

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 317/MP/2013

Coram:

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

Date of Order : 12th of April, 2017

In the matter of

Petition for the relinquishment of the long term open access under the Bulk Power Transmission Agreement dated 7.6.2010 and return of bank guarantee.

And

In the matter of

Navbharat Power Private Limited
Essar House, 11 K.K.Marg,
Mahalaxmi, Mumbai- 400 034

...Petitioner

Vs.

1. Power Grid Corporation of India Limited
'Saudamini', Plot No. 2, Sector-29,
Gurgaon- 122001

2. Central Electricity Authority
Sewa Bhawan,
Rama Krishna Puram,
New Delhi-110066

...Respondents

The following were present:

Shri Sanjey Sen, Senior Advocate, NPPL
Shri Ruth Elwin, Advocate, NPPL
Shri Matrugupta Mishra, Advocate, NPPL
Shri Deepak Rodricks, NPPL
Shri Vijendra Rangwani, NPPL
Shri Ramachandra, PGCIL



ORDER

The Petition has been filed by Navbharat Power Private Limited under Regulation 18 read with Regulation 32 of the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in Inter-State Transmission and Related Matters) Regulations, 2009, (Connectivity Regulations) seeking relinquishment of the Long Term Open Access (LTOA) and seeking direction to Power Grid Corporation of India Ltd. (PGCIL) to return Bank Guarantee.

2. The Petitioner is setting up a 1050 MW (2X525 MW) coal based thermal power plant at Kharag Prasad and Meramundali, Dhenkanal District, Odisha (in short "Project"). On 4.1.2006, the petitioner entered into a Power Purchase Agreement with PTC India Limited for sale of contracted capacity and power output from the Project for "946 MW net power" at the delivery point for 25 years from the commercial operation date, out of the then proposed coal based thermal power project of 1040 MW (2 x 520 MW) to be developed and commissioned by the petitioner. The petitioner has submitted as under:

(a) On 9.6.2006, the Petitioner entered into a Memorandum of Understanding (MOU) with the State of Odisha for setting up of thermal power plant of about 1040 MWs comprising of 2 units of about 520 MWs in the State of Odisha with an estimated investment of about ₹ 4675 crore with the certain terms and conditions enumerated in the MOU.

(b) As per the provisions of the MOU, the Petitioner requires approximately 1200 acres of land for setting up the TPPs and associated facilities. The State



Government has agreed to acquire the required land and hand over the same to the Petitioner free from all encumbrances to the Petitioner through Odisha Industrial Infrastructure Development Corporation (IDCO). The Petitioner vide its letter dated 5.9.2006 requested IDCO to initiate the process for acquisition of land at the earliest.

(c) Pursuant to the MOU, the Government of Odisha vide Resolution No. 7947 dated 17.8.2006 designated Grid Corporation of Orissa Limited ('GRIDCO') as its nominated agency for purchase of 25% the power sent out from the project including infirm power and power generated above 80% PLF. Accordingly, the Petitioner on 28.9.2006 entered into a Power Purchase Agreement with GRIDCO.

(d) On 31.10.2006, Department of Water Resources, Government of Odisha informed the petitioner that the Water Resources Department has accorded in principle approval to the Petitioner for drawl of 42 cusecs of water for the proposed project subject to fulfilment of certain conditions enumerated in the letter. On 2.11.2006, the petitioner paid ₹ 1,20,00,000 to IDCO towards 10% administrative charges on approximate cost of land acquisition for 1200 acres. In this regard, a notification under Section 4 (1) and 6 (1) of the Land Acquisition Act, 1894 was issued on 6.11.2007 and 29.11.2008. On 4.12.2006, Ministry of Railways granted rail transport clearance for construction of private siding from Meramandali railway station of East Coast Railway on account of the project.



(e) On 15.3.2007, the Airports Authority of India has given No-Objection to the construction of the proposed two chimneys by the Petitioner. Such certificate was valid for a period of four years from the date of its issuance. On 26.4.2007, Department of Energy, Government of Odisha accorded administrative approval for acquisition of private land admeasuring to 1093.23 acres. On 31.5.2007, the Divisional of Forest Officer, Dhenkanal Division informed the Petitioner that no forest land is coming under the DLC Report and accordingly issued NOC on 13.7.2007.

(f) On 5.7.2007, the Petitioner made payment of ₹ 1,12,02,900 for balance 10% cost for establishment charges for acquisition of private land of around 1093 acres and alienation of Govt. land measuring around 89.66 acres. The Petitioner also made payment towards codal charges for construction of the Railway siding taking off from MRDL Station in Talcher-Cuttack section of the East coast Railway of 1% of approximate cost of the project amounting to Rs.15 lakh to East Coast Railway, Bhubaneswar. On 13.8.2007, East Coast Railways accorded in principle approval to the Petitioner for undertaking the survey for the proposed railway siding taking off from Meramandali sub-station.

