

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No.24/MP/2017
alongwith
I.A. No. 20 of 2017**

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

Date of Order: 29th June, 2017

IN THE MATTER OF:

Bharatiya Rail Bijli Company Limited

....Petitioner

VERSUS

East Central Railway &Others

....Respondents

AND

IN THE MATTER OF:

Interlocutory Application by Respondent No.1 seeking disposal of the present petition qua Eastern Central Railway.

Parties Present:

Ms Swapna Sheshadri, Advocate for the Petitioner
Shri Hemant Singh, Advocate for the Applicant
Shri Matrugupta Mishra, Advocate for the Applicant
Ms Jyoti Prasad, Representative of PGCIL

ORDER

The present petition has been filed by the Petitioner, Bharatiya Rail Bijlee Company Limited (BRBCL) seeking a direction to Eastern Regional Load Despatch Centre (ERLDC)/Eastern Regional Power Committee (ERPC) to accept the DC as given by Nabinagar Thermal Power Project (NTPP) and to reflect the DC of NTPP in REA without linking the same to the operationalization of Long Term Access.

2. The Petitioner has submitted that BRBCL is a Joint Venture Company of NTPC limited and Indian Railways with shareholding of NTPC (74%) and Indian Railways (26%). The Petitioner has submitted that BRBCL is a generating company as defined under the Electricity Act, 2003 and is a company controlled by the Central Government. The Petitioner has submitted that Government of India vide letter dated 30.6.2007 allocated 90% power generated from the project to the Indian Railways and the remaining 10% power to other States and by letter dated 2.7.2010 was allocated to the State of Bihar. The Petitioner has further submitted that BRBCL entered into Power Purchase Agreement dated 16.12.2010 with East Central Railway for share of Indian Railways and Power Purchase Agreement dated 22.1.2010 with Bihar State Electricity Board for share of Bihar for supply of electricity from NTPC. The Petitioner has submitted that after unbundling of Bihar State Electricity Board, two distribution companies have been created namely North Bihar Power Distribution Company Limited and South Bihar Distribution Company Limited and both these distribution companies have been arrayed as respondents.

3. The Petitioner has submitted that NTPP with a capacity of 4x250 MW was coming up in Aurangabad District of Bihar. The Petitioner on behalf of the beneficiaries had applied to CTU for long term access which was granted by the CTU vide its letter dated 24.7.2009. A Bulk Power Transmission Agreement was signed on 8.1.2010 between PGCIL, East Central Railways and Bihar State Electricity Board.

4. The Petitioner has submitted that Unit 1 of NTPP was declared under commercial operation with effect from 0000 hrs of 15.1.2017 after successful trial run carried out in accordance with the provisions of Central Electricity Regulatory

Commission (Indian Electricity Grid Code) Regulations, 2010 as amended from time to time. ERPC vide its letter dated 15.1.2017 to CEA has also communicated that in 129th OCC meeting, the COD of 1st Unit of NTPP was accepted as 0000 hrs of 15.1.2017. The Petitioner has submitted that BRBCL has been daily declaring its availability (DC) to ERLDC with effect from 15.1.2017. However, ERLDC vide its letter dated 16.1.2017 intimated the Petitioner that for commencement of scheduling of power from NTPP of BRBCL, the Petitioner has to provide (i) share allocation from ERPC; (ii) Long Term Open Access operationalization from CTU; and (iii) issuance of NOC from respective States where scheduling of Railways will be done.

