of default in making payment and opening LC by 5.10.2013, the Petitioner would have no other option but to cancel the MTOA at the risk and cost of CPL. In response, CPL by letter dated 4.10.2013 requested for grant of time till December, 2013 for making payment of the dues and for opening the LC. As the outstanding dues of CPL towards the monthly payment of POC charges under the MTOA stood at Rs 7.94 crore as on 24.10.2013, the request of CPL for extension of time till December, 2013 was not accepted by the Petitioner. However, the Petitioner informed CPL that if the current dues were not paid and LC was not opened by 29.10.2013, it would recommend for the cancellation of the MTOA granted to it.

8. Meanwhile, the Commission by order dated 11.10.2013 disposed of Petition No. 96/MP/2013, rejecting the prayer of CPL seeking operationalization of alternative source of supply under the PPA executed with the AP discoms. The relevant portion of the order is extracted as under:

“43.As the Connectivity Regulations do not allow operationalisation of the existing MTOA after the injection or drawal points are changed, CPL will be required to seek a fresh access to supply power from the alternative source of generation. We are of the view that Para 4.8.1 of the PPA does not give any liberty to CPL to schedule power from alternative source by utilizing the already granted MTOA which is not permissible under the Connectivity Regulations. The provision in the PPA allowing the generator to supply from alternative sources is meant to protect the interest of both seller and buyer and enable the seller to arrange power from alternative sources to meet its contractual obligations. This provision in the PPA cannot supersede or modify the provisions of statutory regulations governing grant of access.”

9. Aggrieved by the said order dated 11.10.2013, CPL filed Appeal No. 276/2013 before the Appellate Tribunal for Electricity (the Tribunal) claiming the relief that it could be permitted to supply power from an alternative source located in the Eastern Region either directly or through a combination of injection points by utilizing the MTOA granted to it for effecting supply from the original source. It also filed Interlocutory Application 372/2013 seeking to restrain the Petitioner from canceling the MTOA till the final disposal of the appeal. The Tribunal, considering the affidavit of CPL dated 22.11.2013 undertaking to furnish a Bank Guarantee for Rs 5 crore as and further open



an LC for Rs 5 crores in favour of the Petitioner, disposed of the said IA by order dated 25.11.2013 for compliance with the said undertaking within three weeks. The relevant portion of the order is extracted as under:

“In view of the objection raised by the Respondent with regard to the time frame and the facts and circumstances, we deem it appropriate to direct the Appellant/Applicant to comply with this undertaking within three weeks from today. Accordingly, ordered.

With this observation, the I.A. is disposed of.”

10. CPL however failed to comply with the above said undertaking within the time frame and sought for further extension of time on the ground that the bank was undertaking the exercise of re-determining the entire credit facility of CPL and that the bank had assured that the BG and LC would be issued by the Bank after the exercise was over. The Tribunal by order dated 18.12.2013 extended the time limit for furnishing BG and LC upto 15.1.2014 and clarified that in case the same are not furnished in terms of the undertaking, the Petitioner would be at liberty to take necessary action as per the contract, after 15.1.2014. Based on the submissions of CPL, the Tribunal in the said order also observed that it was open for CPL to seek Short Term Open Access for supply of power from alternate source to the injection point of CPL plant, which shall be considered and allowed by the appropriate authority as per the regulations. As CPL failed to furnish the BG and LC before 15.1.2014 as undertaken before the Tribunal and had refused to pay the transmission charges under MTOA which stood at Rs 14.47 crore as on 31.1.2014, the Petitioner, in terms of the order of the Tribunal dated 18.12.2013, cancelled the MTOA vide letter dated 31.1.2014. The Petitioner also filed IA No. 83/2014 (in Appeal No. 276/2013) seeking direction on CPL for payment of accumulated dues of transmission charges amounting to Rs 18.89 crore under MTOA for the period from 16.6.2013 to 31.1.2014. However, the Tribunal vide its order dated 11.1.2014 dismissed the appeal as infructuous, but observed that any party feeling aggrieved by the non-implementation or noncompliance of the aforesaid undertaking filed by CPL may take any such recourse as permitted in law.

11. The Petitioner has submitted that the Transmission charges recovered from MTOA customers ultimately inure to the benefit of the transmission licensees in ISTS and non-payment thereof results



in injury to all stakeholders in ISTS. It has further submitted that the Petitioner has been entrusted with the statutory responsibility of raising monthly bills towards the payments of ISTS transmission charges on all the Designated ISTS consumers (DICs) and in case payments are not made in time, financial viability of the Petitioner and other ISTS licensees would be seriously prejudiced. The Petitioner has also pointed out that the Commission in order dated 3.2.2014 in Petition No. 78/MP/2013 had taken note of the persistent non-payment of transmission charges by open access customers and had directed the timely payment of transmission charges and other charges to the Petitioner in accordance with the bills raised by CTU and to provide requisite payment security mechanism in compliance with the regulations so that the viability and sustainability of ISTS network is not disturbed. The Petitioner has pointed out that CPL had obtained MTOA for the period from 16.6.2013 to 31.1.2014 but has failed and refused to pay the transmission charges of Rs 18.89 crore for the said period despite the Commission's order dated 3.2.2014 and the undertaking submitted before the Tribunal.

12. In the above background, the Petitioner has filed the present petition with the reliefs as stated in para 1 above and has made the following submissions:

Submissions of Petitioner

13. The Petitioner in this petition has made the following submissions:

(a) CPL was granted MTOA on 5.10.2012 in the transmission system of the Petitioner for evacuation of 150 MW power from its power plant in the State of Jharkhand as per conditions specified in the Connectivity Regulations. The grant of MTOA was subject to (i) signing of MTOA Agreement (ii) signing of Transmission Service Agreement for sharing of transmission charges and (iii) furnishing of requisite letter of credit as per provisions of the Connectivity Regulations and detailed procedures therein.

(b) CPL signed MTOA agreement and Transmission Service Agreement on 30.10.2012 and agreed to share the Transmission charges as per Point of Connection Methodology. By signing the MTOA agreement and TSA, CPL had agreed to furnish LC for an amount equal to 2.10 times the average first bill amount and also to allow the Petitioner to enforce recovery of payment through LC in the event of default in payment of transmission charges.



