

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 187/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: 11<sup>th</sup> of October, 2017**

**In the matter of**

Petition under Section 79 (1) (f) and (k) of the Electricity Act, 2003, in connection with the disputes and differences arising under the Transmission Agreement dated 3.1.2011 between ESSAR Power Gujarat Ltd. and Power Grid Corporation of India Ltd and abeyance of connectivity, in respect of the ESSAR Gujarat TPS Bachau 400 kV D/C (Triple) line and extension of Bachau sub-station.

**And in the matter of**

Essar Power Gujarat Limited (EPGL)  
Equinox Business Park  
5<sup>th</sup> Floor, Tower-2, Bandra-Kurla Complex  
L.B.S. Marg, Kurla (W)  
Mumbai-40070

.....Petitioner

**Vs**

Power Grid Corporation of India Ltd.  
SAUDAMINI<sup>™</sup>, Plot No-2, Sector-29,  
Gurgaon -122 001 (Haryana)

...Respondent

**Parties present:**

**For Petitioner:**

Shri Sanjay Sen, Senior Advocate, EPGL  
Shri Molshree Bhatnagar, Advocate, EPGL  
Shri Sakaya Singh Chaudhari, Advocate , EPGL  
Mrs. Preet Sethi, EPGL

**For Respondent:**

Shri Gopal Jain, Senior Advocate, PGCIL  
Ms. Swapna Seshadri, Advocate, PGCIL  
Shri A.M. Pavgi, PGCIL  
Shri Roopesh U.P., PGCIL



Mrs. Manju Gupta, PGCIL  
Shri Piyush Awasthi, PGCIL

### **ORDER**

This Petitioner, Essar Power Gujarat Limited has filed the present petition under Section 79 (1) (f) and (k) of the Electricity Act, 2003 (the Act) for adjudication of the disputes and differences arising under the Transmission Service Agreement dated 3.1.2011 between the Petitioner and Powergrid Corporation of India Ltd (PGCIL) and for keeping in abeyance the connectivity in respect of Essar Gujarat-Bachau 400 kV D/C (Triple) line and extension of Bachau sub-station.

#### **Brief Facts of the Case**

2. Brief facts of the case are that in the year 2008, the Petitioner had a proposed thermal generating capacity of 3600 MW at District Jamnagar in Gujarat. The Petitioner applied for Long Term Access for 2300 MW to CTU vide its application dated 25.9.2008, having 1150 MW each for Northern Region and Western Region Utilities. The Petitioner intended to increase the capacity of the generation project to 4440 MW in three phases. Phase I has 1200 MW (2X600) which has been commissioned and 1000 MW capacity out of the installed capacity has been contracted for sale to Gujarat Urja Vikas Nigam Limited (GUVNL). Phases II and III had proposed installed capacity of 2640 (4X660) MW and 600 MW (4x150 MW). The Petitioner made an application to CTU vide letter dated 2.7.2009 to carry out evacuation study for 3240 MW for evacuation of power from Phases II and III. The Petitioner further revised the per unit capacity of individual units on 18.7.2009 and increased the generation capacity from 4440 MW to 5000 MW. The Petitioner made an application dated 9.2.2010 to CTU for grant of connectivity and long term access for 3040 MW in Western Region. In the 12<sup>th</sup> Meeting of the Western Region

Constituents regarding Connectivity/Open Access Applications held on 8.7.2010, the request of the Petitioner for seeking connectivity from June, 2012 for 3040 MW (matching with the commissioning schedules of units of the generating station viz. Unit 1: June, 2012; Unit 2: September, 2012; Unit 3: December, 2012; Unit 4: March, 2013; Unit 5: March, 2013; Unit 6: July, 2013; Unit 7: November, 2013; Unit 8: March, 2014) was considered. Further, the request of the Petitioner for LTA of 3040 MW was also considered in the said meeting. It was decided that connectivity to the project would be provided with direct interconnection at 400 kV Bachau sub-station through 400 kV Essar TPS-Bachau D/C (Triple) line. It was decided that the Petitioner would take up the implementation of the connectivity line i.e. 400 kV Essar TPS-Bachau D/C (Triple) line for connectivity subject to confirmation within one month. As regards the LTA, though CTU had identified the transmission system strengthening for transfer of 3040 MW (WR: 1600 MW and NR: 1440 MW), it was informed by GETCO that GUVNL had entered into a PPA with the Petitioner for drawing 800 MW from the generation switchyard. Considering the development, it was decided to review the transmission system strengthening requirement for the revised LTA and the Petitioner was advised to make a fresh application for LTA to which the Petitioner agreed. CTU vide its letter dated 14.9.2010 conveyed the approval for connectivity to the Petitioner for 2440 MW effective from 1.6.2012 at 400 kV Bachau Sub-station. In the said approval, 400 kV Essar TPS-Bachau D/C (Triple) Line was identified as the connectivity line to be implemented by the Petitioner since timeline for implementation of the transmission project by CTU did not match the commissioning schedule of the generation project. The Petitioner entered into a Transmission Agreement dated 3.1.2011 with CTU according to which the connectivity granted was for 2240 MW and the connectivity line namely, 400 kV

Essar (Salaya) TPS-Bachau D/c (Triple line) was to be implemented by PGCIL in a time period of 9 months plus CERC timeline from zero date [i.e. signing of the Transmission Agreement (3.1.2011) or furnishing of Bank Guarantee whichever is later). The Petitioner agreed to bear the applicable transmission charges as decided by the Commission for the above connectivity line from the date of its commercial operation.

3. In the 14<sup>th</sup> Meeting of WR Constituents regarding Connectivity/Open Access Applications held on 13.11.2011, the application of the Petitioner for grant of LTA for 250 MW with target beneficiaries in Southern Region was considered. LTA was granted to the Petitioner with necessary system strengthening in SR-WR corridor with effect from March, 2014. CTU vide its letter dated 5.8.2011 gave an LTA intimation for 250 MW to Southern Region effective from March, 2014 or commissioning of identified system strengthening scheme whichever is later. In the said intimation, it was indicated that the Petitioner would provide a bank guarantee of ₹112 crore for connectivity @ ₹5 lakh for 2240 MW for development of the transmission line for connectivity. The Petitioner signed an LTA Agreement dated 14.12.2011 with CTU for 250 MW valid for a period of 25 years.

4. While PGCIL has declared the commercial operation of Essar (Salaya)-TPS-Bachau D/C (Triple line) on 2.4.2016, the Petitioner has not implemented the generation project. PGCIL filed a transmission petition before the Commission for approval of the transmission tariff for the said transmission lines and extension of Bachau sub-station. The Petitioner has filed its objections to the said tariff petition mainly on the ground that PGCIL has constructed the transmission lines in disregard of its statutory obligations under clauses (b) (iv) and (c) of sub-Section (2) of Section

38 of the Act and despite prior intimation of prevailing force majeure conditions faced by the Petitioner. Separately, the Petitioner has raised the dispute in the present petition under the Transmission Agreement dated 3.1.2011 between the Petitioner and PGCIL and has sought direction/declaration regarding the existence of alleged force majeure conditions preventing the Petitioner from initiating work on Phase II of the generation project and consequently, PGCIL could have stopped/delayed/re-designed the transmission system to ensure optimum and economic use of resources. The Petitioner has submitted that since an imprudent investment has been made by PGCIL, the Petitioner should not be asked to bear the cost of investment or the transmission charges and the date of connectivity should be put in abeyance till the revised date of commissioning of the generation project is intimated to CTU. The Petitioner has made the following prayers in the Petition:

- (a) Declare that Petitioner is entitled to claim force majeure in terms of Clause 8 of the Transmission Agreement in the facts and circumstances of the case and declare the act of rejection of the force majeure circumstances of the Petitioner by the Respondent as bad in law;
- (b) Pass appropriate direction for keeping in abeyance of connectivity till the revised date of commissioning of the generating project is intimated/communicated by generators to the Respondent;
- (c) Restrain the Respondent from making any claims for transmission charges for the connectivity in respect of connectivity of line till commissioning of the project;
- (d) In interim, grant a stay on the Respondent from raising any invoice for

transmission charges pending disposal of the present petition.