5. The Petitioner has submitted that BRBCL vide its letter dated 17.1.2017 to ERPC has requested to allocate the share of Railways and Bihar in Eastern Region and requested to schedule power on immediate basis. In response to the said letter, ERPC vide e-mail dated 18.1.2017 has communicated that ERPC is not authorized to do allocation to different States and indicated that allocation needs to be done by CEA on concurrence from highest authorities. The Petitioner has submitted that ERLDC is not indicating the DC of Unit 1 of NTPP despite the fact that BRBCL has properly declared Unit 1 commercially operational and the Unit is actually available and DC is being actually communicated to ERLDC on daily basis. The Petitioner has submitted that in the absence of DC in REA, BRBCL is constrained to raise provisional bills to its beneficiaries on the basis of DC submitted for recovery of its fixed charges after COD, without the certification of the regulatory authorities. The Petitioner has submitted that ERPC and ERLDC are also not accepting the DC of NTPP on the ground that LTA has not been operationalized by CTU. The Petitioner has submitted that neither the Tariff Regulations nor the Grid Code restrict acceptance of DC after successful declaration of COD. In the circumstances, the

Petitioner has sought directions to ERLDC/ERPC to accept the DC as given by NTPP and reflect the DC in the REA without linking the same to operationalization of LTA.

6. Replies to the petition have been filed by Eastern Regional Load Despatch Centre (ERLDC), Eastern Regional Power Committee (ERPC), and Power Grid Corporation of India (PGCIL). Eastern Central Railways (ECR) has filed an Interlocutory Application seeking disposal of the Petition qua the Applicant/ECR.

7. The replies of the Respondents are discussed in brief as under:

(a) ERLDC has raised three issues namely, allocation of shares from the Nabinagar TPS by ERPC, operationalization of LTA by CTU and No Objection from the States, to be resolved before the power is scheduled to the beneficiaries of Nabinagar TPS. ERLDC has submitted that for being considered for scheduling and regional energy accounting, the agreements regarding the beneficiary's share in the ISGS is required to be filed with ERLDC in terms of clause 6.4.14 of the Grid Code. Presently, BRBCL neither has State-wise Government of India percentage share allocation for Railways nor long term access operationalization consent from Central Transmission Utility. ERLDC has submitted that the Commission in its order dated in Petition No.197/MP/2015 has decided that since the Indian Railways can be connected with ISTS directly or through State network, the group of TSS situated in a State and connected directly with ISTS shall be treated as fragmented Control Area and the responsibility for their scheduling, metering, balancing, applicability of ISTS charges and losses shall vest in the concerned RLDC and the group of TSSs connected to the State network, the

responsibility for these functions shall vest in the concerned SLDCs. The matter was considered in the meeting for scheduling of power from BRBCL held at ERPC on 25.1.2017. In the light of the views of the constituents in the said meeting and the directions of the Commission in Petition No.197/MP/2015, No Objection Certificates from the respective States are required for scheduling of power to Railways as Railways is an embedded entity and scheduling of power has to be done by SLDC.

(b) CTU has submitted that the Petitioner applied for LTOA of 910 MW (1000 MW less auxiliary power consumption @9%) vide its application dated 14.5.2009 which was modified to 1000 MW vide application dated 29.5.2009, with drawee utilities being Indian Railways (910 MW) and Bihar State Electricity Board (90 MW). The Petitioner was granted LTOA for 1000 MW by CTU vide letter dated 24.7.2009 as per the following details:

1.	Drawee Utilities	(in MW)
a.	Indian Railways-Eastern Region	355 MW
	Bihar	50
	Jharkhand	75
	West Bengal	95
	Odisha	60
	Damodar Valley Corporation	75
b.	Indian Railways-Western Region	485
	Chhattisgarh	95
	Gujarat	75
	Maharashtra	130
	Madhya Pradesh	185
c.	Indian Railways-Northern Region	60
	Uttar Pradesh	60
d.	Bihar State Electricity Board	100
2.	Transmission system requirement	
	Dedicated part	Nabinagar-Sasaram 400 kV D/C line
	Common transmission system associated with Tilaiyya Ultra Mega Power Project, Barh-II Thermal Power Station and Nabinagar Thermal Power Station	1) Balia-Lucknow 765 kV S/C (2 nd circuit) 2) Meerut-Moga 765 kV S/C