(g) The Ministry of Coal, Government of India, vide its letter dated 17.1.2008 allotted Rampia and Dip Side of Rampia coal block in the command area of Mahanadi Coalfields Limited (MCL) to the Petitioner along with five (5) other companies. On 8.2.2008, the Ministry of Environment and Forest, Government of India (MOEF) accorded environmental clearance for the implementation of



Phase-I of 1050 MW of coal based thermal power plant project subject to certain terms and conditions as stipulated in the letter. MOEF accorded in principle clearance after taking into consideration the required land, allotment of coal linkage, approval for drawl of water and forest clearance, etc.

(h) The Ministry of Railway vide letter dated 14.7.2008 granted Rail Transport Clearance to the Petitioner for movement of liquid fuels like LDO, HFO etc. for its project in East Coast Railways. Further, the office of the State Pollution Control Board, Odisha, vide letter dated 7.8.2008, had conveyed its consent to the petitioner to establish the project under the applicable enactments.

(i) The Ministry of Power, Government of India, by letter dated 16.3.2009, granted in principle Mega Power status to the proposed 1050 MW (Phase-I) thermal power project proposed to be implemented at Dhenkanal, Odisha, by the petitioner by which the Petitioner was eligible to participate in tariff based competitive biddings for sale of power and setting of the plant.

(j) The Petitioner submitted application to PGCIL for grant of permission of open access and inter-connection of power with CTU's network. Accordingly, the petitioner made payment of fees to PGCIL to conduct load flow studies. PGCIL vide its letter dated 14.5.2009 informed that it has considered long term open access for evacuation of power from generation projects in the State of Odisha, including the project of the Petitioner.

(k) The Collector, Dhenkanal vide letter dated 30.7.2009, informed the Commissioner cum Secretary to the Government of Odisha that the project area



covers 546.98 hectare of the Ayacut area of Rengali Right Canal System (RRCS) and requested to settle the issue with the concurrence of the Water Resource Department. Pursuant to the letter dated 30.7.2009 of the Collector, Dhenkanal, in order to avoid loss of irrigated land failing under Rengali Right Irrigation project, IDCO, vide its letter dated 29.9.2009 requested the Petitioner to relocate the project site which adversely affected the timely implementation of it. IDCO vide its letter dated 30.10.2009 and 4.3.2010 appraise the Govt. of Odisha, Water Resources Department regarding steps taken by the Petitioner in implementation of the project in obtaining various approvals from the respective authorities for setting up of 1050 MW project.

(l) On 7.6.2010, the Petitioner entered into the Bulk Power Transmission Agreement with PGCIL for grant of long term access to the transmission system of PGCIL for transfer of power from the respective places of generation to the pooling point of PGCIL on payment of transmission charges decided by the Commission. The Petitioner was granted LTA for 720 MW out of which 255 MWs for Western Region and 465 MWs for Northern Region. The first unit of the Petitioner's power project of 350 MWs was scheduled to be commissioned on or before March, 2012. Accordingly, the Petitioner furnished a Bank Guarantee of Rs. 36 crore.

(m) Though the MOU was subject to extension of period from time to time. However, no extension of the MOU was made beyond 31.12.2011. On 1.8.2010, Mahanadi Coalfields Limited issued Letter of Assurance to the Petitioner for the



requirement of 4.219 MTs per annum of E/ F grade coal for its 1050 MW power plant. However, such assurances were provisional in nature subject to the fulfilment of the certain conditions.

(n) In the 2nd Joint Coordination meeting held on 4.3.2011, the Petitioner informed that the first unit is expected to be commissioned by January, 2014 and out of total land requirement of 1090 acres, no land is in possession and Government of Odisha is acquiring the land which would be transferred to the Petitioner by March 2011.

(o) On 20.9.2011, the Ministry of Power, Govt. of India issued prior approval under Section 68 (1) of the Electricity Act, 2003 to the Petitioner for installation of overhead lines for the associated transmission system of 1050 MW project. IDCO granted a certificate on the status report on 18.11.2011 to the effect that the Petitioner has paid the entire compensation amount of ₹ 61.43 crore for acquisition of private land of 1002.569 acres for the purpose of coal linkage. IDCO also informed that Govt. of Odisha has extended the MOU up to 31.12.2011 and the land acquisition is expected to be completed by June/July 2012.