### **Case of the Petitioner**

5. The Petitioner has submitted that the Board of PGCIL accorded Investment Approval for the Essar Gujarat TPS-Bachau 400 kV D/C (triple) line (250 km) with extension bay of 400 kV Bachau sub-station vide its Memorandum dated 14.12.2011 for commissioning of the project within a period of 26 months from the date of investment approval. The Petitioner vide its letter dated 17.8.2012 informed PGCIL about the pending environmental clearance and requested for extension of connectivity and LTA from March, 2014 to March, 2016. The Petitioner has submitted that PGCIL without paying any heed to the letter dated 17.8.2012 proceeded with construction of the transmission line in October, 2012. The Respondent in its letter dated 20.6.2013 requested the Petitioner to sign the Transmission Service Agreement as required under Central Electricity Regulatory Commission (Sharing of inter-State Transmission Charges and Losses) Regulations, 2010 (hereinafter called "the Sharing Regulations"). The Petitioner has submitted that the Petitioner vide its letter dated 6.7.2013 intimated PGCIL about the force majeure in terms of Article 8.0 of the Transmission Agreement affecting the generation project of the Petitioner as delay in obtaining forest clearance is beyond the control of the Petitioner. The Petitioner has submitted that PGCIL has summarily rejected the Petitioner's case for force majeure and decided to continue with the generation project.

6. The Petitioner has submitted that though the Petitioner has apprised PGCIL about the force majeure conditions as early as 17.8.2012 and thereafter on 6.7.2013, PGCIL has rejected the case of force majeure without assigning any reason. The

Petitioner has further submitted that after being apprised of the delay in commencement of the Phase II of the generation project, PGCIL could have diverted its men and materials towards other projects rather than its insistence to continue with the transmission project. The Petitioner has submitted that such an approach is clearly inconsistent with the functions mandated on PGCIL under Section 38 (2) (b) (iv) and 38 (2) (c) of the Act.

### **Case of the Respondent, PGCIL**

7. PGCIL in its reply has submitted that PGCIL has acted prudently by constructing the subject transmission system. PGCIL has submitted that the Petitioner and PGCIL signed the Transmission Agreement on 3.1.2011 after the grant of connectivity to the Petitioner. Further the Petitioner applied for LTA of 250 MW on 30.3.2011 which was granted on 5.8.2011 after its approval in the 14<sup>th</sup> meeting of Western region constituents and LTA held on 13.5.2011. PGCIL has submitted that it was only after the letter dated 16.8.2011 was received from the Petitioner to advance the commissioning schedule of the connectivity line, PGCIL obtained regulatory approval from the Commission vide order dated 13.12.2011 and investment approval was accorded by its Board on 14.12.2011 and the letter of award for the transmission project was placed in January, 2012. PGCIL has submitted that once the contract has been placed, the work on the transmission project cannot be stopped.

8. PGCIL has submitted that the letter of the Petitioner dated 17.8.2012 is not a notice of Force Majeure as contemplated by the Transmission Agreement and is only a request to delay the operationalisation of long term access. PGCIL has further submitted that the Petitioner vide its letter dated 6.7.2013 for the first time asked for

keeping the commissioning of the transmission system in abeyance. PGCIL has submitted that any reasonable person who claims to have already given notice of force majeure in 2012 and 2013 expecting the other person to stop all activities will not in the year 2014 continue to take account of the activities being conducted by the other person and also give its own status. PGCIL has submitted that in all subsequent co-ordination committee meetings as well as WRPC meetings, it has been made clear that the Petitioner would be liable to pay the transmission charges on construction of the subject transmission system which was not objected by the Petitioner.

9. PGCIL has submitted that it was under no obligation to put in abeyance all the activities related to the transmission system merely because the letter dated 17.8.2012 had been received from the Petitioner. PGCIL has submitted that it is under the statutory obligation to proceed to implement the transmission system as per the connectivity and LTA granted. If the Petitioner did not want the LTA, it could have relinquished the same by following the procedures prescribed in the Connectivity Regulations and having not done so, the Petitioner cannot escape the liability to pay transmission charges to PGCIL.

10. PGCIL has submitted that after rejection of its claim of force majeure by PGCIL in 2013, the Petitioner could have challenged the said decision at the relevant time which the Petitioner has not done. Further, the Petitioner filed Petition No. 440/MP/2014 for reduction in amount of bank guarantee with respect to the subject transmission system. In none of the pleadings or the hearings of the said petition, there is even a whisper by the Petitioner that it is suffering Force Majeure and there is no requirement of the subject transmission system.

11. PGCIL has submitted that Clause 8 of the Transmission Agreement does not grant any protection to the Petitioner. What is covered by Clause 8 is a loss or damage. However, PGCIL is only claiming the tariff which it can rightfully recover from the person for whom the subject transmission system is being set up. There is no force majeure affecting the Phase II of the generating station of the Petitioner.

12. PGCIL has submitted that reliance of the Petitioner on the amended proviso under the Connectivity Regulations regarding execution of the dedicated transmission line by PGCIL only after investment of 10% of the contract value of the plant packages of the generating station is misconceived as the Petitioner in the Co-ordination Committee meeting held on 9.7.2012 and thereafter has confirmed that “EPC award for BTG placed with Global supplies (FZE) on 25.2.2010. Award for BoP placed with ESSAR projects India Ltd. on 25.2.2010.” PGCIL has further submitted that as per the second proviso, “the transmission charges for such dedicated transmission line shall be payable by the generator even if the generation project gets delayed or is abandoned”. PGCIL has submitted that this obligation of the generator has been provided for in the Clause 5 (b) of the transmission agreement whereas the reverse obligation of PGCIL has been provided for in Clause 5 (d) of the transmission agreement.

13. With regard to the prayers of the Petitioner, PGCIL has submitted that no case of force majeure has been made out under Transmission Agreement and the Petitioner has no case to seek a declaration to that effect. As regards the prayer to keep the connectivity and LTA in abeyance, PGCIL has submitted that there is no such provision in Connectivity Regulations and the only option is to relinquish the LTA as per the procedure specified.

## **Rejoinders of the Petitioner**

14. The Petitioner in its rejoinders has submitted that PGCIL has not followed prudent developer practices and has violated the provisions of the applicable Regulations and the Transmission Agreement dated 3.1.2011 while proceeding with the construction work of the transmission line, even after being informed by the Petitioner about the impediments faced by the Petitioner in setting up the Generation Project due to delay in grant of environment clearance. The Petitioner has submitted that the notice of Force Majeure need not to be in a specific form and if the letter mentions the occurrence or existence of any force majeure event, the same may be considered as Notice of Force Majeure. The Petitioner has submitted that PGCIL is statutorily bound to seek information from the Petitioner with regards to 10% advance payment towards Main Plant Packages, under Proviso to Regulation 8 (8) of the Connectivity Regulations, 2009 as amended in March, 2012 either through letters or through JCCs before proceeding with the construction of the transmission lines. The Petitioner has submitted that PGCIL has failed to create balance between its two roles, Central Transmission Utility as planner and service provider as transmission licensee. It was incumbent upon CTU to direct PGCIL (Service Provider) to either re-optimize or divert its men and material towards other transmission projects under construction. The discriminatory conduct of PGCIL is apparent and manifest by its lack of attempts or efforts to synchronize the commissioning of the Transmission Project with the Generation Project.