3.	Date of commencement of open access	After commissioning of transmission system elements mentioned above.
----	--	--

CTU has submitted that the immediate evacuation link i.e. Nabinagar-Sasaram 400 kV D/c line was proposed to be implemented by CTU and the Petitioner was to pay/share the entire applicable transmission charges. Based on the request of the Petitioner, the said line was commissioned with effect from 1.7.2012. CTU has further submitted that a common transmission system comprising of Balia-Lucknow 765 kV S/c (2nd Circuit) and Meerut-Moga 765 kV S/c were planned Tilaiya UMPP, Barh II TPS and Nabinagar TPS. On account of delay in materialization of Tilaiya UMPP and Barh-II TPS, the transmission system requirement of Nabinagar TPS was reviewed in the 11th Meeting of Eastern Region Constituents for Connectivity and LTA Applications held on 13.6.2016 and it was decided that for evacuation of power from Nabinagar TPS, the existing and planned transmission system of CTU would be used. CTU has further submitted that in the meeting for scheduling of power from BRBCL held at ERPC on 25.1.2017, a number of regulatory issues were yet to be resolved before scheduling of power under the LTA could take place regardless of whether LTA is formally operationalized or not. CTU has further submitted that as per the pleading in the petition, ECR had requested to operationalize the LTA of 185 MW from Unit 1 and there is a request for operationalization of LTA of 25 MW by Bihar and there is no information about the balance 40 MW. CTU has submitted that in the absence of complete information, any further action by CTU is not possible. CTU has further submitted that in terms of para 25(iii) of the Detailed Procedure under Connectivity Regulations, the Petitioner is required to inform

at least 90 days ahead of the date of commissioning and commercial operation so as to afford necessary time for the CTU to complete the regulatory formalities. According to CTU, in view of the unresolved regulatory issues, the likelihood of any immediate power flow/scheduling from the Nabinagar TPS to its beneficiaries is remote.

- (c) ERPC in its reply has submitted that ERPC informs the share allocation received from CEA/MoP to ERLDC for enabling scheduling. In this case allocation was received only in favour of Bihar (10%) and Railways (90%). Since the Railways are an intra-State entity and have no interface with ISTS or drawal points, Railways do not constitute a control area under RLDC jurisdiction. In case of BRBCL, MoP has allocated 90% power to Railways who in turn through their letter to Chairperson, CEA dated 23.1.2017 conveyed its intentions to draw the allocated power from different drawal points under different State Utilities. ERPC and/or ERLDC cannot schedule this quantum to different States without their consents. ERPC has further submitted that only goal of BRBCL is to raise bills on DC and recover its fixed cost irrespective of whether the power could be made available to beneficiaries. ERPC has submitted that only facilitating BRBCL in certifying DC for fixed cost recovery could never be the function of scheduling and dispatch as formulated under the Grid Code. ERPC has also submitted that if the Commission directs ERPC is ready to adopt the percentage allocation suggested by Railways in their letter dated 23.1.2017 to Chairperson, CEA and intimate the same to ERLDC for scheduling as Constituent (BRBCL power for IR) irrespective of whether the same could be actually scheduled or not.

8. The Petitioner in its rejoinder has submitted that CEA has already clarified to the Railways and ERPC that the Government of India/Ministry of Power vide letters dated 30.6.2010 and 2.7.2010 has allocated 90% power to the Railways and 10% to Bihar and there is no further need for reallocation. As regards the operationalization of LTA, the Petitioner has submitted that the BPTA dated 2.7.2010 has been signed between CTU, Bihar and the Railways and the Petitioner is not a party to the BPTA. CTU has not taken any action to operationalize the LTA inspite of the agreement arrived at the meeting held on 25.1.2017 at ERPC that CTU would take action within one month to operationalize the LTA. As regards the NOC from the States, the Petitioner has submitted that it is the concern of the beneficiaries since the evacuation of power is their responsibility.