(c) In accordance with Clause 4.6.1 of the PPA, CPL proposed to supply power to AP discoms from an alternative source and requested the Petitioner to transfer the 150 MW MTOA corridor granted to it for one year to the alternate source of supply from another region and sign MTOA agreement for the same. Since the Connectivity Regulations did not permit transfer of LTOA rights, the Petitioner could not accommodate the request of CPL. The option to supply power from original or from alternate source was a matter of contractual arrangement between CPL and the AP Discoms and the Petitioner could not have any say in it or prevent CPL from supplying from alternate source. CPL was at liberty to exercise the option available to it under the PPA but the same was necessarily to be in accordance with the applicable regulations and in a manner that the process, operations in ISTS were not adversely affected and the financial interest of the Petitioner and the transmission licensees were not prejudice.

(d) While the Connectivity Regulations provide for relinquishment of MTOA rights, there is no provision at all for transfer of such rights under any circumstances including when the point of injection remains same. In terms of the Connectivity Regulations, in the event CPL surrendered the granted MTOA, then vacated capacity was necessarily to be offered to the applicants whose applications for grant of MTOA were pending. The Tribunal in its judgment dated 31.3.2010 in Appeal No. 104/2009 had held that change of drawl/injection point called for surrender of access and the applicant needed to apply afresh for point to point transmission of power.

(e) In terms of the Connectivity Regulations, Letter of Credit for payment of POC charges under the MTOA agreement was to be opened by CPL 15 days prior to the commencement of MTOA transmission. As CPL failed to open necessary LC despite repeated reminders, the Petitioner vide letters dated 18.6.2013 and 23.6.2013 once again requested CPL to submit the requisite LC immediately failing which the Petitioner was constrained to take appropriate action as per regulations in the implementation of LTOA.

(f) Whether the said reserved capacity was in fact used by the successful applicants or remained idle for any reason whatsoever, did not alter the status of availability of balance capacity for other applicants. CPL holding the MTOA permission and not using the capacity available with it for any reason whatsoever could not therefore be heard to contend that since it was not using the transmission system under the MTOA it was not liable to pay monthly transmission charges for the same to the Petitioner.

(g) Though CPL vide letter dated 4.10.2013 had admitted the liability for payment of transmission charges under the MTOA, the only reason constraining CPL from paying monthly POC charges and opening LC under the MTOA was the financial non-readiness of CPL



despite having availed MTOA rights and reserving the granted capacity in the transmission system of the Petitioner.

(h) CPL had on oath filed affidavit before the Tribunal and also by statements recorded in the orders of the Tribunal admitted and acknowledged its liability to pay transmission charges to the Petitioner till the time the MTOA granted to it and the consequent capacity reserved for it in the transmission system of the Petitioner had existed.

(i) CPL has been granted Long-Term Open Access (LTA) by the Petitioner vide letter dated 8.12.2010. In case the generation project of CPL does not materialize in time due to poor financial health, then the transmission charges payable for LTA are also to be clouded under risk and the same may be taken as a relevant consideration by the Commission while adjudicating upon the deliberate nonpayment of MTOA charges by CPL.

Accordingly, the Petitioner has prayed that CPL may be directed to pay transmission charges amounting to Rs 18.89 crore together with surcharge thereon towards MTOA granted to it for the period from 16.6.2013 to 31.1.2014. The Petitioner has also prayed for initiation of appropriate penal proceedings against CPL under Section 142 of the Electricity Act, 2003 for willfully violating the provisions of the Connectivity Regulations by failing and refusing to pay the said transmission charges as mandated under the said regulations.

Submissions of Respondent, CPL

14. The Respondent No.1, CPL in its reply affidavit dated 28.1.2015 has mainly submitted as under:

(a) CPL denies the said payments since CPL was not allowed at all to use the transmission network by the Petitioner. When CPL was denied such use of the transmission system, then the Petitioner cannot claim charges for a service which was not allowed to be availed by the Petitioner.

(b) The contention of AP discoms for re-routing of power was also dismissed, even though the said proposal to re-route power from an injection point in the ER to the substation at Namkum and from the said s/s to the AP discoms using the MTOA dated 30.10.2012 was not against any provision of either the regulations of this Commission. The Tribunal by order dated 18.12.2013 had allowed CPL to seek STOA from alternate source upto the injection point and CPL was further permitted to then wheel the power from Namkum to the AP discoms by using the already granted MTOA.



(c) The Tribunal also directed CPL to furnish BG /LC worth Rs 10 crore towards safeguarding the interest of the Petitioner since the said Petitioner was demanding alleged transmission charges. However, the said direction was not adjudication of the alleged claim of the Petitioner towards transmission charges. The order dated 18.12.2013 proves that CPL was earlier wrongly denied permission to wheel power by the Petitioner from an alternate source, for which both CPL and the AP discoms have been pleading. CPL had withheld transmission charges payment since the Petitioner was not permitting use of transmission system even after the order dated 18.12.2013 of the Tribunal.

(d) The power flow is dependent upon physics of electron flow and this flow cannot be subject to any interpretation of law given by courts. If power flow is possible, then the same cannot become impossible only on account of the court/authority denying the same. Therefore, if the flow of power through re-routing is possible, as clarified by the Tribunal, then the same means that the Commission and the Petitioner wrongly denied the use of the transmission system to CPL which means that CPL is not at all liable to pay any transmission charges.

(e) CPL does not deny the fact that the stakeholders in the ISTS ought to pay the transmission charges as the CERC Sharing Regulations. However, the same does not mean that a DIC has to be compelled to make payments towards transmission charges when the said DIC was wrongly prevented from using the transmission network by the Petitioner.

(f) The LTOA granted vide letter dated 8.12.2010 is a separate right to use of transmission lines by CPL and any failure to use the said access lines by CPL has to be decided separately and can have no bearing in the present case.

Accordingly, the Respondent, CPL has prayed that the petition filed by the Petitioner ought to be dismissed.

Rejoinder of the Petitioner

15. The Petitioner in its rejoinder affidavit dated 5.2.2015 has mainly submitted as under:

(a) MTOA was to be granted for point to point transmission on a specified segment of transmission system with point of injection and the point of drawl being clearly identified as stated in the MTOA application. In case of change in any of the identified points whether of injection or of drawal, there came into being a different segment of transmission system than that for which MTOA had been granted. Consequently, the MTOA granted was to be surrendered and a fresh application was to be made for the new segment of transmission charges.



(b) While signing the MTOA agreement, CPL had unequivocally agreed and undertook to share and pay all applicable charges of the ISTS from the date of grant of MTOA and had further agreed to furnish LC for an amount equal to 2.10 times the average first bill as computed in accordance with the Sharing Regulations. The obligation to pay monthly transmission charges and open a LC to secure payment of such charges pursuant to the grant was absolute on MTOA customer irrespective whether the energy was actually transmitted through the system of the Petitioner during the period of grant.