## **IA No.22/2016**

15. The Petitioner has filed this IA to bring on record certain documents and pleadings in Petition No. 64/TT/2015 filed by the Petitioner for determination of transmission tariff of the subject transmission system. The Petitioner has submitted

that in Petition No. 64/TT/2015, PGCIL in its reply dated 24.8.2015 submitted that it had tried to delay the construction of the transmission line to match the commissioning schedule of the generating station but it could not do so on account of contractual reasons. Further, PGCIL vide its affidavit dated 19.11.2015 in the said petition has submitted that it could not have indefinitely delayed/or held the execution of the contract to match the schedules of the Generation Project as the Terms and Conditions of the Letter of Award would have been violated, which might have caused cost as well as legal ramifications. The Petitioner has submitted that PGCIL has been re-optimizing and revising the transmission schemes when the Generation Projects were affected by force majeure conditions as in cases of Krishnapatnam UMPP and Tiliaya UMPP Projects. Accordingly, the Petitioner has requested to take these documents and submissions on record of the preset petition.

16. We have considered the submissions of the Petitioner. The documents and arguments relied upon by the Petitioner are in the context of the transmission tariff of the transmission system, which shall be considered while disposing of the said tariff petition. However, the documents and pleadings in so far as they are relevant for examining the issues raised in the present petition shall be considered while discussing the issues on merit.

**Analysis and decisions:**

17. We have heard the learned counsel for the Petitioner and Respondent at length and examined the pleadings and documents on record in the present petition. The Petitioner has filed this petition for adjudication of the dispute between the parties arising out of the Transmission Agreement dated 3.1.2011 between the Petitioner and PGCIL. The Petitioner has sought a declaration that there has been

existence of force majeure conditions preventing the Petitioner from initiating Phase II of the Essar-Salaya Generation Project. The Petitioner has further sought a declaration that on account of force majeure affecting its generation project, PGCIL could have stopped/delayed/re-designed its transmission system to ensure optimum and economic use of resources. The Petitioner has also sought a direction to PGCIL to keep the connectivity in abeyance and not to make any claims for transmission charges for connectivity till the Phase II of the generation project of the Petitioner is commissioned. The Respondent, PGCIL has submitted that it has acted in a prudent manner while implementing the project and at no point of time, the Petitioner has indicated that it is abandoning the project but has only sought deferment of operationalization of connectivity. PGCIL has submitted that since the investment has been made by PGCIL on the basis of commitment by the Petitioner in the Transmission Agreement and its letter dated 16.8.2011, the Petitioner is liable to pay the transmission charges.

18. The following issues arise for our consideration in the present case:

- (a) Issue No.1: Whether the Petitioner's letters dated 17.8.2012 and 6.7.2013 amount to notices of force majeure under Article 8 of the Transmission Agreement dated 3.1.2011?
- (b) Issue No.2: Whether the Petitioner is affected by force majeure in terms of Article 8 of the Transmission Agreement dated 3.1.2011?
- (c) Issue No.3: Whether PGCIL has failed to take action under the Connectivity Regulations and in discharge of its function under Section 38 of the Act while executing the transmission system and thereby has failed to act in a prudent

manner?

(d) Issue No.4: Whether any direction can be issued to keep the operationalization of connectivity and LTA in abeyance till the Phase II of the Generation Project of the Petitioner is commissioned?

(e) Issue No.5: Since the transmission system has been commissioned without the generation project, how the cost of the said transmission system will be serviced?

**Issue No.1: Whether the Petitioner's letters dated 17.8.2012 and 6.7.2013 amount to notices of force majeure under Article 8 of the Transmission Agreement dated 3.1.2011?**

19. Based on the application of the Petitioner for connectivity made vide letter dated 9.2.2010, PGCIL granted connectivity for 2440 MW vide its letter dated 14.9.2010 after consultation at the 12<sup>th</sup> Meeting of the Western Region Constituents regarding Connectivity/Open Access Applications held on 8.7.2010. In the connectivity approval, it was the responsibility of the Petitioner to execute the connectivity line, namely, 400 kV Essar TPS-Bachau D/C (Triple) Line. The Petitioner wrote a letter dated 11.8.2011 to CTU for advancement of the commissioning of the connectivity line to December, 2013. Thereafter, PGCIL sought regulatory approval for certain transmission projects vide Petition No. 154/2011 which included the connectivity line of the Petitioner. The Commission vide its order dated 13.12.2011 accorded regulatory approval, directing PGCIL to undertake the implementation of the transmission system matching with the generating station. Thereafter, PGCIL obtained investment approval from its Board on 14.12.2011 and placed the letter of award for the project in January, 2012 and the work on the project started on October 2012, and was completed on 30.3.2016.

20. The case of the Petitioner is that it informed PGCIL about the force majeure event affecting the Phase II of the generating station vide its letter dated 17.8.2012 and 6.7.2013 but PGCIL did not stop/delay/re-design the execution of the transmission system to ensure optimum and economic use of resources and has made imprudent investment. PGCIL has submitted that these letters cannot be considered as notices for force majeure in terms of the Transmission Agreement dated 3.1.2011 and therefore, PGCIL is under no contractual obligation to abandon/delay the transmission project.

21. Article 8.0 of the Transmission Agreement deals with force majeure as under:

"8.0 The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, a major accident, act of God, change of law and any other causes beyond the control of the defaulting party. But **any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice of 30 days to the other party to this effect.** All activities related to connectivity shall be started as soon as practicable by the parties concerned after such an eventuality has come to an end or ceases to exist."

22. As per the above provision, a party claiming force majeure is required to give a written notice of 30 days to the other party and satisfy the other party about the existence of force majeure. Let us consider the letter dated 17.8.2012 relied by the Petitioner as notice for force majeure. The said letter is extracted as under:

"To

"Powergrid Corporation of India Limited  
"Saudamini" Plot No.2 Sector-29,  
Gurgaon, (122001) HARYANA

Subject: Extension for execution period for 400KV Essar-Bachau line  
planned for power evacuation of M/s Essar Power Gujarat Ltd.

Ref : LTA agreement dated 14<sup>th</sup> December, 2011

Dear Sir,

As per LTA of 250 MW dated 14<sup>th</sup> December, 2011 between M/s Essar Power Gujarat Limited and Power Grid Corporation of India Limited, target date for completion of project is envisaged as March, 2014.

Out 2x660 MW generation project present status is as under:

- a) Final letter of possession for the entire 100 Ha land has been received from the Government of Gujarat (GOG) on 19 June for 2x660 MW generating plant developments.
- b) Fuel Supply Agreement has been signed with Essar Shipping & Logistics Limited on 17<sup>th</sup> December, 2009 for long term supply of imported coal from Indonesia /Mozambique and other countries.
- c) Final approval has been received from Gujarat Maritime board on 9<sup>th</sup> February, 2010 for using sea water.
- d) EPC contract has been signed with Essar Projects (India) Ltd and Global Supplies (FZE)
- e) Main Plant equipment will be supplied by Harbin Power Equipment, China(Boiler) & Toshiba Japan(STG)
- f) Main plant contract has been signed with Global Supplies (FZE) on 25<sup>th</sup> February 2010
- g) BOP contract has been signed with Essar Projects India Ltd on 25<sup>th</sup> February, 2010
- h) The status of environment clearance is as under:

Forest clearance for 4.6 Hacters land for existing 2x660 MW phase-I of EPGL near Salaya jetty is pending for approval from MOEF due to pending confirmation from State Board of wild life (SBWL) that the Land is not in eco-sensitive zone (ESZ) The Esz demarcation has since then been given by SBWL to MOEF and draft notification for public comments released by MOEF,. The Public comments have been received by MOEF in July 2012 and comments received have been clarified by GOG and now MOEF is reviewing the same for final notification.