I.A. No.20 of 2017

9. The Interlocutory Application No. 20 of 2017 has been filed by Eastern Central Railway, Respondent No.1 in the main petition (hereinafter referred to as “Applicant”) seeking disposal of the petition qua Respondent No.1/Applicant.

10. The Applicant has submitted that Eastern Central Railway entered into a Joint Venture Agreement dated 6.11.2007 with NTPC Ltd for setting up a Captive Generating Station with four units of 250 MW each at Nabinagar in the State of Bihar. Subsequent to the execution of the said agreement, Bharatiya Rail Bijli Company Limited (BRBCL) was established as a Joint Venture Company of NTPC Limited and Indian Railways. The Applicant has submitted that BRBCL and Railways entered into a Bulk Power Purchase Agreement (BPPA) on 16.12.2010 for bulk power purchase of electricity generated from the captive generating station located at Nabinagar to the captive user, Eastern Central Railways. As per the said

Agreement, 90% of the capacity of the generating station will be for captive use of Railways and balance 10% were allotted to the Bihar Utilities by Ministry of Power vide letter dated 2.7.2010. The Applicant has submitted that the BPPA is void ab initio in its present form on account of the fact that Eastern Central Railway has been referred to as a captive user in the BPPA and therefore, the generating station is not amenable to the jurisdiction of the Central Commission in terms of Section 79(1)(a) read with Section 62(1)(a) of the Electricity Act, 2003. The Applicant has further submitted that Articles 5.1 and 5.2 of the BPPA which provide for determination of tariff by this Commission for payment by Indian Railways is hit by Section 23 of the Indian Contract Act, 1872. The Applicant has submitted that in the present case, consideration clause is not implementable as Eastern Central Railways is the captive user and in the absence of valid consideration, the contract is not enforceable in terms of Section 10 read with Section 25 of the Indian Contract Act, 1872. The Applicant has submitted that the present petition filed by BRBCL is misconceived and no directions can be issued to ERLDC/ERPC to accept the declared capacity of BRBCL qua the Eastern Central Railways.

11. The Petitioner, BRBCL, has submitted that it is wrong on the part of the Applicant to contend that consumption by Railways is captive consumption or the generating station is a CGP for which tariff determination by the Commission is not required by this Commission. The Petitioner has denied that the consideration clause under the BPPA is not maintainable since the Commission has been vested with the power from generating companies to distribution licensees. The Petitioner has further submitted that the Commission in its order dated 5.11.2015 in Petition No.197/MP/2015 on a petition filed by Indian Railways has clarified that the Indian Railways is a deemed licensee and the Applicant cannot take a contrary stand only

to suit itself in the present petition. The Petitioner has submitted that the clauses in the BPPA are legal and implementable.

12. During the hearing of the petition, the learned counsel for the Applicant strenuously argued that Nabinagar TPS is the captive power plant of the Indian Railways and therefore, as per the provisions of the Electricity Act, 2003, supply of power from a captive power plant to its captive user cannot be subject matter of tariff determination by the Commission. Learned counsel further submitted that BPPA in its present form, is void *ab initio* and not implementable on account of the settled principles law that no contract is enforceable without a valid consideration clause.

13. Since the Applicant has raised a preliminary issue of jurisdiction of the Commission to deal with the petition and has sought disposal of the petition *qua* the Applicant, we intend to dispose of the IA in the first instance. The main contention of the Applicant is that BRBCL and Railways entered into a BPPA dated 16.12.2010 for bulk power purchase of electricity generated from the captive generating station located at Nabinagar to the captive user East Central Railways. The Applicant has submitted that the BPPA is void *ab initio* on account of the following reasons:

(a) The Applicant/Respondent No. 1/ECR has been referred to as a captive user of BRBCL in the BPPA.

(b) Articles 5.1 and 5.2 of the BPPA refer to the consideration of the said contract and determination of tariff by the Commission. Since there is no provision for determination of tariff by the Commission for a captive power plant supplying power to its captive user, these articles of the BPPA are hit by the Section 23 of the Contract Act, 1872.