(c) It is evident from the mechanism for grant of MTOA as laid down in the Connectivity Regulations, MTOA was to be granted on a relative priority basis and the applications waiting in queue were to be processed only to the extent of capacity left available in the transmission system. The grant of MTOA was also to impact Short-Term Open Access (STOA) the balance available capacity become a relevant factor. Thus, upon grant of MTOA, a certain capacity in the transmission system become reserved for the applicant to whom MTOA was granted and that curtailed the availability of capacity not only to other applicants of MTOA but also to applicants for STOA. Whether the reserved capacity was in fact used by the successful applicant or remained idle for any reason whatsoever, did not alter the status of availability of balance capacity for other applicants. The applicant holding the MTOA permission and not using the capacity available with it, could not therefore be heard to contend that since it did not use the transmission system under the MTOA, it was not liable to pay the transmission charges for the same. CPL is wrong in claiming the payment of transmission charges to be dependent on actual use of ISTS under the MTOA granted to it and its misplaced plea is liable to be rejected.

(d) The records placed before this Commission would show that it was never the case that CPL had not been allowed to use the ISTS for power flow under the MTOA granted to it. CPL had at all times had the contractual liberty to supply power from original or from alternate sources and the Petitioner neither had any say in it nor could prevent CPL from supplying power from alternate source as subsequently alleged. The Petitioner was only insisting that the supply of power from alternate source was to be as per the Connectivity Regulations which require the surrender of existing open access upon payment of transmission charges and a fresh application for open access in case any point of injection or drawl was changed. Only when CPL had repeatedly violated the undertaking given before the Tribunal for complying with its payment obligations under the Connectivity Regulations, the Petitioner was constrained to cancel the MTOA as per the liberty granted by the Tribunal in that behalf.



(e) The order dated 18.12.2013 of the Tribunal is in continuation of order dated 25.11.2013 passed by the Tribunal in an interim application filed by CPL to allow flow of power from alternate source or in the alternative restrain the Petitioner from cancelling the MTOA till final disposal of the appeal. Prior thereto, CPL had filed an undertaking on affidavit in the context of termination/cancellation of MTOA that it would furnish a BG for an amount of Rs 5 crore and also open a LC for an amount of Rs 5 crore in favour of the Petitioner and the BG/LC would be liable to be encashed subject to further orders of Tribunal. By order dated 18.12.2013, the Tribunal extended the time limit for furnishing BG and LC and further directed that upon failure to do so, the Petitioner was at liberty to take necessary action as per contract. Since CPL failed to comply with fulfilling its undertaking within the extended time, the Petitioner was left with no option but to cancel the MTOA granted by it to CPL. The plea of CPL for wheeling of power from an alternate source under the existing MTOA was not considered at all by the Tribunal and even maintaining status quo as regards termination of MTOA was permitted subject to CPL securing the payment of accumulated transmission charges to the Petitioner which CPL failed and refused to do. The order dated 18.12.2013 nowhere allowed the Petitioner to reroute power from an alternate source under the existing MTOA as has wrongly been contended by CPL.

(f) CPL had unequivocally admitted to the Petitioner as also in the proceedings before the Tribunal its liability to pay transmission charges under the MTOA granted to it. When its intention of not fulfilling its obligations and abuse of process became evident, the Tribunal passed order dated 11.4.2014. The conduct of CPL with respect to its commitment to pay transmission charges was thus viewed seriously by the Tribunal and was found to be misleading the Tribunal in that behalf. The fact remains that CPL never intended to pay transmission charges for the MTOA granted to it by the Petitioner and has only misused the regulatory process with impunity to discharge its statutory obligation of paying transmission charges to the Petitioner for the period MTOA subsisted in its favour.

Accordingly, the Petitioner has prayed that the petition be allowed and the reliefs sought for may be granted by the Commission.

16. The Commission had directed the Petitioner to file necessary information with regard to the winding up of the Respondent Company. The Commission also directed the Respondent, CPL to file information regarding the status of the company.



17. In compliance with the above directions of the Commission, the Petitioner vide affidavit dated 11.5.2015 has submitted that proceedings have been initiated before the Hon'ble High Court of Calcutta in C.P. 682/2014 (Corporate Power Ltd v Rajendra Kumar) wherein the Court vide order dated 2.9.2014 had held that the Respondent CPL is liable to be wound up and that as recorded in order dated 13.1.2015 of the Hon'ble Court, an appeal filed by CPL for recall of the said order dated 2.9.2014 has also been dismissed. It has also submitted that the Hon'ble Court on 3.2.2015 had ordered that CPL be wound up in accordance with the provisions of the Companies Act and Official Liquidator has been directed to forthwith take possession of all the assets and properties of the Respondent Company, now in liquidation, and take charge of its books, records, documents and transactions. The Petitioner has also submitted that on an application made by some contributories, the Hon'ble High Court has restrained the Official Liquidator from taking possession of the assets and effects of CPL till 23.2.2015 and that to the best of knowledge, CPL continues to be under liquidation under the orders of the Hon'ble High Court. The Petitioner has further submitted that the transmission charges for MTOA granted to CPL are claimed under the provisions of the Connectivity Regulations. Referring to Section 174 of the Electricity Act, 2003, the Petitioner has submitted that that the provisions of the Act are to have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the act. It has also stated that in view of the overriding effect of the provisions of the Electricity Act, 2003, the claim for transmission charges made by the Petitioner under MTOA granted to CPL are liable to be decided by this Commission without taking leave of the Hon'ble Court which has ordered CPL to be wound up and had appointed an Official Liquidator to take charge of its books, records, documents and transactions. The Petitioner has submitted that as the subject matter regarding liquidation process of CPL and subsequent recovery of transmission charges as per the decision of the Commission is likely to take considerable time, the Petitioner may be allowed to bill to other DICs the said outstanding dues against the MTOA of CPL amounting to Rs 18.89 crore, as the YTC needs to be primarily recovered from LTA charges and the credit for MTOA charges is to given to the DICs making payment of LTA charges, or otherwise it will cause huge loss to the ISTS licensees. It has further submitted that on realization of the dues from CPL by



the Petitioner based on proceedings before the Commission and the Hon'ble High Court of Calcutta, the proportionate credit for the same will be passed onto the DICs by the Petitioner.