**The Phase 2 expansion (2x660MW) environmental clearance is pending due to linking of the above to Phase 2 expansion project by MOEF. The environment clearance for Phase 2 is hence expected to start after the above process get completed and expect final Moef clearance tentatively by End Dec 2013.**

**Considering above explained project status of 2x660 MW (Phase-II), it will be practically difficult to evacuate power by March-2014 due to issue beyond our control.**

**Hence we request you to extend the connectivity and the LTA request date to March-2016 of March-2014. (emphasis supplied)”**

It is noticed from the above letter that said letter has been written with reference to the LTA Agreement dated 14.12.2011 and not under the Transmission Agreement dated 3.1.2011. The present petition has been filed invoking the Article 8.0 of the Transmission Agreement dated 3.1.2011. Therefore, the said letter cannot be treated as a notice under the Transmission Agreement dated 3.1.2011. After describing the difficulties faced by the Petitioner in para (h) of the said letter and concluding that it would be difficult to evacuate power by March, 2014 due to the issues beyond its control, the Petitioner has requested to extend the connectivity and LTA request date to March, 2016. The letter does not make a plea for being excused to discharge obligation under Transmission Agreement dated 3.1.2011 nor there is any unambiguous request to PGCIL not to implement the project as has been made by the Petitioner in the present petition.

23. Let us consider the letter dated 6.7.2013 written by the Petitioner to PGCIL. The said letter is extracted as under:

“To Executive Director  
Power Grid Corporation of India Limited  
Saudamini, Plot No. 2, Sector-29  
Gurgaon-122001

Sub: Request for review of Long Term Open Access date of Essar Power Gujarat Ltd. (EPGL)

Ref: 1) Our letter dated 17<sup>th</sup> August, 2012 on request for extension of LTOA from March, 2014 to March, 2016.

2) Transmission Agreement dated 3<sup>rd</sup> January, 2011 between EPGL and PGCIL.

3) LTAA dated 14<sup>th</sup> December, 2011 between EPGL and PGCIL.

4) PGCIL TSA request letter dated 20<sup>th</sup> June, 2013.

Dear Sir,

EPGL has commissioned its 2X600 Mw Thermal Power Plant at Vadinar, Gujarat on 1<sup>st</sup> April, 2012. EPGL had also planned for expansion of its 2X600 MW power project with further 2X600 MW which will be connected to STU and CTU networks and has LTOA of 250 MW with PGCIL effective March, 2014. The Phase II will also supply 800 MW to GUVNL as per Long Term PPA.

EPGL through its earlier letter dated 17<sup>th</sup> August, 2012 had already requested PGCIL for extension of the LTOA date from March, 2014 to March, 2016. However, EPGL has not received any confirmation from PGCIL about the same.

**EPGL would like to highlight the various issues concerning the expansion project to PGCIL as listed below:**

- 1) Forest clearance for the 4.6 Ha land of EPGL near Salaya jetty is pending for approval from MoEF. MoEF has approved the Eco-sensitive zone (ESZ) and send its draft notification to Govt. of Gujarat in March, 2013 for their views before notifying the same.

The above jetty is proposed to be used for our Phase 1 & Phase 2 coal and sea water requirements. However, due to the unavailability of the above clearances, EPGL had to arrange contingency arrangement of coal and water at its own cost by arranging coal supply by trucks from another port and sourcing river water from the Narmada canal. This has severely affected our financials in running our Phase 1 of 2\*600 MW power plant and supplying power to the State. However, the same contingency arrangement will not be possible to cater to Phase 2 of 2\*660 MW due to the limited availability of resources and arrangements.

Due to the above, we have deferred Phase 2 till the final approval of the forest clearance which we are expecting somewhere in Dec'13 and final environmental clearance for our phase 2 expansion by Dec'14. Once the MoEF approval is received, we can then our project and should take approximately 36 months for commissioning the project.

- 2) EPGL has represented the above issue with Govt. of Gujarat and also with our beneficiary GUVNL at various high levels. Recently, GUVNL invited EPGL on 27<sup>th</sup> May 13 for a presentation to understand its various issues and discuss the same. Based on the same, GUVNL has taken EPGL case sympathetically and has considered extension to EPGL to meet its obligations of above approvals.
- 3) EPGL is operating its power plants on imported coal from Indonesia. However, due to the Indonesian regulations of benchmark pricing to global markets, the price of coal envisaged during putting up the project and as of now has severely impacted the bottom-line of EPGL (and also others like Reliance, Adani, Tata Power etc.) with the result that EPGL is severely bleeding and can barely buy its coal and pay for its O&M expenses with the revenues received from GUVNL as per the present PPA. EPGL has already taken up the tariff revision review of its PPA due to the Indonesian coal price regulations with GUVNL and the same is under review.

Considering the above main issues, it will be impossible to kick-start the Phase 2 of 2\*660 MW project till the Environmental approvals and the tariff issues are resolved at appropriate regulatory levels which as you will agree are beyond the control of EPGL.

We understand that PGCIL has already started construction of the line from Bhachau and is expected to complete construction by next year. However, EPGL does not have point of location presently where the line can be terminated.

**To resolve the same in a business- like manner, EPGL proposes the following for PGCIL to review and confirm:**

a) The termination of the PGCIL Bhachau lines can be terminated to the Existing EPGL phase 1 switchyard. Existing EPGL switchyard is already connected to GETCO lines going to Hadala and Amreli (presently under construction). The phase 1 and phase 2 is under the same legal entity of Essar Power Gujarat Ltd. (EPGL) and hence it should not be any issue in connecting the PGCIL lines to existing phase 1 switchyard. EPGL has 100 MW excess power from its Phase 1 besides its long term PPA and can tie up the same with a beneficiary preferably in the WR region or in SR region. EPGL will require around 18 months from confirmation of PGCIL for the above. This arrangement can be planned for the interim period till the Phase 2 project comes up and it is connected to the permanent arrangement. We have also additional 150 MW from our nearby Group Company Essar Oil which we can connect to EPGL switchyard for total evacuation of 250MW as per the LTOA.

b) Alternatively, PGCIL can put the transmission line in abeyance for the time till the project is actually able to start. We refer Clause 8.0 of the Transmission Agreement between PGCIL and EPGL on 3<sup>rd</sup> Jan 2011. **The Clause 8.0 covers the Force Majeure condition where EPGL for no fault of its actions, has not been able to put up the project as of now.** The clause 8.0 is produced below for reference:

"The parties shall ensure due compliance with the terms of the agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lockout, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice of 30 days to the other party to this effect. All activities related to connectivity shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist"

Based on the above Clause, we request PGCIL to consider this case as Force Majeure due to circumstances beyond control of EPGL and grant EPGL abeyance of the LTOA till further confirmation from EPGL.