(p) In the 4th Coordination meeting for High Capacity Transmission corridors in Eastern Region for Phase 1 IPP's held on 31.10.2011, it was informed that the transmission system for Phase 1 generation projects in Odisha would be commissioned by November 2013.

(q) The Petitioner vide its letter dated 5.4.2012 informed IDCO that as per the new proposal, the total land required stood reduced to approximately 755 acres including Govt. and private land and requested IDCO to initiate necessary steps for land acquisition and issuance of notification under Section 4 of the Land Acquisition Act. On 21.6.2012, State Pollution Control Board, Odisha granted its consent to establish the Mega Thermal Power Project, superseding its earlier consent dated 7.8.2008.

(r) The Petitioner vide its letter dated 4.6.2012, requested PGCIL to revise the commercial operation dates for Unit-I and II to 31.3.2015 and 30.6.2015 respectively and accordingly amend Annexure-1 and Annexure-4 in the BPTA for LTA dated 7.6.2010. In the said letter apart from appraising PGCIL regarding the milestones already achieved by the Petitioner, the delay in development of Unit I was said to be on account of delay in land acquisition by IDCO.

(s) The Petitioner vide its letter dated 27.7.2012 informed the Department of Water Resources, Government of Odisha that since the earlier permission for water drawl of 42 cusecs of water from Brahmani River signed on 31.10.2006 had lapsed in November 2009 due to delay in land acquisition by IDCO on account of Ayucut issue, the Petitioner re-applied for 40 cusecs of water drawl again with requisite fee of Rs. 60 lakh.

(t) On 11.09.2012, the Petitioner submitted its progress report to PGCIL stating that the land is expected to be acquired by March 2013 by IDCO and the expected date of commissioning of its units would be 31.3.2015 and 30.6.2015.



PGCIL vide letter dated 13.2.2013 appraising the status of transmission system for phase-I, IPPs in Odisha informed that the implementation of the transmission system is expected to be commissioned as per the schedule and the transmission system including Angul and Jharsuguda sub-stations along with Angul-Jharsuguda-Dharamjaygarh 765 kV transmission line scheduled to be commissioned in May, 2014. Accordingly, PGCIL requested all the other generation developers including the Petitioner to ensure that their dedicated transmission line along with associated line bays at Angul is commissioned before May, 2014.

(u) In spite of the repeated requests being made by the Petitioner from time to time, the Government of Odisha did not grant extension of MOU beyond 31.12.2011. Even though land acquisition process was initiated by IDCO and notification under section 4(1), 6(1) and 7 of the Land Acquisition Act were completed on 18.12.2010. However, no progress could be undertaken due to overlapping of the project area under the proposed irrigation command area of the Rengali right canal system (Ayacut area), which could not be realigned. Thereafter, the IDCO reduced the required land to accommodate the canal and resubmitted the request for reissuance of notification under section 4(1). The Department of Water Resources accorded Ayacut clearance to the petitioner on 10.07.2012, however, fresh issuance of section 4(1) notification could not be made in absence of extension of the validity of MOU. Further, the grant of prospecting license for Rampia and dip Side Rampia coal block were pending



with Government of Odisha since April 2008, which caused enormous delay in other related activities.

(v) In the light of the above extraneous circumstances and uncertainties which created an abnormal delay in implementation of the project, the Petitioner vide its letter dated 25.6.2013 requested PGCIL for relinquishment of LTOA without any liability on either side, exemption from paying any access without any transmission charges applicable and return bank guarantee of Rs. 36 crore till the petitioner is able to confirm further course of action pertaining to the project.

(w) PGCIL vide letter dated 12.8.2013, called for a meeting to discuss connectivity and LTA issues pertaining to generation projects in Eastern Region. Under the agenda for meeting PGCIL discussed the issues raised by the petitioner in its letter dated 25.6.2013. In the said meeting dated 12.8.2013, PGCIL advised the Petitioner to approach the Commission in this regard.

3. On the above background, the Petitioner has made the following prayers:

“(a) direct relinquishment of the long term open access under the Bulk Power Transmission Agreement dated 07.06.2010 without any liability on the part of the Petitioner;

(b) direct the Respondent No. 1 to return the bank guarantee bearing no. 00080100005091 dated 21.07.2010 for an amount of Rs.36 Crores issued by Axis Bank Limited on behalf of the Petitioner;

(c) grant an exemption to the Petitioner from making any transmission charges; and

(d) pass such other and further order or orders as this Hon'ble Commission may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.”