18. The petition was heard on 12.5.2015. During the hearing, the Learned Senior Counsel for the Petitioner reiterated the submissions made in the petition. He also submitted that CPL has refused to pay transmission charges to the Petitioner for the period MTOA subsisted in its favour and is now seeking to take shelter behind the winding up proceedings been initiated against CPL, for non-payment of dues to its various other creditors. The Learned Counsel further submitted that the Hon'ble High Court vide order dated 3.3.2015 has stayed the winding up proceedings in which the Official Liquidator was appointed, provided CPL fully clears the dues of its creditors, till 16.4.2015. However, CPL has failed to inform the Commission whether the said payments have been made by them or not. It was pointed out that since CPL has violated the provisions of the Connectivity Regulations, under which an absolute liability to pay transmission charges has been imposed on MTOA customers, CPL is liable to pay an aggregate sum of ` 18.89 crore under the MTOA granted to it by the petitioner. The Learned Counsel relied upon the judgment of the Hon'ble Supreme Court in Allahabad Bank V Canara Bank & Anr [(2000) 4 SCC 406] and submitted that the ongoing winding up proceedings does not affect the present proceedings before the Commission as the latter are proceedings under a Special Act and as such, override the proceedings initiated under General Act.

19. The Learned Counsel for the Respondent, CPL filed affidavit dated 11.5.2015 enclosing the copy of the orders of the Hon'ble High Court of Calcutta dated 3.2.2015 and 3.3.2015 relating to the winding up proceedings in C.P. No. 682/2014 and submitted during the hearing that since the assets are under the control of Official Liquidator appointed by Hon'ble High Court, the possession of all assets and properties are now in liquidation and not under the Company's control. The learned counsel accordingly submitted that the Petitioner has to recover its dues from the assets under the possession and control of the Official Liquidator. The learned counsel however clarified that he had no knowledge as to whether payments were made by CPL before 16.4.2015 in terms of the order of the Court dated 3.3.2015. The Commission however directed CPL to place on record the present



position of the liquidation process of the Respondent, CPL under the directions of Hon`ble High Court of Calcutta and reserved its orders on the admissibility of the petition.

20. The Respondent, CPL vide affidavit dated 15.5.2015 has submitted that the Commission has reserved its orders on 12.5.2015 to decide the question as to whether the hearing of the petition on the alleged unpaid transmission charges of the Petitioner by CPL can be held in the light of the fact that Official Liquidator has been appointed by the Hon`ble High Court of Calcutta and that the order ought to be confined to the said issue. It has also submitted that that the hearing has not begun in the instant petition and the Respondent has not been given an opportunity to argue and rebut the claims of the Petitioner in the main petition. It has further submitted that once the issue whether the Commission can hear the instant petition is decided, only then any hearing on the main merits of the petition as regards liability of CPL to pay the transmission charges can be held. The Respondent has stated that in the event the Commission proceeds to decide the main petition on merits, then the same would be grossly against the principles of natural justice and would lead to miscarriage of justice and severe prejudice and hardship to the Respondent, CPL and hence, without hearing the Respondent, CPL on merits, no final orders can be passed.

21. The Petitioner in its written submissions vide affidavit dated 24.6.2015 has reiterated its submissions made in earlier affidavits. The Petitioner has also referred to the judgment of the Hon`ble Supreme Court in Allahabad Bank vs. Canara Bank &Anr [(2000) 4 SCC 406] and has submitted that in terms of the principle laid down by the Court, the on-going winding up proceedings before the Hon`ble High Court of Calcutta does not affect the present proceedings before this Commission as the latter are proceedings under a Special Act and as such, override the proceedings initiated under a General Act. Accordingly, it has submitted that the Respondent, CPL is liable to pay to the Petitioner the outstanding dues of transmission charges under the MTOA together with surcharge as prayed for in the petition.



Analysis and Decision

22. We have considered the submissions of the parties and the documents available on record. The contention of Respondent, CPL that the hearing in the petition has not begun and that it has not been given opportunity to argue and rebut the claims raised by the Petitioner is incorrect and contrary to the records of the case. It is noticed that pursuant to the hearing of the matter on 18.9.2014 on admission, copy of the petition was served on the Respondent and in response, the Respondent vide affidavit dated 28.1.2015 has filed paper book containing detailed reply on merits, in the matter. Though the petition was heard on several dates before orders were reserved on 12.5.2015, the fact that winding up proceedings have been initiated against the Respondent, CPL, based on the orders of the High Court of Calcutta were never brought to the notice of the Commission. Only during the hearing on 12.5.2015, the Respondent, in response to the submissions of the Petitioner on merits, filed affidavit dated 11.5.2015 and submitted that since the assets are under the control of the Official Liquidator appointed by Hon'ble High Court of Calcutta, the possession of all assets and properties are now in liquidation and not under the company's control. The Respondent also submitted that the Petitioner has to recover it from the assets under the possession of the Official Liquidator. It is therefore evident that the Respondent, CPL had acknowledged the claims of the Petitioner by suggesting that the Petitioner might recover the same from the assets under the possession of the Official Liquidator. The Commission, after considering the submissions of parties and documents available on record, reserved the order on 12.5.2015 to consider the admissibility of the petition. CPL vide affidavit dated 15.5.2015 has sought an opportunity of hearing to rebut the claims of the Petitioner on merit. Accordingly, we proceed to decide the admissibility of the petition filed by PGCIL and thereafter will consider whether in the light of the detailed submission made by CPL, there is any further requirement of hearing on admissibility.

23. The Respondent, CPL has raised a preliminary objection that whether the Commission can hear the petition during the pendency of the ongoing winding-up proceedings of the Respondent company before the Official Liquidator. The Respondent during the hearing suggested that the



Petitioner could approach the official liquidator for recovery of its dues as the assets are under the possession of the Official Liquidator. This is an acknowledgement of the claims of the Petitioner by the Respondent, CPL. It is also pertinent to observe that the said Respondent was a party to the winding up proceeding before the Hon'ble High Court of Calcutta as early as on 2.9.2014, when the Hon'ble High Court passed order for winding up of the Respondent company, but the Respondent chose to disclose the said fact before this Commission only during the hearing on 12.5.2015 by filing affidavit dated 11.5.2015. Even in this affidavit, no issue was raised by the Respondent against the hearing of this petition during the pendency of the winding up proceedings before the Official Liquidator. In our view, the ongoing winding-up proceedings do not in any manner affect the present proceedings before the Commission as the scope of proceedings before the official liquidator and the scope of proceeding before the Commission are different. The claims of the Petitioner against Respondent have to be determined in terms of the Connectivity Regulations and the detailed procedure there under which has been enacted by the Commission in exercise of the powers under Section 178 of the Electricity Act 2003. Only after determination of the claims by the Commission, the Petitioner can approach the official liquidator for recovery of its claims through the winding-up proceedings. In our view, pendency of the proceedings before the official liquidator cannot put an embargo on the Commission to proceed with the present petition.