With reference to the above issues, we are not sure as of now when the environment and the tariff issue will be resolved. We humbly request PGCIL to have a sympathetic view of our case and request review of the above two suggestions on the LTOA usage with no liabilities on either side till we have some clarity of development of the project. We also request for exemption of any transmission charges applicable till we are able to confirm course of action for our project considering that we are already bleeding heavily and will not be able to bear any further burden. Hence we would not be in a position to sign the TSA as of now till we are clear on the start of the project.

We are ready for a discussion or presentation with your team at your office at convenient date and time to further clarify any points, if any and decide the way forward."

As per the above letter, the Petitioner has stated that it would be impossible to kick-start the Phase II of the project till the environmental approvals and tariff issues

are resolved at appropriate regulatory levels. The Petitioner has further acknowledged that PGCIL has already started construction of the line from Bhachau and is expected to complete the construction during the next year and also the fact the Petitioner did not have “a point of location presently where the line can be terminated”. The Petitioner has suggested two alternatives. First alternative is that the connectivity line can be terminated at Phase 1 of the project for the interim period till phase II comes up. The second alternative is that by invoking Article 8.0 of the Transmission Agreement, the Petitioner has requested the Petitioner to treat the problem of forest clearance as force majeure and grant the Petitioner abeyance of LTA till confirmation from the Petitioner. Since the Petitioner has specifically invoked the provisions of Article 8.0 of the Transmission Agreement in the letter dated 6.7.2013, we are inclined to treat the said letter as a notice under Article 8.0 of the Transmission Agreement. Whether non-grant of forest clearance is an event of force majeure under the said Article, is dealt with in subsequent part of the order.

**Issue No.2: Whether the Petitioner is affected by force majeure in terms of Article 8 of the Transmission Agreement dated 3.1.2011?**

24. We have accepted the letter dated 6.7.2013 as a notice of force majeure under Article 8.0 of the Transmission Agreement. In the said letter, the Petitioner has stated that forest clearance for 4.6 Ha land of the Petitioner near Salaya jetty is pending for approval from MO&EF. The Petitioner has stated in that letter that the Salaya jetty is proposed to be used for coal and sea water requirements for Phase I and Phase II. However, due to the unavailability of the above clearances, the Petitioner had to make contingency arrangement of coal and water at its own cost by arranging coal supply by trucks from another port and sourcing river water from Narmada canal. This has adversely affected the financials in the running of the

plants and supplying power to the State. The Petitioner has stated that the same contingency arrangement will not be possible to cater to the Phase II of the generation project due to limited availability of resources and arrangements. Another reason stated by the Petitioner is that the Petitioner is operating its plant on imported coal from Indonesia. However, due to Indonesian Regulations linking the benchmark price to global market, the price of coal envisaged during putting up the project and as of 2013 has severely impacted the bottom line of the Petitioner. Considering these issues, the Petitioner has stated that it would be impossible to kick-start the Phase II of the generation project till environmental approval and tariff issues are resolved at appropriate regulatory level.

25. In the letter dated 6.7.2012, the Petitioner has not received the forest clearance for development of Salaya jetty which is required for supply of sea water and coal. Phase I is affected on account of environmental clearance and the Petitioner is making alternative arrangement of water from Narmada river and coal by truck from another port. That means, water and coal for Phase II can be arranged through alternative sources though the Petitioner would be required to spend more. Further, the Petitioner has also claimed the hike in price of coal due to Indonesian Regulations as force majeure events. Here also, the Petitioner could have arranged coal from other countries or through e-auction or participation in competitive bidding for coal. The fact that the Petitioner has cancelled the EPC contract awarded shows that the Petitioner has taken a commercial decision to abandon the project. Therefore, the events relied upon by the Petitioner in its letter dated 6.7.2013 cannot be held to be beyond the control of the Petitioner so as to excuse the Petitioner from performance of its obligations under Transmission Agreement dated 3.1.2011. Further, the Petitioner has proposed in the letter dated 6.7.2013 to put the

transmission system into use by connecting to the Phase I of the generation project. Therefore, non-execution of the Phase II of the generation project cannot be held to be a reason for non-utilisation of the transmission system.

26. Even otherwise, Article 8.0 of the Transmission Agreement cannot absolve the Petitioner from paying the transmission charges after the transmission system has been commissioned. For understanding the scope of Article 8.0, it is necessary to read the Transmission Agreement dated 3.1.2011 as a whole. Recital B of the Agreement says that the Petitioner is desirous of availing connectivity as per details contained in Annexure-1 and Recital B states that the transmission system required for connectivity shall be built, owned, operated and maintained by PGCIL as indicated at Annexure-2 which refers to 400 kV Salaya TPS-Bachau D/C (Triple Line). The zero date for implementation of the transmission system for providing connectivity would start from the day of signing of the agreement or submission of bank guarantee whichever is later. Further, the transmission system would be implemented in a time period of 9 months plus CERC time line from zero date.

Recital C of the Agreement provides as under:

“(C) M/s Essar Power Gujarat Ltd. (EPGL) has agreed to bear the applicable transmission charges as decided by Central Electricity Regulatory Commission for the transmissions system from the date of commercial operation of the transmission system.”

As per Recital C, the Petitioner has agreed to bear the transmission charges of the transmission system as determined by the Commission from the date of commercial operation of the transmission system. Further, Article 5 (a) to (d) of the Transmission Service Agreement provide as under:

“5.0 (a) The M/s. Essar Power Gujarat Ltd (EPGL) shall not transfer its rights and obligations specified in the Transmission Agreement. The M/s. Essar Power Gujarat Ltd (EPGL) may relinquish its rights specified in the Transmission Agreement,

subject to payment of compensation in accordance with the Regulations as amended from time to time.

(b) In case M/s Essar Power Gujarat Ltd (EPGL) fails/delays to utilize the connectivity provided or makes an exit or abandon its project, Powergrid shall have the right to collect the transmission charges and/or damages as the case may be in accordance with the notification/regulation issued by CERC from time to time. M/s. Essar Power Gujarat Ltd (EPGL) shall furnish a Bank guarantee for an amount which shall be equivalent to 5 (five) lakhs/MW as mentioned in the Detailed Procedure approved by the Commission, to partly compensate such damages. The bank guarantee format is enclosed as FORMAT CON-7. The details and categories of bank would be in accordance with clause 2(f) above. The Bank guarantee would be furnished in favour of POWERGRID within 1(one) month of signing of the Agreement.

(c) This bank guarantee would be initially valid for a period upto six months after the expected date of schedule date of commissioning of the Transmission system indicated at Annexure-2. The bank guarantee would be encashed by POWERGRID in case of adverse progress assessed during coordination meeting as per para 6 below. However, the validity should be extended by M/s. Essar Power Gujarat Ltd. (EPGL) as per the requirement to be indicated during co-ordination meeting.

(d) In the event of delay in commissioning of the transmission system from its schedule, as indicated at Annexure-2. POWERGRID shall pay the transmission charges to M/s. Essar Power Gujarat Ltd (EPGL) proportionate to its capacity ready for connection. Provided further that POWERGRID fails to make alternate arrangement for dispatch of power.

6. In order to monitor/review the progress of connected systems alongwith connectivity, Joint Co-ordination meetings with representatives of M/S Essar Power Gujarat Ltd. (EPGL) and POWERGRID shall be held at regular intervals (preferably quarterly) after signing of this Agreement.”

From the above provisions of the Transmission Agreement, the following can be inferred:

- (a) The Petitioner may relinquish its right specified in the Transmission Agreement (connectivity right) subject to compensation in accordance with the Regulations of the Commission issued from time to time.
- (b) If the Petitioner fails or delays to utilize the connectivity provided or makes an exit or abandon its project, PGCIL shall have the right to collect the transmission charges and/or damages in accordance with the Regulations of the Commission.