4. Notice was issued to the Respondent to file its reply. Reply to the petition has been filed by Power Grid Corporation of India Ltd. (PGCIL).

5. PGCIL vide its reply has submitted as under:

(a) A comprehensive transmission system has been planned for evacuation of power of about 10,000 MW LTA capacity from Phase 1 and Phase 2 generation projects from Odisha as well as Srikakulum generation project in the Southern Region. The transmission scheme includes four number of 765 KV lines in Angul-Jharsuguda-Dharamjayagarh section.

(b) The Petitioner has requested for relinquishment of LTA for 720 MW as well as return of the Bank Guarantee. As per the provisions of Connectivity Regulations, a long term customer may relinquish the LTA rights fully or partly before the expiry of the full term of LTA, by making payment of compensation for stranded capacity.

(c) In the current integrated and meshed up system, it is difficult to determine the stranded elements for each project as it shall be subjective and open to disputes.

(d) The actual order of use of network can only be ascertained when the transmission and generation project would actually be materialised. Accordingly, in view of the difficulty in identifying the stranded capacity, the Commission may take a view regarding the issue of relinquishment of LTA for the instant as well as future applications.



6. PGCIL was directed to examine whether any transmission capacity will be stranded on account of the proposed relinquishment of the LTA by the petitioner. In response, PGCIL vide its submission has submitted as under:

(a) A comprehensive transmission system has been planned for evacuation of power from Phase-I and Phase-II generation projects in Odisha and Srikakulam generation project in Southern Region. The installed and LTA capacity of Phase-I generation projects are about 10,000 MW (presently revised to 8,770 MWs and 6,000 MWs presently revised to 5,280 MWs), respectively.

(b) Various generation projects in the State of Odisha are already delayed from their original commissioning schedule. Lanco Babandh Power Pvt. Ltd. has already relinquished 800 MW LTA and for remaining they have requested for extension up to May, 2016. In the present petition, the Petitioner has requested for relinquishment for 720 MW LTA. Sterlite Energy Ltd has also requested for relinquishment of 1000 MW out of 1400 MW LTA for phase-I and II.

(c) In the present market scenario the power flow scenario is dynamic and it is difficult to ascertain the utilisation/ non-utilisation of transmission corridors. In such circumstances, identification of stranded elements would be subjective and open to disputes.

(d) Keeping in view of the above circumstances, it would be prudent that the compensation for relinquishment of LTA may be calculated on the basis of fixed quantum in MW in place of stranded capacity. Further, in view of the difficulty in ascertaining stranded capacity, the Commission may take a view of



relinquishment of LTA for the instant as well as future applications based on quantum of power for which LTA is withdrawn and for upfront collection of charges.

7. The Petitioner in its rejoinder dated 17.6.2014 has refuted various submissions made by PGCIL in its reply. The Petitioner has submitted that the circumstances which were beyond the reasonable control of the petitioner, being force majeure events within the meaning of Article 9.0 of the LTA Agreement, which constrained the petitioner to file the present case for relinquishment of LTA and return of bank guarantee. The Petitioner further submitted that relinquishment of 720 MW from the total transmission capacity of PGCIL would not lead to any stranded capacity. In the absence of any stranded capacity the Petitioner is not liable to pay any compensation under Regulation 18 of the Connectivity Regulations. The Petitioner reiterated that PGCIL has failed to ascertain the stranded capacity and such inability to ascertain the stranded capacity would not lead to calculating compensation on the basis of the fixed quantum per MW. The suggestion of imposing compensation in terms of fixed quantum in MW in place of stranded capacity is extraneous to Regulation 18 of Connectivity Regulations. The Petitioner has placed on record Ministry of Coal, Govt. of India letter dated 17.2.2014 intimating recommendation of inter-ministerial group of de-allocation of coal block earlier allocated to the petitioner.

8. Learned senior counsel for the Petitioner submitted that due to reasons beyond the control of the Petitioner, the Petitioner is unable to implement the project. Learned senior counsel relied upon APTEL's judgement dated 4.2.2014 (Gujarat Urja Vikas



Nigam Limited Vs. Gujarat Electricity Regulatory Commission) and submitted that in this case, non-availability of land was considered as force majeure event. The Commission directed PGCIL to submit (a) date and time-lines when PGCIL started construction of these lines under HCPTC-I system and when investment approval was given and (b) progress of the project as the Commission vide its order dated 31.5.2010 in Petition No. 233/2009 had directed CTU to link the progress of these transmission lines matching with the generation projects.