(c) The BPPA is not enforceable in the absence of a valid consideration as there is no sale of electricity by a captive generating plant to its captive user.

14. We have gone through the pleadings in the petition and the documents on record. The Applicant has relied on para 2.1.3 of the BPPA in support of its contention that Nabinagar TPS is a captive power plant of Indian Railways:

“2.1.3 The Station is being developed as a captive generating plant for the Railways. It shall be the responsibility of the Railways to ensure compliance of all applicable statutory provisions w.r.t. drawal and consumption of power.”

In the light of the above provision, the Applicant/Respondent No.1 has claimed that the agreement has become non-enforceable and therefore, the Respondent No.1 is relieved from the performance of its obligations under the said agreement.

15. It is also a well-recognised principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible. [North Eastern Railway Co. v. Lord Hastings (1900 AC 260: (1900-03)]. In Ganga Saran v. Firm Ram Charan Ram Gopal [AIR 1952 SC 9] the Hon'ble Supreme Court stated as under:

“6. ... Since the true construction of an agreement must depend upon the import of the words used and not upon what the parties choose to say afterwards, it is unnecessary to refer to what the parties have said about it.”

The Supreme Court in Bank of India v. K. Mohandas [(2009) 5 SCC 313], the Supreme Court held as under:

“28. The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties.”

16. As per the principles of construction of the contract, the intention of the parties should be ascertained from the language they have used and in the light of the surrounding circumstances and object of the contract. We have considered the various provisions of the BPPA in the light of the language used, the surrounding circumstances and the object of BPPA.

17. BRBCL is a Joint Venture of NTPC Limited and Indian Railways with equity participation of 74% and 26% respectively based on the Joint Venture Agreement dated 6.11.2007 for setting up a generating station with four units of 250 MW each. The main purpose of the company is to generate and supply electricity and therefore, it is a generating company under section 2(28) of the Act. On the basis of the approval of Cabinet Committee of Economic Affairs (CCEA), 90% of power from the project was allocated to Indian Railways and 10% of power was kept as unallocated quota at the disposal of the Central Government to meet the overall requirement of the constituent States of Eastern Region from time to time. Subsequently, Ministry of Power vide its letter dated 2.7.2010 allocated 10% power to Bihar for the time being. In this background, the BPPA between BRBCL and ECR was entered into on 16.12.2010. BPPA clearly mentions that 90% of the entire capacity of the generating station is allocated to Railways. Clause 2.1.2 of the BPPA states that “the station is being developed as Mega Power Project as per the terms and conditions of GOI policy applicable to Mega Power Project.” It is pertinent to mention that Mega Power Policy does not envisage to promote captive power plants for captive users. One of

the conditions of the Mega Power Policy is that the power purchasing States have constituted the Regulatory Commissions with full power to fix tariff. Therefore, the intention of Mega Power Policy is that the tariff of the generating companies set up under Mega Power Policy shall be determined by the Regulatory Commissions. As per Clause 5.1 of the BPPA, “the parties agree that the charges for supply of electricity shall be as determined by CERC from time to time.” There is no requirement of determination of charges by a Regulatory Commission for supply of power from a captive generating plant to its captive user. Clause 5.2 of the BPPA says that the charges for supply of electricity shall be determined by CERC from time to time. Clause 5.2 says that BRBCL shall approach CERC for determination of charges for supply of electricity before the Commercial Operation Date of each Unit of the station. Clause 6.4 of the BPPA provides that in the event of default in opening the Letter of Credit (LC) or reinstatement of the LC of the requisite amount or non-payment of bills within a period beyond which surcharge is applicable as per provisions of applicable regulations, BRBCL shall have the right to regulate/divert the allocated capacity of the Railways to any other bulk power consumer(s)/Third Party. Clause 6.4.5 of the BPPA provides that the procedure for implementation and withdrawal of power regulation in the event of default shall be as per the prevailing applicable CERC regulations. Clause 6.5.1 of the BPPA says that in case of default in payment of bills beyond a period of 90 days of billing, BRBCL shall have the right to reallocate full or part capacity to any other Bulk Power Customer(s)/Third Parties subject to approval of Ministry of Power, without the Railways being relieved of its obligations to pay Capacity Charges and Energy Charges and arrears, if any under the BPPA. Capacity Charges have been defined as “monthly Fixed Charges as provided in CERC (Terms and Conditions of Tariff) Regulations, 2009 as amended