(c) The Petitioner shall be required to give bank guarantee for an amount which shall be equivalent to ₹5 lakh/MW to partly compensate the damages. The bank guarantee shall be encashed in case of adverse progress assessed during the coordination meetings as per Clause 6 of the Agreement.

(d) In the event of delay in commissioning of the transmission system from its schedule, PGCIL to make alternate arrangement for despatch of power or pay the transmission charges to the Petitioner proportionate to its capacity ready for connection.

27. Thus the Petitioner carries the liability to pay the transmission charges to PGCIL if it fails or delays to utilise the connectivity granted or makes an exit or abandons the project. If the Petitioner intends to relinquish its connectivity rights, it will be required to pay the compensation as per the regulations. None of the above provisions says that transmission charges are payable on the commissioning of the generating station. The Transmission Agreement provides that transmission charges are payable on commercial operation of the transmission system and even if the Petitioner fails/delays to utilise connectivity or makes an exit or abandon the project. In contrast, Article 8.0 provides that a party claiming to be affected by force majeure shall not be liable for any claim of losses or damages arising out of failure to carry out the terms of the agreement. Since the Agreement does not provide that the transmission charges shall be payable on commercial operation of the generating station, failure of the Petitioner to set up the generating station will not absolve the Petitioner from payment of transmission charges under Article 8.0 of the Agreement. Further, the last sentence of Article 8.0 that “all activities related to connectivity shall be started as soon as practicable by the parties concerned after the eventuality

comes to an end or ceased to exist” leads us to the conclusion that the force majeure provision is meant for temporary non-utilisation of connectivity after commissioning of generating station as well as connectivity line, and not for deferment of the operation of connectivity ad infinitum as claimed by the Petitioner.

28. In view of the above discussion, we hold that the Petitioner is not affected by force majeure as reasons being pleaded as beyond the control of the Petitioner could be addressed through alternative means and the connectivity transmission system can be put to use by Phase I of the generation project. Moreover, the case of the Petitioner is not covered under Article 8.0 of the Transmission Service Agreement and the Petitioner is liable to pay the transmission charges unless it relinquished connectivity on payment of relinquishment charges for the connectivity line.

**Issue No.3: Whether PGCIL has failed to take action under the Connectivity Regulations and in discharge of its function under Section 38 of the Act while executing the transmission system and thereby has failed to act in a prudent manner?**

29. The Petitioner has submitted that PGCIL has acted in violation of the provisions of the applicable Regulations and the Transmission Agreement dated 3.1.2011 while proceeding with the construction work of the transmission line, even after being informed by the Petitioner about the impediments faced by the Petitioner in setting up the Generation Project due to delay in grant of environment clearance. The Petitioner has submitted that PGCIL is statutorily bound to seek information from the Petitioner with regards to 10% advance payment towards Main Plant Packages, under Proviso to Regulation 8 (8) of the Connectivity Regulations, 2009 as amended in March, 2012 either through letters or through JCCs before proceeding with the construction of the transmission lines. The Petitioner has submitted that PGCIL has

failed to create balance between its two roles, Central Transmission Utility as planner and service provider as transmission licensee, since the Petitioner as CTU did not direct PGCIL (Service Provider) to either re-optimize or diverts its men and material towards other transmission projects under construction. The Petitioner has submitted that the approach of PGCIL is inconsistent with the functions mandated to PGCIL under Section 38 (2) (b) (iv) and Section 38 (2) (c) of the Act.

30. PGCIL has submitted that it has not failed in discharging its statutory responsibilities under Section 38 (2) (b) (iv) and 38 (2) (c) of the Act. PGCIL has submitted that it has promptly acted on the basis of the letter dated 16.8.2011 to advance the commissioning of the connectivity line to December, 2013 by obtaining regulatory approval and awarding the project in January, 2012. PGCIL has submitted that it is under a statutory obligation to proceed with implementation of the transmission system as per the connectivity and LTA granted. PGCIL has further submitted that reliance of the Petitioner on the proviso under Regulation 8 (8) of the Connectivity Regulations is misconceived as the Petitioner in the Co-ordination Committee Meeting held on 9.7.2012 had confirmed about the award of EPC for BTG and award for BoP on 25.2.2010. PGCIL has submitted that as per second proviso under Regulation 8 (8) of Connectivity Regulations, transmission charges for dedicated line (connectivity line) executed by the CTU is payable even if the generation project gets delayed or abandoned.

31. We have considered the submission of the Petitioner and PGCIL. Before we examine the issue on merit, we have an important observation to make. The Petitioner applied for connectivity for 3240 MW vide its application dated 9.2.2010. After consideration of the said application in the 12<sup>th</sup> Meeting of WR constituent held

on 8.7.2010, the intimation of grant of connectivity was made vide letter dated 14.9.2010. In the said intimation letter, the identified transmission system for connectivity is “400 kV Essar TPS-Bachau D/C (Triple) Line with Implementing Agency indicated as “Essar Power Gujarat Limited”. However, in the Transmission Agreement dated 3.1.2011, the connectivity has been stated to be built, owned, operated and maintained by PGCIL. It is not understood as to why after issue of the connectivity letter stating clearly that the Petitioner would execute the connectivity transmission line, the responsibility to execute the connectivity transmission line has been assumed by PGCIL. A report to that effect shall be submitted to the Commission by PGCIL within a period of 15 days from the date of issue of this order.

32. The Petitioner requested PGCIL vide letter dated 16.8.2011 to implement the connectivity line matching with expected completion of the project by December, 2013. Relevant portion of the said letter is extracted as under:

“....We would like to mention that since we have got all infrastructures available at site and with the past experience, we would be able to complete 1<sup>st</sup> Unit of the project by December, 2013. In view of this, we shall appreciate Powergrid to expedite the construction of 400 kV D/C Salaya-Bachau line on best effort basis. We are ready to pay transmission charge as decided by Powergrid/CERC keeping the above commissioning schedule”.

Thus the Petitioner unambiguously committed for payment of transmission charges for commissioning of the transmission system matching the schedule of December, 2013. PGCIL has submitted that after receipt of the request from the Petitioner on 16.8.2011, the Petitioner sought the regulatory approval. The Commission noted submission of PGCIL with regard to progress of the generating station of the Petitioner and made the following observation while granting regulatory approval in the order dated 13.12.2011:

“G. Transmission System for Connectivity of M/s Essar Power Gujarat Ltd. (3240MW)

31. The Petitioner has made the following submission on the progress of work on this corridor:

a. BPTA for the subject transmission system was signed by the Petitioner on 3.1.2011. The system is proposed to be implemented by the Petitioner on cost plus basis with expected commissioning schedule as May, 2014.

b. Considering the progress of the generation project, the transmission system is required on urgent basis. Hence, pre-award activities for the system have been initiated. DPR of the transmission system has been prepared and tenders have been issues in July, 2011. The subject transmission system is to be taken up for implementation on immediate basis.

32. From the details submitted by the Petitioner regarding the progress of the concerned generating, it is observed that land is in possession and EPC orders have been signed. However, Environment & forest clearance is not received yet and Fuel Supply Agreement is in phase for 1920 MW only, out of total capacity of 3240MW. Therefore, the generating station is likely to come but there may be some delay. The implementation of transmission system may be undertaken by the Petitioner matching with commissioning of generating units.”

33. Thus, the Commission took note of the preparatory works undertaken by PGCIL and granted regulatory approval. PGCIL secured the Investment Approval from its Board on 14.12.2011 and awarded the EPC contract in January, 2012.

34. The Commission while granting regulatory approval had also made it clear that PGCIL would execute the project matching with the progress of the generating station. Even Article 6.0 of the Transmission Agreement dated 3.1.2011 provided that Joint Co-ordination Meeting between the Petitioner and PGCIL should be held regularly, preferably quarterly after signing of the Agreement.

35. The Petitioner has raised the issue that as per 2<sup>nd</sup> proviso to Regulation 8(8) of the Connectivity Regulations, the Petitioner should have ascertained about the progress made by the generation developer in the form of placing the award and making advance payment of 10% of the contract value before proceeding with the implementation of transmission project. The said provisions are extracted as under:

"Provided further that the construction of such dedicated transmission line may be taken up by the CTU or the transmission licensee in phases corresponding to the capacity which is likely to be commissioned in a given time frame after ensuring that the

generating company has already made the advance payment for the main plant packages i.e. Turbine island and steam generator island or the EPC contract in case of thermal generating station and major civil work packages or the EPC contract in case of hydro generating stations for the corresponding capacity of the phase or the phases to be commissioned, subject to a minimum of 10% of the sum of such contract values:

Provided also that the transmission charges for such dedicated transmission line shall be payable by the generator even if the generation project gets delayed or is abandoned'.

Both the provisos as quoted above needs to be read together. The second proviso provides that CTU shall undertake construction of dedicated transmission lines if advance payment for main plant package has been done by the generator. Third proviso says that transmission charges shall be payable by the generator even if the generation project gets delayed or abandoned. If we read the provisions together, the inference is that even after advance payment of main plant package by the generator based on which the dedicated transmission line is executed, if the generating station is delayed or abandoned, then the generator shall be liable to pay the transmission charges.

36. In the 4<sup>th</sup> Coordination Committee Meeting of IPPs granted/applied LTO/LTA in WR held on 9.7.2012, the representative of the Petitioner submitted the status report of the Phase II of the generation project as under:

“They informed that 100 Ha of Govt. Land is under their possession, whereas, 77 Ha of Pvt. Land is in possession of group companies. Necessary lease agreement for the same is in process.

Fuel Linkage: For 2X660 MW FSA has been signed with Essar shipping and logistic limited for supply of imported coal from Indonesia/Mozambique and other countries. For 4X150 MW FSA has been signed with Essar Oil Ltd. dated 3.9.2010 for long term supply of pet coke from Essar refinery. POWERGRID asked them to submit a copy of the FSA.

Environment clearance in progress. Water linkage obtained. No forest is involved. Consent to establish under progress.

EPC award for BTG placed with Global Supplies (FZE) on 25.2.2010. Award of BoP placed with Essar Projects India Ltd. on 25.02.2010”

It is noticed that the representative of the Petitioner confirmed about the placing of award for BTG as well as BoP on 25.2.2010 apart from reporting substantial progress in acquisition of land, fuel linkage, environmental clearance, financial closure, start of civil works at site. According to the Petitioner, PGCIL should have called for the information in terms of proviso under Regulation 8(8) of the Connectivity Regulations before awarding the contract for the transmission line. It is pertinent to mention that the said provisos were introduced through an amendment carried out on 22.3.2012. Award of contract for the transmission line was prior to that date and therefore, PGCIL could not be expected to comply with the regulation which was not in existence on the date of award of the contract. But the issue is whether PGCIL has made due diligence before awarding the contract for transmission system. Keeping in view the preparatory works undertaken by the Petitioner which has been noted in para 31 and 32 of the order dated 13.12.2011 in Petition No. 154/MP/2011 and the request of the Petitioner vide its letter dated 16.8.2011 for the commissioning of the connectivity line matching with Unit 1 of the generating station in December, 2013, it cannot be said that PGCIL has not acted with due diligence while awarding the transmission package in January, 2012.

37. Next issue is whether PGCIL could have delayed/postponed/re-designed the transmission system to ensure optimum and economic use of resources after it received the intimation from the Petitioner vide its letters dated 17.8.2012 and 6.7.2013. PGCIL has submitted that after the contract was awarded in January, 2012 and work has started, there was no indication from the Petitioner that the subject transmission line was not required to be constructed or commissioned by PGCIL. It has been argued by PGCIL that the letter dated 17.8.2012 was written by the Petitioner to extend the connectivity and LTA date to March, 2016 and not to keep

the implementation of the transmission line in abeyance. PGCIL has further submitted that for the first time through letter dated 6.7.2013, the Petitioner had requested to keep the transmission project in abeyance. PGCIL vide its letter dated 26.7.2013 has rejected the claim of the Petitioner for force majeure and clarified that there was no provision to keep the connectivity and long term access in abeyance. PGCIL has submitted that the transmission projects are planned and executed in a professional and prudent manner and cannot be simply put in abeyance as and when requested by any party. PGCIL has submitted that in all subsequent coordination committee meetings as well as WRPC meetings, PGCIL has clearly informed the Petitioner about the construction of the transmission system and the Petitioner would be liable to pay the transmission charges but the Petitioner never objected to the same.

38. The Commission is of the view that PGCIL has not responded to the letter of the Petitioner dated 17.8.2012. PGCIL could have reviewed the progress of its transmission project and the progress of the generation project and could have apprised the Petitioner about the commercial and financial implication for deferring implementation of the project in order to enable the Petitioner to take an informed decision. Further, the Petitioner has not pursued the matter for almost one year with PGCIL which shows lack of seriousness on its part. When PGCIL rejected the letter of the Petitioner dated 6.7.2013 by letter dated 26.7.2013, the Petitioner could have approached the Commission for suitable directions to PGCIL. Another aspect is that the Petitioner gave an alternative proposal for utilisation of the transmission system built by PGCIL by linking it to Phase I of the project which conveyed that the transmission system after implementation can be utilised by the Petitioner. In fact, a meeting was held between the Petitioner and PGCIL on 21.8.2013 wherein the

possibility of inter-connection of the 400 kV Essar TPS-Bachau 400 kV D/C (Triple) Transmission line. Relevant para of the minutes are extracted as under:

“3) POWERGRID informed that construction of 400 kVD/C Essar-Bachau line is in the advance stage therefore Essar Power will have to explore the possibilities for termination of this line in existing switchyard of Essar Power plant Phase I as construction of its associated 2 nos bays for Phase II shall take time.

4) Essar Power has informed that they will discuss possibilities with M/s GETCO for bundling and termination of two circuit of 400 kV D/C Essar-Amreli in one bays (GETCO line) and similarly bundling and termination of two circuits of 400 kV D/C Essar-Bachau line (POWERGRID line) in another bay of Phase I”.

We find that the above minutes are in line with the first alternative given by the Petitioner in its letter dated 6.7.2013. Further, in the 7<sup>th</sup> Coordination Committee Meeting of IPPs granted/applied for LTOA/LTA in WR held on 25.2.2014, the Petitioner submitted that they are not taking up 2X660 MW units and therefore, installed capacity shall reduce to 1920 MW. PGCIL informed that the dedicated transmission line being implemented by it is in the advance stage of commissioning and the Petitioner is liable to pay the transmission charges. In a coordination meeting between the Petitioner and PGCIL held on 3.9.2014, PGCIL indicated that the transmission line was likely to be ready by December, 2014 and the Petitioner confirmed that on account of non-receipt of environmental clearance for Phase II, the Petitioner has taken up matter with CEA/CTU for alternative arrangement for termination of 400 kV Essar-Bachau line in two bays getting ready for 400kV Essar-Amreli line by GETCO which delayed. The Petitioner further undertook to coordinate with CEA/GETCO for giving clearance to PGCIL to terminate line at Amreli bays. In the 8<sup>th</sup> Joint Coordination Committee Meeting for High Capacity Corridor for IPPs in Western Region, the Petitioner informed that they were expecting environmental clearance in March, 2015 and the expected COD is June, 2018. PGCIL informed that the dedicated transmission line is in the advance stage of commissioning and the

Petitioner was required to pay the transmission charges for delay in commissioning of the generation project. In the 9<sup>th</sup> Joint Coordination Committee Meeting for High Capacity Corridor for IPPs in Western Region held on 25.5.2015, the Petitioner submitted that the dedicated transmission line is in the advance stage of completion. However, the Petitioner informed that as the project is based on imported coal, it has become unviable for which they are discussing with lenders and GUVNL and further, MoEF clearance is not available. From the above documents, it emerges that there have been periodic interaction between the Petitioner and PGCIL with regard to the transmission line. The Petitioner has been seeking deferment of the operationalization of connectivity and LTA to match with the commercial operation of Phase II of the generation project. In the prayer at para 5.2 of the present petition, the Petitioner has prayed to the Commission to “pass appropriate directions for abeyance of connectivity till such time the revised date of commissioning of the Generation Project is intimated/communicated by the Generator to the Respondent (CTU/PGCIL)”. It emerges that the Petitioner is not saying that the transmission system developed by PGCIL is no more required but is seeking deferment of its operationalization and direction for non-payment of transmission charges.

39. Considering the facts in totality, the Commission is of the view that PGCIL has discharged its responsibility under the Act, Connectivity Regulations and the Transmission Agreement dated 3.1.2011 in this case, though coordination could have been more pro-active and frequent. It is the Petitioner who failed to give a clear indication at the stage of investment approval of the transmission system that it is not executing the generation project and hence transmission system is not required. On the other hand, the Petitioner shifted the milestones for commercial operation of the generating station and accordingly, PGCIL implemented the transmission system.

Further, the Petitioner's suggestion regarding alternative utilization of the transmission system also helped PGCIL to go ahead with the transmission system.

40. The Petitioner has submitted that PGCIL has failed to create balance between its two roles, Central Transmission Utility as planner and transmission licensee service provider. The Petitioner has submitted that it was incumbent upon CTU to direct PGCIL (Service Provider) to either re-optimize or diverts its men and material towards other transmission projects under construction. The discriminatory conduct of PGCIL is apparent and manifest by its lack of attempts or efforts to either synchronize the commissioning of the Transmission Project with the Generation Project. In the IA No. 22/2016, the Petitioner has submitted that in the 33<sup>rd</sup> Meeting of the Standing Committee on Transmission Planning in the Southern Region held on 20.10.2011, the associated transmission system of Krishnapatnam UMPP was delinked from the Krishnapatnam UMPP generation due to uncertainty. The perusal of the said minutes settles the position that PGCIL has at all times capacity to defer/delay the construction of transmission lines or divert materials to other projects.

41. PGCIL has submitted that the arguments of the Petitioner suggesting PGCIL to divert the men and material of the transmission project in the event of delay of the generation project is without any basis and lacks merit. PGCIL has submitted that there is absolutely no conflict in the role of PGCIL as CTU and as a transmission licensee in the present case. PGCIL has submitted that the planning of the transmission network is done on the basis of LTA which has been granted to various parties and is solely based on the consideration of ensuring a good and strengthened network. There is no commercial interest in so far as the CTU's planning role is concerned. However, in the present case, the transmission system

was developed by PGCIL as a transmission licensee and in terms of the Transmission Agreement entered into between the Petitioner and PGCIL.

42. As we have held, execution of the subject transmission line was carried out by PGCIL on account of the failure of the Petitioner to provide clarity whether the transmission system is required or not. However, we feel that PGCIL in its capacity as CTU should have taken a proactive role to ensure coordinated execution and avoid mismatch between the commissioning of the generating station and transmission system. We are of the view that there is a requirement of ring-fencing between the functions of CTU and PGCIL as a transmission licensee to ensure impartiality. We request Ministry of Power to look into this aspect.

**Issue No.4: Whether any direction can be issued to keep the operationalization of connectivity and LTA in abeyance till the Phase II of the Generation Project of the Petitioner is commissioned?**

43. The Petitioner has prayed for appropriate directions for keeping in abeyance of connectivity till such time the revised date of commissioning of the Generation Project is intimated/communicated by the Generator to the Respondent (CTU/PGCIL). PGCIL has submitted that relief sought by the Petitioner is beyond the regulations as there is no provision to keep the connectivity and LTA in abeyance.

44. We have considered the submissions of the Petitioner and Respondent. The subject transmission line has been constructed as a connectivity line for evacuation of power from the Phase II of the generating station of the Petitioner. The Petitioner has claimed force majeure conditions for delay in the commissioning of the generation project. We have rejected the claim of the Petitioner for force majeure. Since the transmission system has been executed based on the connectivity granted and Transmission Agreement signed and the letter of the Petitioner dated 16.8.2011,

the Petitioner has to either use it and pay the transmission charges or continue to pay the transmission charges till the transmission line is utilised or pay the relinquishment charges if it intends not to use the connectivity line. PGCIL is also entitled to encash the bank guarantee in terms of the Article 5.0 (c) of the Transmission Agreement on account of adverse progress of the generation project. There is no provision for keeping the connectivity and LTA of the transmission line in abeyance which will result in non-recovery of the investment made. Further, the Petitioner cannot be exempted from paying the transmission charges for the subject transmission line. Accordingly, we reject prayers at para 5.2 and 5.3.

**Issue No.5: Since the transmission system has been commissioned without the generation project, how the cost of the said transmission system will be serviced?**

45. It has emerged during the analysis of various pleadings that the Petitioner was exploring utilisation of the subject transmission line by connecting to the bays in Phase I of the generation project. Since Phase I is dedicated to GETCO, the Petitioner is required to get consent of GETCO. We also notice that a number of wind and solar generation projects are coming up in Bachau area. CTU in consultation with CEA, GETCO and the Petitioner may explore the possibility of optimum utilisation of the Essar Gujarat TPS-Bachau 400 kV D/C (Triple) Line. Till alternative arrangements for utilisation of the said transmission line, the Petitioner shall continue to pay the transmission charges as determined by the Commission. As already held, PGCIL is at liberty to encash the bank guarantee for adverse progress of the generating station of the Petitioner and the same on recovering shall be adjusted against capital cost of the subject transmission projects.

46. We have noticed that PGCIL has gone ahead with execution of the transmission line despite the Phase-II of the generating station of the Petitioner making zero progress on the ground. PGCIL should have explored the possibility for short closure of the contract seeing adverse progress of the generation project and claimed damages from the Petitioner which the PGCIL was liable to pay to the OEM contractor and to meet other related expenditure. As a prudent utility practice, PGCIL is directed to make appropriate provisions in the contracts with the suppliers as well as in the TSA to take care of such eventuality. In view of the above, the Commission express its displeasure towards PGCIL for not adopting prudent utility practice while executing the subject transmission system.

47. The Petition is disposed of in terms of the above directions.

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

**sd/-**  
**(A.S. Bakshi)**  
**Member**

**sd/-**  
**(A.K. Singhal)**  
**Member**

**sd/-**  
**(Gireesh B. Pradhan)**  
**Chairperson**