9. PGCIL vide its affidavit dated 26.8.2014 has submitted that a comprehensive transmission system was planned for evacuation of power from Phase-I generation project in Odisha including the generation project of the Petitioner which is being implemented by PGCIL in three parts, namely Part-A, B and C. PGCIL has submitted that Board of Directors of PGCIL accorded investment approval for the transmission system in September, 2010, December, 2010 and March 2011. Various sub-station and transmission line packages were awarded progressively from September 2010 to March 2011. PGCIL has placed on record the status of various transmission lines under Part-A, B and C.

Analysis and Decision:

10. We have heard the learned senior counsel and learned counsel appearing for the parties and perused the material on records. First, the factual details of the case need to be noted. The Petitioner proposed to execute a thermal power plant of 1050 MW of 350 MW each in Dhenkanal District, Odisha with the SCOD of March, 2012, July 2012 and December, 2012. The Petitioner applied for LTA for 720 MW with the target region of



WR (255 MW) and NR (465 MW). CTU after consideration of the, grant LTA for 720 MW to the Petitioner vide intimation dated 14.5.2009. The Petitioner signed an Agreement for LTA on 7.6.2010 with PGCIL. As per the said agreement, the Petitioner was required to execute the Navabharat-Angul Pool 400 kV D/C line with associated bays on or before March 2012. The transmission system under the scope of PGCIL included the System Strengthening in Odisha as well as ER-WR AC Corridor. The Petitioner furnished the bank guarantee of Rs. 36 crore @ 5 lakh per MW which validity is being extended from time to time.

11. The following issues arise for our consideration:

- (a) Whether the petitioner's contentions that the circumstances faced it are force majeure events under meaning of Article 9.0 of the LTA Agreement?
- (b) Whether the LTA granted to the petitioner under LTA Agreement dated 7.6.2010 should be relinquished without any liability on the part of the petitioner?
- (c) What should be the treatment of BG submitted by the Petitioner in accordance with LTA Agreement?

Issue (a): Whether the petitioner's contentions that the circumstances faced it are force majeure events under meaning of Article 9.0 of the LTA Agreement?

12. Clause 7.0 of the LTA Agreement provides as under:

"7. In order to monitor/review the progress of generating units along with its direct evacuation lines and also the common transmission system, Joint co-ordination meeting with the representative of each developers and POWERGRID shall be held at regular interval (preferably quarterly) after signing of this Agreement."

In accordance with the said provision, PGCIL is required to hold regular Joint Co-ordination Committee meeting. As per the information on record, the Petitioner in the 2nd Joint Coordination meeting held on 4.3.2011 informed that the 1st unit was expected to



be commissioned by January, 2014. The Petitioner also informed that Govt. of Odisha was acquiring the land which would be made available by March, 2011. During 4th Coordination meeting for High Capacity Transmission Corridors in ER on 31.10.2011, PGCIL informed that the transmission system for phase-1 generation projects would be commissioned by November, 2013. The Petitioner, vide letter dated 4.6.2012, requested PGCIL to revise COD of Unit-I and Unit-II to 31.3.2015 and 31.6.2015 respectively and accordingly amend Annexure-I and Annexure-4 of the LTA Agreement. The petitioner also appraised PGCIL in detail of all the statutory approvals obtained by it except land acquisition. The Petitioner vide letter dated 11.9.2012 submitted progress report to PGCIL wherein the Petitioner informed that land for the project was yet to be acquired and the expected date of land acquisition was March, 2013 and accordingly, the expected COD of Unit-I and Unit-II would 31.3.2015 and 31.6.2015 respectively. The Petitioner, vide its letter dated 25.6.2013 informed PGCIL about in difficulties faced by it in execution of the project and requested PGCIL for relinquishment of LTA without any liability on either side and return of BG of Rs. 36 crore. PGCIL convened meeting on 27.8.2013 wherein PGCIL advised the Petitioner to approach the Commission in this regard. Accordingly, the Petitioner has filed the present petition.

13. The Commission had directed PGCIL to submit the date and timeline when PGCIL started contraction of their lines under HCPTC-I Stage including the investment approval therefor and the progress of the transmission projects covered under HCPTC-I. PGCIL vide its affidavit dated 26.8.2014 has appraised that the Board of Directors of PGCIL has accorded investment approval for transmission system for Phase-I



generating projects in Odisha-Part-A, Part-B and Part-C in September, 2010, December, 2010 and March, 2011.