or replaced from time to time and shall be paid on a monthly basis in proportion to the allocated capacity from time to time. Similarly, Energy Charges have been defined as “variable charges as provided in CERC (Terms and Conditions of Tariff) Regulations, 2009 as amended or replaced from time to time and shall be paid on a monthly basis corresponding to the amount of energy scheduled.”

18. All these provisions of the BPPA as quoted in the preceding paragraph clearly point out the intention of the parties to treat Nabinagar TPS of BRBCL as a generating station which will be subject to the determination of tariff as per the Tariff Regulations of the Commission as distinguished from a Captive Generating Plant which is not subject to the regulations of the Commission. Further, BPPA also clearly provides that Nabinagar TPS shall be subject to scheduling, metering and energy accounting as per the Grid Code and decisions taken at the respective Regional Power Committee forums. The very facts that allocation or reallocation of capacity of Nabinagar TPS is done by the Ministry of Power, Government of India on the same line as the generating stations owned or controlled by the Central Government, the Nabinagar TPS was accorded the Mega Power status by the Government; and the parties have consciously agreed to get the tariff of the generating station decided by the Commission and comply with the regulations of the Commission with regard to scheduling, metering and energy accounting as applicable to a generating station; clearly bring out the intention of the parties namely, NTPC and BRBCL to treat the Nabinagar TPS as a generating station and not as a Captive Generating Plant.

19. It is pertinent to mention that the Indian Railways approached the Commission by filing Petition No.197/MP/2015 seeking a direction that the Indian Railways in their capacity as an authorized entity to distribute and supply electricity in connection with

its working as Railways and across number of States, shall be a separate participating entity like any other State entity for the purpose of deviation settlement mechanism and to direct all State Transmission Utilities and State Load Despatch Centres to give connectivity and process the applications for open access by Railways, treating the Railways as an entity akin to a person who has been granted distribution licence in their States. The Commission, after hearing the parties to the said petition, framed certain issues and for the purpose of the present application, the following issues are relevant:

- (a) Whether the petitioner's claim as an authorized entity under the provisions of the Railways Act to undertake distribution of electricity in connection with the working of the railways can be sustained in law. If so, whether the petitioner is entitled for grant of connectivity and open access as a distribution licensee in connection with the working of the railways?
- (b) Whether the petitioner can be treated as a deemed licensee under the Electricity Act?
- (c) Whether the petitioner should be treated as a separate regional entity for the purpose of scheduling and energy accounting in terms of deviation settlement?

With detailed reasoning, the Commission answered the issues in paras 42, 47 and 51 of the order dated 5.11.2015 in Petition No.197/MP/2015 as under:

"42. In view of the above discussion, we hold that since the Indian Railways is an authorized entity to distribute and supply electricity in connection with the working of the Railways under the Railways Act, the petitioner shall be entitled for grant of Open Access in connection with the working of the Railways as per the provisions applicable to a distribution licensee."

“47. In view of the above discussion, the petitioner is a deemed licensee under third proviso to Section 14 of the Electricity Act and there is no requirement for declaration to that effect by the Appropriate Commission.”

“51. The Indian Railways can be connected with ISTS directly or through state network. The Commission is inclined to consider option "c" as provided in CEA Report with slight modification. The drawl points from ISTS located within a State shall be treated as a single entity for the purpose of scheduling. This arrangement according to CEA and POSOCO may lead to fragmented control area. Therefore, the group of TSSs situated in a State and connected directly with ISTS shall be treated as one „fragmented control area“ and the responsibility for the purpose of scheduling, metering, balancing, applicability of ISTS charges and losses etc, shall vest in the concerned RLDC. In so far as the TSSs of Indian Railways connected to State network are concerned, the responsibility for these functions shall vest in the concerned SLDC.”

20. West Bengal State Electricity Distribution Company Limited challenged the above order of the Commission before the Appellate Tribunal for Electricity (Appellate Tribunal) in Appeal No.276 of 2015. The Appellate Tribunal while deciding the IA No. 445 of 2015 for interim relief vide order dated 16.12.2015 observed with regard to the status of the Indian Railways as under:

“17. In the present case, we are concerned with the Railways Act and, the Electricity Act saves it in case of inconsistency. Therefore, Section 11 of the Railways Act which empowers Railway Administration to undertake erection, operate and maintain electric traction equipment as well as power supply and distribution installation in connection with working of Respondent No.2 is not affected by the provisions of the Electricity Act. Respondent No.2 has full authority to undertake electricity distribution and supply of electricity by virtue of the provisions of the Railways Act. It will also not lose its status as a deemed distribution licensee acquired under third proviso to Section 14 of the Electricity Act merely because it consumes the power procured by it. Reliance placed on Sesa Sterlite Ltd. prima facie appears to us to be misplaced.”

21. In the light of the order of the Commission as well as the Appellate Tribunal as quoted above, Indian Railways has been vested with the authority to undertake distribution and supply of electricity in terms of the Railways Act, 1989 and Electricity Act, 2003. In the teeth of the above legal position, the Applicant cannot take a different stand to claim that it is a bulk consumer and Nabinagar TPS is a captive power plant of East Central Railways. BRBCL has entered into BPPA dated 16.12.2010 with Indian Railways and PPA dated 22.1.2010 with Bihar Electricity

Board and therefore, Nabinagar TPS has the contractual arrangement to supply power to distribution licensees in more than one State. In terms of section 79(1)(a) read with section 62(1)(a) of the Act, the tariff of BRBCL which is jointly owned by Indian Railways, a Department of Government of India and NTPC Limited, a Central Generating Company owned and controlled by Ministry of Power, Government of India, shall be determined by the Central Commission. Therefore, we do not accept the contention of the Applicant that the determination of tariff of Nabinagar TPS is not amenable to the jurisdiction of this Commission.

22. The Applicant has submitted that Articles 5.1 and 5.2 of the BPPA are hit by Section 23 of the Contract Act, 1872 and therefore, are void *ab initio* and not implementable in the absence of a valid consideration in accordance with Section 10 read with Section 25 of the Contract Act, 1872. We have considered the submission of the Applicant. Section 10 of the Indian Contract Act provides that all agreements are contracts if they are made by free consent of parties competent to contract, lawful consideration and with a lawful object and are not hereby expressly declared to be void. The BPPA has been entered into by BRBCL and Indian Railways and there is nothing on record to prove that the agreement was not made with free consent. The object of the agreement is to supply power from the Nabinagar TPS to Indian Railways which is a legitimate activity under the Electricity Act, 2003 and the consideration for supply of power is the tariff determined by this Commission. We have already held that the tariff determination for supply of power from Nabinagar TPS to Indian Railways is amenable to the jurisdiction of this Commission. Since the BPPA has been made with a lawful object and valid consideration, the provisions of Section 23 and Section 25 of the Indian Contract Act are not applicable.

23. In the light of the above discussion, the prayer of the Applicant in IA No. 20 of 2017 for disposal of the petition qua the Applicant/Respondent No. 1/ECR is rejected. The IA is disposed of accordingly.

Consideration of the submission of the Petitioner on merit

24. The Petitioner in the main petition has sought a direction to ERLDC/ERPC to accept the DC given by Nabinagar Thermal Power Plant and for direction to ERLDC/ERPC to reflect the DC of Nabinagar Thermal Power Plant in REA without linking the same to the operationalization of the LTA. The Petitioner has submitted that the Petitioner meets the requirement of Regulation 3 (15) of the 2014 Tariff Regulations with regard to declared capacity after the first unit of the generating station has successfully completed the trial run and declared the COD with effect from 0000 hrs of 15.1.2017 and the said declaration has been accepted by ERPC in 129thOCC Meeting. However, for commencement of scheduling of power, ERLDC has requested for share allocation intimation from ERPC, long term access operationalization from CTU and issuance of NOC from respective States where scheduling of railways will be done. The Petitioner has submitted that the share allocation has already been made by Ministry of Power vide letters dated 30.6.2010 and 2.7.2010. Further, the Petitioner has taken LTA on behalf of the Indian Railways for power to be scheduled State-wise. Consequent to the grant of long term access by CTU, BPTA dated 8.1.2010 has been signed by Indian Railways and Bihar with CTU. As regards the operationalization of LTA, the Petitioner has submitted that the BPTA has been signed between CTU, Bihar and Railways. The Petitioner has submitted that the CTU is required to sort out the payment security and other aspects with the beneficiaries in order to operationalize the LTA and therefore, the Petitioner's generating station cannot be denied DC for failure of CTU to

operationalize the LTA. As regards the NOC from the States, the Petitioner has submitted that it is the responsibility of beneficiaries, in this case, the Railways, to get the NOC from the States.

25. The main objection of ERLDC is that since Railways are connected through the State network, No Objection Certificates are required from the States for scheduling of power. The reservation of CTU is that ECR had requested to operationalize 185 MW and there is a request for operationalization of 25 MW by Bihar but there is no information about the balance 40 MW. Since complete information is not available, CTU cannot operationalize the LTA. According to ERPC, MoP has allocated 90% power from BRBCL to the Railways and the Railways vide its letter dated 23.1.2017 has intimated about the drawal of the said allocated powers at different drawal points under different State Utilities. ERPC has submitted that scheduling of Railways share of power at different drawal points cannot be done without the consent of the respective States. ERPC has further submitted that if the Commission directs, ERPC will adopt the percentage allocation suggested by Railways in its letter dated 23.1.2017 and intimate the same for scheduling irrespective of whether the same could be actually scheduled or not.

26. The main hurdle for scheduling of power from the first unit of BRBCL is the non-availability of consent from the States where the drawal points of the Railways are situated. It is the responsibility of CTU to operationalize the LTA. According to CTU, the evacuation link from BRBCL, namely, Nabinagar-Sasaram 400 kV D/c Line was commissioned on 1.7.2012. No system strengthening has been carried out by CTU for scheduling of power from Nabinagar TPP and the existing and planned

transmission system would be used. There is a BPPA between BRBCL and Indian Railways and PPA between BRBCL and Bihar. Therefore, all requirements of operationalization LTA have been met. Accordingly, we direct the CTU to operationalize the LTA for evacuation of power from Nabinagar Thermal Power Plant and raise the bills for transmission charges in accordance with the LTA. Since Indian Railways has intimated the percentage of allocation between different drawal points, ERPC/ERLDC should accept the DC by BRBCL. For drawal of power, it is the responsibility of Indian Railways to facilitate scheduling of power by the respective SLDCs where the State network is used for drawal of power from Nabinagar TPP.

27. In the light of our decision in para 26 above, we direct ERPC to convene a meeting of CTU, ERLDC, Indian Railways, BRBCL and Constituent States and sort out the outstanding issues in connection with scheduling of power from Nabinagar TPP and report to the Commission by 17.7.2017.

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

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B Pradhan)
Chairperson