24. One more submission of the Respondent is that it would be grossly against the principles of natural justice and no final orders can be passed without hearing the Respondent, CPL on merits. As already stated, the Respondent has filed detailed reply on merits and sufficient opportunity was also given to the parties to put forward arguments in the case. In response to the arguments of the Petitioner on merits on 12.5.2015, the Respondent has submitted that the Petitioner can recover the dues from the assets under the control of the Official Liquidator. The Respondent having made its stand clear with regards the recovery of dues of the Petitioner as claimed in the petition, cannot as an afterthought contend that the final orders passed on merits without hearing the Respondent would result in hardship and miscarriage of justice. Even though it is recorded that the order in the petition is reserved on admissibility, after considering the detailed submission on merit and other



documents on record, the Commission is of the view that order can be passed in the petition and there is no requirement of rehearing.

Grant of Relief

25. The relief prayed for by the Petitioner at para 1(b), (c) and (d) are directed against the Respondent No. 1. In prayer (b), the Petitioner has sought recovery of the transmission charges amounting to Rs 18.89 crore for the period from 16.6.2013 to 31.1.2014 and surcharge thereon. According to the Petitioner, the MTOA was operationalized on 16.6.2013 and was terminated on 31.1.2014. The Respondent No. 1 entered into PPA with A.P Discoms for supply of 480 MW power for a period of 3 years from 16.6.2013 from 15.6.2013.

26. Article 3.1.1(c) of the PPA provides that arrangement of MTOA is one of the conditions subsequent to be fulfilled by the seller (CPL). The said provision reads as under: “(c) The seller shall have obtained the necessary permission for medium term open access for the transmission system from the Injection Point up to the Delivery point and shall have executed the transmission Service Agreement with the transmission licensee for the transmission of power from the Injection Point upto the Delivery Point and provided a copy of the same to the Procurer(s);”

27. Connectivity Regulations defines “medium-term open access” as the right to use the inter-State transmission system for a period exceeding 3 months but not exceeding 3 years. Central Transmission Utility has been designated as the nodal agency for grant of medium term open access to inter-State transmission system. Regulations 9 of Connectivity Regulations provides for the criteria for granting Long Term Access and Medium Term Open Access as under:

“9. Criteria for granting Long Term access or medium term open access (1) Before awarding long-term access, the Central Transmission Utility shall have due regard to the augmentation of inter-State transmission system proposed under the plans made by the Central Electricity Authority.

(2) Medium-term open access shall be granted if the resultant power flow can be accommodated in the existing transmission system or the transmission system under execution.

Provided that no augmentation shall be carried out to the transmission system for the sole purpose of granting medium-term access: Provided further that construction of a dedicated transmission line shall not be construed as augmentation of the transmission system for the purpose of this regulation.



28. Regulation 19 of the Connectivity Regulations provides for the application for grant of medium term open access as under:

"19. Application for Medium Term Open Access

1. The application for grant of medium-term open access shall contain such details as may be laid down under the detailed procedure and shall, in particular, include the point of injection into the grid, point of drawal from the grid and the quantum of power for which medium-term open access has been applied for. 2. The start date of the medium-term open access shall not be earlier than 5 months and not later than 1 year from the last date of the month in which application has been made."

29. Further, proviso of Regulation 21(1) of the Connectivity Regulations provides as under :

"...The medium-term open access agreement shall contain the date of commencement and end of medium-term open access, the point of injection of power into the grid and point of drawal from the grid, the details of dedicated transmission lines required, if any, the bank guarantee required to be given by the applicant and other details in accordance with the detailed procedure."

30. Regulation 21 of the Connectivity Regulations provides that the applicant is required to sign an MTOA agreement with the CTU in accordance with the Detailed Procedure which require that after signing of the MTOA agreement, the applicant is to submit a Bank Guarantee to the CTU/Transmission licensee equivalent to estimated transmission charges of two months within 30 days from the grant of MTOA and three months prior to the date of scheduled commencement of MTOA. In case the BG is not submitted by the applicant within the stipulated period, the grant of MTOA is to be cancelled by CTU. In addition, for payment of monthly transmission charges, irrevocable revolving Letter of Credit in favour of CTU equivalent to 105% of the average monthly transmission charges is required to be opened by the applicant within 15 days before the commencement of MTOA.

31. The Petitioner has submitted that the Respondent No.1 had applied for grant of MTOA on 1.8.2012 and the same was granted by the Petitioner on 5.10.2012 for the period from 16.6.2013 to 15.6.2016. It has also submitted that at the time of making the grant, the respondent was informed that the grant was subject to the signing of the requisite MTOA agreement and fulfillment of conditions as per the Connectivity Regulations. The Petitioner has further submitted that MTOA and TSA on was signed on 30.10.2012 wherein the Respondent CPL undertook to share and pay all applicable charges from the date of grant of MTOA and also furnish LC for an amount equal to 2.1



times the average first bill amount for different months as computed in line with Regulation 3.6 of the Billing, Collection and Disbursement Procedure under the CERC (Sharing of Inter-State Transmission charges & Losses) Regulations, 2010 (Sharing Regulations). The Petitioner has further stated that after grant of MTOA and agreements both TSA and MTOA, the Respondent did not open the letter of Credit and instead requested the Petitioner to transfer the corridor granted under MTOA to transmit power from an alternate source which was rejected by the Petitioner on 9.5.2013 on the ground that the same was in violation of the Connectivity Regulations. The Petitioner has submitted that despite several correspondences and orders of the Tribunal, the Respondent CPL failed to open the required LC in favour of the Petitioner and accordingly, in line with the order of the Tribunal dated 18.12.2013, the Petitioner was constrained to cancel the MTOA on 31.1.2014. Accordingly, it has submitted that the Respondent No.1, CPL is liable to pay the outstanding dues of transmission charges amounting to Rs.18.89 crore under MTOA for the period from 16.6.2013 to 31.1.2014 together with surcharge and cannot take refuge of the winding up proceedings and refuse to pay the statutory dues of the Petitioner for MTOA granted under the provisions of the Electricity Act 2003 read with the regulations framed there under.