14. PGCIL has also given the status of the projects as on July, 2014 as under:

Sl. No.	Name of the Trans line	Length (CKM)	Locations (No.)	Progress of Construction			Commissioning Schedule
				Stubs Setting (No.)	Tower Erect. (No.)	Strng. (ckm)	
1	Transmission System for Phase-I Generation Projects in ORISSA-Part-A.	675	1439	1370 (95%)	1243 (86%)	400 (59%)	Nov'14
1.1	765kV S/C Angul Pooling station-Jharsuguda Pooling station line-I (Incl. Common D/C portion -212 locs. Of total line)	270	743	712	680	167	Oct'14
1.2	765kV S/C Angul Pooling station-Jharsuguda Pooling station line-II	274	510	472	377	106	Nov'14
1.3	LILO of 400kV D/C Rourkela-Raigarh at Jharsuguda Pooling stn.	88	120	Commissioned in May'13			
1.4	LILO of 400kV S/C Meramunali-Jeypore at Angul Pooling stn.	9	14	Commissioned in Mar'13			
1.5	LILO of one ckt 400kV D/C Talchar-Meramundali at Angul Pooling stn.	34	52	Commissioned in Mar'14			
2	Transmission System for Phase-I Generation Projects in ORISSA-Part-B.	1209	1600	1364 (85%)	1097 (69%)	447 (37%)	Dec'14
2.1	765 kV D/C Jharsuguda Pooling Station-Dharamjaygarh line*	300	410	Commissioned in Jul'14			
2.2	765 kV D/C Dharamjaygarh-Jabalpur Pooling Station line	868	1132	896	629	106	Dec'14
2.3	LILO of 765kV S/C Ranchi-Sipat (Bilaspur) Pooling Station at Dharamjaygarh/near Korba	10	13	Commissioned in Mar'14			
2.4	400 kV D/C Jabalpur Pooling Station-Jabalpur (High Capacity) line	31	45	Commissioned in Dec'13			
3	Transmission System for Phase-I Generation Projects in ORISSA-Part-C.	1274	2638	2613 (99%)	2416 (92%)	987 (77%)	Feb'15
3.1	765 kV D/C Jabalpur Pooling Station-Bina line	460	616	Commissioned in Dec'13			
3.2	765 kV S/C Bina-Gwalior line (3rd Ckt)	231	625	Commissioned in May'14			
3.3	765 kV S/C Gwalior-Jaipur line (2nd Ckt)* (excl. common D/C portion locs. (195)	311	656	650	603	175	Feb'15
3.4	765 kV S/C Jaipur-Bhiwani line	272	741	722	572	121	Feb'15



15. It is noted that the Petitioner in various JCC meetings and correspondence had been appraising PGCIL that land acquisition for the project was in progress and sought postponement of the SOCD of the project, last request being made vide letter dated 11.9.2012 wherein it was indicated that the commissioning would be March and June 2015 respectively. Based on the commitment of the Petitioner and other project developers in the Generation corridor in Odisha Part-A, Part-B and Part-C, the investment approval was accorded by the Board of PGCIL on September 2010, December, 2010 and March, 2011. The project of the Petitioner being in Part A, the investment approval was accorded in September, 2010 and the sub-station and transmission packages were awarded between September, 2010 to March, 2011. In other words, the substantial works with respect to execution of the project were completed keeping in view the progress of the generating station apprised by the Petitioner to PGCIL. The Petitioner through its letter dated 25.6.2013 apprised PGCIL for the first time that it was abandoning its project due to various reasons such as non-acquisition of land. As on the date of request of the Petitioner to relinquish the project, all contractual formalities have been completed, packages have been awarded and substantial works on the transmission projects have been carried out. As per the information submitted by PGCIL, as on 31.7.2014, 95% of stub setting, 86% tower erection and 59% stringing have been completed and the project commissioning was expected in November, 2014. From the above, it is clear that based on the commitment of the Petitioner, PGCIL had gone ahead with the execution of the project and had incurred substantial expenditure. Moreover, the transmission project cannot be abandoned half way and have to be completed.



16. Next, we consider the relevant provisions of the LTA Agreement. Clause 5.0 and 6.0 of the LTA Agreement are extracted as under:

“5.0 The Long Term transmission customer shall not relinquish or transfer its rights and obligations specified in the Bulk Power Transmission Agreement, without prior approval of POWERGRID and CERC and subject to payment of compensation in accordance with CERC Regulations issued from time to time.

6.0 (a) In case any of the developers fail to construct the generating station/ dedicated transmission system or makes and exit or abandon its project, POWERGRID shall have the right to collect the transmission charges and/ or damages as the case may be in accordance with the notification/ regulation issued by CERC from time to time. The developer shall furnish a Bank guarantee from a Nationalised bank for an amount which shall be equivalent to Rs.5 (five) Lakhs/ MW to compensate such damages. The bank guarantee format is enclosed as **Annexure-Y**. The details and categories of bank would be in accordance with clause 2(h) above. The bank guarantee would be furnished in favour of POWERGRID in the month of June and within 30 days of signing the Agreement.

(b) This bank guarantee would be initially valid for a period upto six months after the expected date of commissioning schedule of generating unit(s) mentioned at Annexure-I (however , for existing commissioned units, the validity shall be the same as applicable to the generator in the group mentioned at Annexure I). The bank guarantee would be encashed by POWERGRID in case of adverse progress of individual generating unit(s) assessed during coordination meeting as per para 7 below. However, the validity should be extended by concerned Long Term transmission customer(s) as per the requirement to be indicated during co-ordination meeting.

(c) The POWERGRID shall build transmission system included at Annexure-3 keeping view of various commissioning scheduled, however, till the completion of identified transmission elements the transfer of power will be based on the availability of system on short term basis.

(d) In the event of delay in commissioning of concerned transmission system from its schedule, as indicated at Annexure-4, POWERGRID shall pay proportionate transmission charges to concerned Long Term Access Customer(s) proportionate to its commissioned capacity (which otherwise would have been paid by the concerned Long Term Access Customer(s) to POWERGRID) provided generation is ready and POWERGRID fails to make alternate arrangement for dispatch of power.”

As per the above provisions of the LTA Agreement, if the developers fails to construct the generating station/dedicated transmission system or makes an exit or



abandon the project, PGCIL 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 the Commission from time to time. The above provision further provides that in the event of delay in commissioning of concerned transmission system from its schedule, PGCIL shall pay proportionate transmission charges to concerned LTA customer in proportion to its commissioned capacity (which would have been paid by the concerned LTA customers) subject to the condition that the generation is ready and PGCIL fails to make alternate arrangement for dispatch of power. Thus, this is a binding obligation on PGCIL to make alternate arrangement for power or pay the transmission charges to the LTA customers in the event of delay in commissioning of its transmission project. The LTA Agreement envisages a reciprocal obligation on the part of the LTA customers that in case of its failure to construct the generating station/ dedicated transmission system or make an exit or abandoning the project, it would be liable for payment of transmission charges and for damages in accordance with the Regulations of the Commission. In the present case, the Petitioner has abandoned the project and has informed the PGCIL about the abandonment at a stage when PGCIL has already made substantial investment and the project was in the advance stage of execution. Since, PGCIL has made investment on the commitment of the Petitioner, in the event of the Petitioner abandoning the project, it is liable to pay the transmission charges or damages as per the Regulations of the Commission.

17. The Petitioner has relied upon the provisions of Clause 9.0 of the LTA Agreement and has contended that it was affected by *Force Majeure* event on account of non-acquisition of land. Clause 9 of the LTA Agreement is extracted as under:

“9.0 The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable to any claim for any loss or damage whatsoever arising out of failure to carry out the terms of this Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other 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. Transmission/drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.”

18. The Petitioner has submitted that its case is covered under the expression “beyond the control of the affected party’ and accordingly, the Petitioner is affected by *force majeure*. The Petitioner has submitted that the following factors were beyond the control of the Petitioner for which it could not execute its project:

- (a) In spite of the survey and other detailed examination on the part of IDCO and other agencies of the State Government, the overlapping of the project with the proposed irrigation command area of Rengali Right Canal System, could not be detected for which the entire land acquisition process, which had gone to the extent of publication of notification under Section 6(1) of the Land Acquisition Act, had gone into abeyance and consequently lapsed. The subsequent in-principle allotment of land pursuant to approval of the Department of Water Resources could come in July 2012. Hence, the entire process of land acquisition would have to start afresh.

(b) Section 4(1) notification would be required to be re-issued only after the extension of MOU by the State Government. In spite of repeated requests being made by the petitioner, the State Government has failed to extend the validity of MOU beyond 31.12.2011. In absence of such extension of validity of the MOU by the State Government, the agencies and instrumentalities of the State Government like IDCO and IPICOL are denuded of any authority to acquire land or make any further effort towards implementation of the project.

(c) The allottees of Rampia and Dip Side Rampia coal block have eventually formed a joint venture company, namely Rampia Coal Mine and Energy Pvt. Ltd. The Petitioner is one of the JV partners. In spite of the approval made by the Ministry of Coal, the grant of prospecting licence for the said coal block is pending with the Government of Odisha since April 2008. Therefore, all other activities relating to coal block have been accordingly delayed. It is pertinent to mention that vide notice dated 17.2.2014, the Ministry of Coal on the basis of the recommendation of IMG, has de-allocated Rampia and Dip Rampia coal blocks allotted to the Petitioner and its other JV partners.