32. The Respondent, CPL has further submitted that when the service for which the Petitioner is claiming payments was not available for use of the Petitioner, there is no question of making any payments whatsoever. It has also submitted that the proposal for re-routing of power from an alternate source using the MTOA was not against the provisions of the Connectivity Regulations or the Detailed Procedure framed by the Commission. The respondent has pointed out that the order of the Tribunal dated 18.12.2013 allowing the Respondent to seek STOA from alternate source to the injection point and then to wheel the power from Namkum to AP discoms by using the MTOA granted, proves that the respondent was wrongly denied permission to wheel power by the Petitioner from an alternate source. Accordingly, it has submitted that the transmission charges payment were withheld since the Petitioner was not permitting the use of transmission system even after the order dated 18.12.2013. The Respondent has further stated that even though the Appeal has become infructuous due to termination of MTOA by the Petitioner, it does not take away the fact



that power flow through rerouting of power was possible as clarified by order dated 18.12.2013 of the Tribunal. Accordingly, the Respondent has submitted that the Petitioner had deliberately prevented the flow of power of respondent thereby denying the use of MTOA and hence any claim by the Petitioner is denied and disputed.

33. We have considered the submissions of the parties. It is noticed that the issue of non-payment of transmission charges by open access customers including the Respondent No.1 came up for consideration before the Commission in Petition No. 78/MP/2013 and the Commission by order dated 3.2.2014 decided as under:

“20. Non-payment of transmission charges or partial payment of transmission charges by the DICs for the transmission services availed by them is a matter of grave concern as it will cripple the financial viability of the petitioner and other inter-State transmission licensees. It will bring to a standstill the entire regulatory mechanism which has been evolved and put in place in order to supply safe, reliable and quality power to the consumers and will act as a dampener to the investment in the transmission sector which the country needs keeping in view the power requirement in future. This Commission has been vested with the function to regulate the inter-State transmission of electricity and has the mandate of the Parliament to ensure that inter-State transmission is regulated in a smooth and efficient manner and is not crippled on account of non-payment or partial payment of transmission charges. We direct all DICs to make timely payment of transmission charges and other charges to the petitioner in accordance with the bills raised by the CTU and provide requisite payment security mechanism in compliance with the Sharing Regulations so that viability and sustainability of ISTS network is not disturbed. We also direct the DICs mentioned in para 19 above to liquidate the outstanding amount at the earliest, preferably by 31.3.2014.”

34. Since the Respondent No.1 was party to the proceedings in the said petition, the respondent was expected to comply with the directions contained in the said order and clear all outstanding dues as regards payment of transmission charges to the Petitioner. As regards the submission of the Petitioner that the respondent had failed to open LC in terms of the Detailed Procedure laid down under the Connectivity Regulations and that only after repeated requests and grant of extension of time to the respondent, the MTOA was cancelled on 31.1.2014, it is noticed that in terms of the Connectivity Regulations, the Respondent was required to submit a LC to the CTU/Transmission licensee equivalent to estimated transmission charges of two months within 30 days from the grant of MTOA and three months prior to the date of scheduled commencement of MTOA and in case the LC was not submitted within the stipulated time, the grant of MTOA is to be cancelled by CTU. In this background, it is not clear as to why the Petitioner, despite the non-submission of LC by the respondent, had failed to cancel the MTOA granted to it on 5.10.2012.



Though the Petitioner has stated that it refrained from taking any precipitative action against the respondent owing to the pendency of Petition No. 93/MP/2013 filed by the respondent seeking transmission of power under the MTOA granted to it from alternate source, in our view, the pendency of the proceedings, in the absence of any interim order, cannot act as a bar for the Petitioner to cancel the MTOA within the stipulated time in terms of the provisions of the regulations. It is noticed that the respondent had challenged the order of the Commission dated 11.10.2013 in Petition No. 93/MP/2013 rejecting the prayer of the respondent seeking transmission of power under the MTOA granted to it from alternate source before the Tribunal in Appeal No.276/2013 and had also prayed for grant of interim relief to maintain status quo with respect to the termination/cancellation of MTOA on 25.11.2013. However, the Tribunal directed the respondent to file affidavit undertaking to furnish a Bank Guarantee for an amount of Rs.5 crores, and further open the Letter of Credit for an amount of Rs. 5 crores, in favour of the Respondent No.1 and also directed the respondent to comply with this undertaking within three weeks from 25.11.2013. The relevant portion of the order is extracted as under:

“ We have heard the learned counsel for the parties.

As directed by this Tribunal, the undertaking affidavit has been filed by the Appellant/Applicant seeking for interim relief. The relevant portion at Para Nos. 3, 4 & 5 is as follows:

3. “I state that the Appellant is seeking the indulgence of this Hon’ble Tribunal for grant of interim prayer to maintain a status-quo, as on date, with respect to the termination/cancellation of the MTOA. In this regard, as directed by this Hon’ble Tribunal the Appellant hereby undertakes to furnish a Bank Guarantee for an amount of Rs.5 crores and further open the Letter of Credit for an amount of Rs. 5 Crores, in favour of the Respondent No.1.

4. The said Bank Guarantee and Letter of Credit shall be liable to be encashed/invoked subject to further orders of the Hon’ble Tribunal in the present appeal.

5. I further state that the Appellant shall comply with the terms and conditions of the present undertaking within a period of 6 weeks.”

35. Though the respondent has submitted that the direction of the Tribunal to furnish the BG /LC worth Rs 10 crore is only to safeguard the interest of the Petitioner and was not an adjudication of the claim of the Petitioner towards transmission charges, the fact that the direction to furnish such undertaking for payment was based on the prayer of the respondent to maintain status quo with respect to the termination/cancellation, cannot be overlooked. It is further noticed that the



respondent has sought extension of time for furnishing the BG and LC for one month and accordingly, the Tribunal by order dated 18.12.2013 had extended the time upto 15.1.2014 and held that in case the BG and LC are not furnished by the respondent in terms of the undertaking, the Petitioner would be at liberty to take necessary action as per contract. The relevant portion of the order dated 18.12.2013 is as under:

“The learned counsel for the Appellant has sought extension of time in complying with the undertaking dated 25.11.2013. The Appellant has approached its banks for opening the LC and furnishing a bank guarantee. However, the bank is in the process of undertaking the exercise for redetermining the entire credit facility of the Appellant whereby it is difficult for the said bank to issue the bank guarantee to the learned counsel midway during the said exercise. According to the Appellant, the bank has assured that the said bank guarantee and LC will be issued after the said exercise is over.

Accordingly, the Appellant seeks extension for one month for furnishing the bank guarantee and LC.

We have heard the learned counsel for the parties. We deem it appropriate to extend the time limit for furnishing the bank guarantee upto 15.1.2014. After 15.1.2014, if the bank guarantee and LC are not furnished in terms of the undertaking dated 25.11.2013, the Respondent No.1 will be at liberty to take necessary action as per the contract.

The learned counsel for the Appellant has pointed out that according to the power supply agreement based on the standard bidding document of Govt. of India, there is a provision for supplying power from the alternate source in the event of delay in commissioning of the Appellant's power plant. Accordingly, they were seeking a short term open access from an alternate power plant in the eastern region upto the injection point of the Appellant.

It is open for the Appellant to seek short term open access for supply of power from alternate source of power from such alternate source to the point of injection of the Appellant's power plant, which shall be considered and allowed by the appropriate authority as per the regulations.”

36. Referring to the above order, the respondent has submitted that the Tribunal had allowed the respondent to seek STOA from alternate source upto the injection point (Namkum) and it was further permitted to then wheel the power from Namkum to the AP discoms by using the already granted MTOA. It has further submitted that since the Petitioner was not permitting the use of the transmission system despite the order dated 18.12.2013 of the Tribunal, the respondent had withheld the transmission charges payment to the Petitioner. This submission of the respondent is devoid of any logic and is unsustainable. Though the Connectivity Regulations permit the supply of power from alternate sources, it required the surrender of the existing open access upon payment of transmission charges and fresh application for open access in case any point of injection and drawl was changed. On a plain reading of the said order it is clear that the Tribunal at the request of the respondent herein had only granted liberty to the said respondent to seek STOA for supply of power



from alternate sources and the same was directed to be considered by the authority (the Petitioner CTU) as per regulations. In our view, no such permission was granted to the respondent herein by the Tribunal to procure power from alternate source under the existing MTOA as stated by the respondent and the submission of the respondent that the Tribunal had permitted the respondent to supply power from alternate source under the existing MTOA is a deliberate attempt to distort the order of the Tribunal, which is not acceptable. The respondent therefore cannot withhold the payment of transmission charges on a false premise that the Petitioner had not permitted the use the transmission system despite the order of the Tribunal.

37. As stated, the Tribunal in its order dated 18.12.2013 has held that in case the BG and LC are not furnished by the respondent in terms of the undertaking, the Petitioner would be at liberty to take necessary action as per contract. As the respondent failed to comply with the terms of the undertaking furnished by it, the Petitioner in terms of the liberty granted by the Tribunal cancelled the MTOA on 31.1.2014. Accordingly, the Tribunal on 11.4.2013 dismissed the appeal as infructuous and observed that any party aggrieved by the non-implementation or non-compliance of the aforesaid undertaking filed by the respondent herein may take such recourse as permitted under law. The relevant extract of the order dated 11.4.2014 is as under:

“We have perused our earlier Orders dated 25.11.2013, 18.12.2013 and 3.4.2014. On the date of arguments namely, on 3.4.2014, the learned counsel for the Appellant-Corporate Power Limited admitted that the instant appeal has already become infructuous as the Respondent No.1 has terminated/cancelled the Medium Term Open Access granted to the Appellant which fact has not been disputed by the learned counsel for the Respondents. Thus, the admitted position is that the instant appeal has become infructuous.

The Appellant had earlier filed IA No.372 of 2013 seeking interim order to maintain status-quo as on date, with respect to the termination/cancellation of Medium Term Open Access. The Appellant gave an undertaking to furnish a Bank Guarantee for ₹.5 crores and further open the Letter of Credit for an amount of ₹.5 crores in favour of the Respondent No.1 and the Bank Guarantee and Letter of Credit shall be liable to be encashed/invoked subject to further orders of this Tribunal in the Appeal. The Tribunal passed an order on 25.11.2013 directing the Appellant to comply with the undertaking within three weeks from the date of the order.

The Appellant sought extension of time of one month in complying with the undertaking dated 25.11.2013. This Tribunal by order dated 18.12.2013 after hearing both the parties extended the time limit for furnishing Bank Guarantee up to 15.1.2014 and held that in case the Bank Guarantee and Letter of Credit are not furnished by the Appellant in terms of their undertaking, the Respondent No.1 will be at liberty to take necessary action as per the contract.

The matter was posted for hearing on 20.1.2014, in the meantime, directed the rival parties to file their written submissions after exchanging copies of the same.



After giving undertaking in the form of affidavit before this Tribunal by the Appellant and again taking extension of time, the Appellant has not acted upon or complied with the contents of the affidavit for the reasons best known to it. The Appellant also tried to mislead this Tribunal by first seeking leave to file undertaking in the form of affidavit, filed the same and knowingly did not comply with the same. In the process the Appellant has managed to avert possible termination/cancellation of the contract at an earlier date. Since the appeal has become infructuous, we restrain from making more comments on the attitude and conduct of the Appellant.

Since the appeal has become infructuous, the appeal is dismissed without any order as to costs. Any party feeling aggrieved by non-implementation or noncompliance of the aforesaid undertaking filed by the Appellant may take any such recourse, as permitted in law. All the interim orders passed in this Appeal are hereby discharged/vacated.”

38. Despite the appeal being declared infructuous as above due to termination of MTOA, it is observed that the respondent, has submitted that it does not however take away the fact that power flow through re-routing of power was possible as clarified in order dated 18.12.2013. This submission of the respondent is not tenable considering the fact that no such clarification and or permission was granted by the Tribunal in its order dated 18.12.2013 as stated above. Even otherwise, the Tribunal while declaring the appeal as infructuous had discharged /vacated all interim orders passed in the said appeal and hence reliance by the respondent to order dated 18.12.2013 is baseless and illegal. It is noticed that the respondent by letter dated 1.5.2014 has categorically refused to pay any transmission charges to the Petitioner for the period of MTOA which subsisted in its favour despite the fact that it undertook to furnish the BG and LC in terms of the directions of the Tribunal. In our view, the Petitioner has approached the Commission in terms of the said order dated 11.4.2014 and has sought the reliefs as in para 1 above. On the contrary, the respondent has placed reliance on the order of the Tribunal dated 18.12.2013 to justify its contention that re-routing was possible and since the Petitioner had denied the use of the transmission system to the respondent, it is not liable to pay any transmission charges to the Petitioner. As already held no such clarification/permission was given by the Tribunal in its order dated 18.12.2013 for rerouting of power on STOA with the existing MTOA. Also, the Tribunal by its order dated 11.4.2014 as quotes supra had discharged /vacated all interim orders passed in the said appeal. In the light of the findings and discussions in the said order, we hold that the Petitioner is entitled for transmission charges amounting to ₹18.89 crore, together with surcharge for MTOA granted to the respondent for



the period from 16.6.2013 to 31.1.2014 and the respondent, CPL is liable to pay the same. We direct accordingly.

39. The next question arises as to how the dues of Petitioner are to be recovered. The Petitioner vide affidavit dated 11.5.2015 has submitted that the Hon'ble High Court of Calcutta by order dated 2.9.2014 in Civil Petition No. 682/2014 (Corporate Power Ltd v Rajendra Kumar) has initiated winding up proceedings of the respondent company on default of payment of ₹6.43 lakh to the petitioning creditor and the appeal filed by respondent for recall of the order dated 2.9.2014 admitting the winding up petition has been dismissed by the said Court on 13.1.2015. It has also submitted that on 3.2.2015, the Hon'ble Court has ordered the winding up of the respondent company for nonpayment of dues to creditors, in accordance with the provisions of the Companies Act and the Official Liquidator has been directed to forthwith take possession of all assets and properties of the company and take charge of the documents, records, books and transactions. The relevant portion of the order dated 3.2.2015 is extracted as under:

"This application for winding up appears at the post-advertisement stage. It is quite apparent that the company is not in a position to pay its dues and it has not been able to pay the dues of the petitioning creditor or any of the supporting creditors.

As such, the company, namely, Corporate Power Limited, is directed to be wound up in accordance with the provisions of the Companies Act. The Official Liquidator will forthwith take possession of all the assets and properties of the company, now in liquidation, and take charge of its books, records, documents and transactions.

The petitioner will cause a gist of this order to be published in the same newspapers where the winding up petition had been advertised. The petitioner as well as the supporting creditors will be entitled to pursue their claims in accordance with law before the Official Liquidator. The petitioner will be entitled to costs of the advertisements, both at the initial stage and at the final stage, as liquidation expenses, to come out first from the assets of the company in liquidation."

40. Against the said order dated 3.2.2015, some of the contributories filed appeal (TA 8/2015) and the Hon'ble Court by order dated 17.2.2015 decided as under:

"Considering the case made out by the applicants, their proposal is worth consideration, but not by this Court having company determination only upto today.

On the above prima facie case I restrain the official liquidator from taking possession of the assets and effects of the company till 23rd February 2015, to enable the applicant to approach the Court having regular determination. The applicants are also restrained from transferring, dealing with or parting with any assets of the company for the time being."

41. Thereafter, the Hon'ble High Court of Calcutta by order dated 3.3.2015 held as under:



“Having regard to the facts and circumstances of the instant case, this Court is of the view that even if the claims of the petitioning creditors are relatively small, it was absolutely incumbent on the part of the company to have paid the dues of the petitioning creditors in accordance with law. It is quite evident from the records that the company failed to do so and obtained the order dated 17th February, 2015 only to stall the Official Liquidator from taking possession of the assets of the company in terms of the order dated 3rd February, 2015.

However, since the learned advocate appearing on behalf of the applicant company submits that the contributories are ready and willing to clear off the debts of all the petitioning creditor as well as the supporting creditors, if the Court grants some installments, this application is disposed of by giving an opportunity to the contributories to clear off the entire dues of the petitioning creditor – as it stands crystallized in the order dated 2nd September, 2014 – together with the due of the supporting creditors in two installments, first of which shall be payable on 16th March, 2015 and the second on 16th April, 2015.

In the event of a single default, the Official Liquidator shall, proceed to comply with the directions contained in the order dated 3rd February, 2015 passed in CP No. 682 of 2014. It is, however, made clear that if the dues of the petitioning creditor as well as the supporting creditors are fully paid, the winding up petition shall remain permanently stayed.”

42. The Petitioner vide affidavit dated 11.5.2015 has submitted that that the respondent company continues to be under liquidation under the orders of the Hon'ble High Court of Calcutta. However, the learned counsel for the respondent during the hearing on 12.5.2015 has submitted that since the assets are under the control of Official Liquidator appointed by Hon'ble High Court of Calcutta, the possession of all assets and properties are now in liquidation and not under the company's control. Accordingly, the learned counsel submitted that the petitioner has to recover it from the assets under the possession of the Official Liquidator. He however had no instructions as to whether the payments were made by the company by 16.4.2015 or not in terms of the orders of the Court dated 17.2.2015. We have in this order decided that the Petitioner is entitled for transmission charges amounting to ₹18.89 crore, together with surcharge, for the MTOA granted to the respondent for the period from 16.6.2013 to 31.1.2014 and the respondent, CPL is liable to pay the same. Accordingly, the Petitioner, if so advised, may pursue the claims in accordance with law before the Official Liquidator appointed in terms of the orders of the Hon'ble High Court of Calcutta. This disposes of the prayer of the Petitioner in para 1(b) of the petition.

43. As regards the prayer of the Petitioner in para 1(c) and (d) above, no directions can be given at this stage considering the fact that the proceedings for winding- up of the respondent company is pending before the Official Liquidator.



44. As regards the prayer of the Petitioner in para 1(a) above, we do not agree with the contention of the Petitioner to bill other DICs the outstanding dues against the MTOA. In our view, the transmission charges due against MTOA granted to the respondent, CPL is payable by the said respondent. The argument of the Petitioner that corridor was utilized in STOA cannot be a ground for relieving the MTOA customer of the charges due on him in terms of the connectivity regulations. Accordingly, the Respondent No. 1, CPL is liable to pay the charges towards MTOA granted to him by the Petitioner.

45. We direct the CTU to ensure strict compliance with the Connectivity Regulations and if any MTOA customer does not open the LC within the stipulated period, no extension shall be granted and the MTOA shall be cancelled.

46. Petition No. 136/MP/2014 is disposed of in terms of the above.

Sd/-
(A.S. Bakshi)
Member

Sd/-
(A. K. Singhal)
Member

Sd/-
(Gireesh B. Pradhan)
Chairperson