19. The Petitioner has abandoned the project for the purely commercial reasons and the Petitioner cannot be said to be affected by reasons beyond its control. The Petitioner has relied upon the findings of the Hon'ble Appellate Tribunal for Electricity dated 4.2.2014 in Appeal No. 123 of 2012. In the said case, the Appellate Tribunal held that the approval under the Bombay Tenancy and Agricultural Land (Vidarbha Region and Kutch Area) Act,1958 and for water source under the Environment Protection Act,1986



and CRZ Regulations are statutory/ legal approvals under the PPA and accordingly, it fall under *force majeure* events and the period of delay is required to be suspended or excused and to that extent the period of Commercial Operation Date, Date of construction default and Scheduled Commercial Operation Date were to be extended under the LTA Agreement. In the present case, the Petitioner has abandoned the project on account of delay in obtaining clearances and is seeking to wriggle out of the LTA Agreement. From the analysis of Clause 9 of the LTA Agreement, it clearly emerges that the said clause is for providing temporary amnesty to the parties affected by force majeure in order to make their agreement work. The provision of Clause 9 of the LTA Agreement does not permit a defaulting party to abandon the LTA which is evident from the last sentence of the said clause which states that drawal/transmission of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.

Issue No. (b): Whether the LTA granted to the petitioner under LTA Agreement dated 7.6.2010 should be relinquished without any liability on the part of the Petitioner?

20. Clause 7 of the LTA Agreement provides that in case the developers fail to complete the generating station/dedicated transmission system or makes an exist or abounded its project, PGCIL shall have the right to collect the transmission charges and/or damages as the case may be in accordance with the notifications/regulations of the Commission issued from time to time. Regulation 18 of the Connectivity Regulations provides for the relinquishment of long term access right as under:

"18. Relinquishment of access rights



(1) A long-term customer may relinquish the long-term access rights fully or partly before the expiry of the full term of long-term access, by making payment of compensation for stranded capacity as follows:-

(a) Long-term customer who has availed access rights for at least 12 years

(i) **Notice of one (1) year** – If such a customer submits an application to the Central Transmission Utility at least 1 (one) year prior to the date from which such customer desires to relinquish the access rights, there shall be no charges.

(ii) **Notice of less than one (1) year** – If such a customer submits an application to the Central Transmission Utility at any time lesser than a period of 1 (one) year prior to the date from which such customer desires to relinquish the access rights, such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of a notice period of one (1) year.

(b) Long-term customer who has not availed access rights for at least 12 (twelve) years – such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of 12 (twelve) years of access rights:

Provided that such a customer shall submit an application to the Central Transmission Utility at least 1 (one) year prior to the date from which such customer desires to relinquish the access rights;

Provided further that in case a customer submits an application for relinquishment of long-term access rights at any time at a notice period of less than one year, then such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the period falling short of a notice period of one (1) year, in addition to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of 12 (twelve) years of access rights.

(2) The discount rate that shall be applicable for computing the net present value as referred to in sub-clause (a) and (b) of clause (1) above shall be the discount rate to be used for bid evaluation in the Commission's Notification issued from time to time in accordance with the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees issued by the Ministry of Power.

(3) The compensation paid by the long-term customer for the stranded transmission capacity shall be used for reducing transmission charges payable by other long-term customers and medium-term customers in the year in which such compensation payment is due in the ratio of transmission charges payable for that year by such long term customers and medium-term customers."

As per above provision, a long-term customer may relinquish the long-term access rights fully or partly before the expiry of the full term of long-term access. Therefore, the Petitioner has the statutory right to relinquish the LTA at any time by fulfilling



requirement of payment of relinquishment charges in terms of Regulation 18 of the Connectivity Regulations.

21. The relinquishment charges shall be determined by the Commission in the light of the recommendation of the Committee formed by the Commission vide order dated 28.8.2015 in Petition No. 92/MP/2015 for assessment/determination of stranded transmission capacity with regard to relinquishments of LTA right by a long term customer and relinquishment charges in terms of the provisions of the Connectivity Regulations.

Issue (c): What should be the treatment of BG submitted by the petitioner in accordance with LTA Agreement?

22. The petitioner has also prayed for return of Bank Guarantee submitted by it as per the terms and conditions of the BPTA. Pending decision with regard to the relinquishment charges, no relief can be granted to the Petitioner for refund of Bank Guarantee at this stage. The decision to refund of Bank Guarantee shall be taken in the light of the decision in Petition No. 92/MP/2015.

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

Sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson

