

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 55/MP/2015

Coram:

Shri Gireesh B.Pradhan, Chairperson

Shri A.K.Singhal, Member

Shri A.S.Bakshi, Member

Date of Order : 20th of September, 2017

In the matter of

Petition for the relinquishment of the long term open access under the Bulk Power Transmission Agreement dated 13.5.2010 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.

And

In the matter of

Jindal India Thermal Power Limited
Plot No. 12, Sector B—1, Pocket-1,
Local Shopping Complex,
Vasant Kunj, New Delhi-110 079

.....Petitioner

Vs

1. Power Grid Corporation of India Limited
B-9, Qutab Institutional Area,
Katwaria Sarai, New Delhi-110 016

2. Central Electricity Authority
Sewa Bhawan, R.K.Puram,
New Delhi-110 066

.....Respondents

Parties Present:

1. Shri Sanjay Sen, Senior Advocate, JIPL
2. Shri Matrugupta Mishra, Advocate, JIPL
3. Shri Hemant Singh, Advocate, JIPL
4. Shri Tushar Nagar, JIPL
5. Shri C.S.Bobade, JIPL
6. Miss Purna Priyadarshini, Advocate, PGCIL
7. Ms. Joyti Prasad, PGCIL
8. Shri A.M.Pagvi, PGCIL
9. Shri Aryaman Saxena, PGCIL

ORDER

The Petitioner, Jindal India Thermal Power Limited, has filed the present petition 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 as amended from time to time (Connectivity Regulations).

2. The Petitioner has submitted as under:

(a) The Petitioner has set up a 1200 MW (2x600 MW) coal based thermal power generating station at Dereng Village, District Angul in the State of Odisha. On 16.9.2006, the Petitioner entered into a Memorandum of Understanding (MOU) with Government of Odisha to establish 1000 MW thermal power station (Project) which was further amended from time to time whereby the installed capacity of the project was enhanced to 1200 MW. On 28.11.2007, the Petitioner made an application to Ministry of Coal for grant of long term linkage amounting to 2.576 MT coal for 500 MW. On 23.11.2007, the Petitioner made an application to CTU for grant of Long Term Open Access (LTA) accompanied with Rs. one lakh application fee. Pursuant to the direction of CTU, on 6.2.2008, the Petitioner paid ₹ 14,94,074/- to PGCIL to carry out system studies for identifying the strengthening requirement in the grid. On 9.1.2008, Ministry of Coal allocated Mandakini-A coal block to the Petitioner along with other two developers. PGCIL vide its letter dated 14.5.2009 granted LTA to the Petitioner and advised the Petitioner to execute the BPTA. On 13.5.2010, the Petitioner entered into a BPTA and furnished bank guarantee of Rs.

52,20,00,000/-. As per Annexure-1 of the BPTA, the Petitioner was granted LTA for 1044 MW out of which 210 MW was to Western Region and 834 MW was to Northern Region. Unit-I (600 MW) and Unit-II of the project were scheduled to be commissioned in March 2012 and June 2012 respectively.

(b) On 17.2.2012, Ministry of Coal informed that CIL will sign FSAs with power plants who have entered into long term PPAs with the Distribution companies and have been commissioned/would get commissioned after 31.3.2009 and on or before 31.3.2015. CIL was sign to the FSAs with power plants before 31.3.2012 who have been commissioned upto 31.12.2011.

(c) The Ministry of Power vide its Office Memorandum dated 31.5.2012 informed that all coal based power project developers are required to have long term PPA with the distribution companies for signing of Fuel Supply Agreement with coal companies. Subsequently, Ministry of power vide its letter dated 6.8.2012 informed that long term PPAs signed with trading companies who sign back to back long term agreements with the distribution companies shall be considered valid for the purpose of signing of FSAs.

(d) On 24.1.2013, the Petitioner entered into FSA with the Ministry of Coal on the premise that the Petitioner had executed long term PPAs either directly with Discoms or through power trading companies having

signed back to back long term PPA with the distribution companies and have commissioned the project or would get commissioned after 31.3.2009 and on or before 31.3.2015.

(e) On 14.6.2013, the Ministry of Coal issued show cause notice to the Petitioner as to why the delay in the development of the coal block should not be held as violation of the terms and conditions of the allotment of Mandakini Coal block as was presumed that the company had no explanation to offer and action be taken against company for de-allocation of the said coal block. In response to show cause notice, Mandakini Coal Company Ltd. (MCCL) vide its letter dated 2.7.2013 submitted that it has already achieved most of the milestones as required under the terms and conditions of the letter of allotment. However, due to delay in obtaining the stage-II approval for forest land diversion and delay in processing of MCCL's mining lease, it could not start production in the coal block which was beyond its control.

(f) Subsequently, on account of the decision of the Ministry of Coal that FSAs shall only be entered into with power utilities having long term PPAs with the distribution companies, the original FSA dated 24.1.2013 was amended on 21.9.2013 wherein, *inter alia* an addition was made to Clause 2.8.2 (Purchaser's Condition Precedent) to the effect that "The Purchaser shall have to furnish the long term Power Purchase Agreements (PPA) either directly with Distribution Companies (DISCOMs) or through Power Trading Company(ies) (PTC) who

has/have signed back to back PPA(s) (long-term) with DISCOMs within the condition precedent (CP) period as per clause 2.8.3.1.” The clause 2.8.3.1 of the FSA dated 24.1.2013 categorically stated that the condition precedent shall be fulfilled/achieved within a period of twenty four (24) months from the date of signing of the FSA or such further period (up to a maximum of 180 days) as may be extended on account of Force Majeure under Clause 17 of the FSA. However, due to non-fulfilment of the condition precedent, the FSA could not be implemented till date.

(g) On 15.1.2015, the Ministry of Coal informed that such coal blocks would be de-allocated (a) where environmental clearance and forest clearance have not been obtained, (b) which are explored/regionally explored/partially explored at the time of allocation, and where prospecting licence has not been obtained or where prospecting licence has been issued but geological reports have not been prepared, and (c) where forest clearance Stage-II has not been obtained. The Ministry of Coal further directed to submit the information regarding mining lease, etc. In response, the Petitioner vide its letter dated 3.2.2014 informed the Ministry of coal that it has taken all steps for grant of mining lease. However, Govt. of Odisha has not taken action in approving mining lease even after continuous follow-up since the filing of mining lease application in October 2008. Accordingly, Govt. of Odisha be asked for reasons for its inaction and delay in complying with the direction of the Central Govt.

(h) On 25.8.2014, the Petitioner stated that on account of inordinate delays of about 280 to 1000 days on the part of BHEL in providing supplies and erection and on account of other problems such as repeated boiler tube failures, turbine barring gearing problem and generator problem, the unit-I of the project has been delayed. The delays in achieving milestones of project is also on account of non-performance of BHEL at the project site coupled with the BHEL sub-contractor's inefficiency in mobilising manpower and machinery. Subsequently, the Hon`ble Supreme Court vide its judgment dated 24.9.2014 de-allocated the Mandakini-A coal block which was the primary source of fuel for the unit-II of the project.

3. The Petitioner has submitted that it had executed the BPTA of 1044 MW with the intention that the petitioner would subsequently enter into PPAs with various State utilities and the LTA was granted for the evacuation of 210 MW of power to utilities in the Western Region and 834 MW of power to utilities in the Northern Region. However, due to the fact that in the years subsequent to the execution of the BPTA and the grant of the LTA, the petitioner had no opportunity to enter into long term PPAs since there were hardly any long term bids called for by utilities.

4. The Petitioner has submitted that though it was still affirmative about overcoming the obstacles being put by BHEL in delaying the commissioning of the project, however, due to cancellation of Mandakini coal block by the

Hon'ble Supreme Court of India, which was the primary source of fuel for unit-II of the Project, it had put a grinding halt to the progress of the Project. In such circumstances, the Petitioner, vide its letter dated 24.11.2014, by invoking the Force Majeure clause under Article 9 of the BPTA requested PGCIL to relinquish the LTA without any contractual liability and also requested for return of bank guarantee of ₹ 52.20 crore which was furnished prior to execution of the BPTA due to above reasons. In response, PGCIL vide its letter dated 2.1.2015 on the ground that (a) technical issues with respect to the damage to the Rotor and Stator, (b) the judgement of the Hon'ble Supreme Court in Manohar Lal Sharma vs. the Principle Secretary & ors. de-allocating the Mandakini-A coal block, and (c) non-availability of long term PPAs in the years subsequent to the execution of the BPTA, are not Force Majeure events and directed the Petitioner that it can relinquish the LTA as per the applicable Regulations.

5. Against 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 13.05.2010 to the extent of 949 MW of power without any liability to the Petitioner;

(b) direct Respondent No. 1, being PGCIL, to return the bank guarantee bearing no. 2164ILG010910 dated 04.05.2010 of an amount of Rs. 52,20,00,000/- (Rupees Fifty Two crores Twenty Lacs Only) issued by Punjab National Bank, on behalf of the Petitioner;

(c) pass any order and/or any such 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.”

6. Notice was issued to the Respondents. Reply to the petition has been filed by the Power Grid Corporation of India Ltd. (PGCIL). Subsequently, the Petitioner filed the IA No. 25/2015 for bringing additional facts on record and for amendment of the petition. In the IA, the Petitioner requested for change in the relinquishment quantum from 1044 MW to 944 MW on the pretext of allotment of such reduced 100 MW to Southern region from the quantum already allotted without any liability.

7. PGCIL vide its reply has submitted as under:

(a) On 23.11.2007, the Petitioner made an application for grant of LTA for 1044 MW which was revised on 14.5.2009 due to modifications in the transmission system strengthening requirements.

(b) While the Petitioner is pressing for relinquishment of LTA for 1044 MW, on 30.12.2014, it made an application for grant of LTA for 95MW for supply of power upto September 2014 to Kerala after signing the PPA with KSEB.

(c) The Petitioner vide its letters dated 9.1.2015 and 18.2.2015 informed PGCIL that both the units of the project have been declared under commercial operation and requested to enhance the export capacity of project from 1044 MW to 1200 MW.

(d) If the generation project and commissioning of associated transmissions system which is partly commissioned and remaining is expected to be commissioned by July, 2014, the Petitioner should not

allow relinquishing the LTA without paying the relinquishment charges which is being decided by the Commission separately.

8. PGCIL in its further reply has submitted as under:

(a) The Petitioner has failed to comply with the provisions of Clause 9 of the BPTA to notify the PGCIL about the occurrence of force majeure event. The Petitioner vide its letter dated 24.11.2014 alleged that the three circumstances, namely technical difficulties in the machinery provided by BHEL, de-allocation of Mandakini-A coal block and non-signing of PPAs with the distribution companies, constituted force majeure events. However, no further details of any of the above three events were communicated to PGCIL. Force majeure is a concept engrained in specifically of time, event and procedure, all of which are missing in the present case.

(b) Force majeure is not a ground for an automatic relinquishment of LTA without payment of relinquishment charges under the Connectivity Regulations.

(c) The Petitioner's prayer to relinquish LTA capacity without payment of relinquishment charges on the alleged ground of force majeure is completely unsustainable under the Connectivity Regulations and the BPTA.

9. On the next date of hearing on 11.8.2015, the Commission observed that a Committee is proposed to be constituted by the Commission to go into all aspects of the stranded capacity and relinquishment charges in Petition No.

92/MP/2015 and suggested that the present petition to be referred to the Committee. Learned Counsel for the petitioner sought a week`s time to seek instruction in this regard. The petitioner vide its affidavit dated 17.8.2015 has submitted that the matter may be independently heard.

10. The Petitioner in its rejoinder has submitted that as per Regulation 18 of the Connectivity Regulations, the Petitioner is entitled to relinquish the LTA which can take place with or without the payment of the compensation/relinquishment charges for stranded capacity. Relinquishment charges can only be determined once there is stranded capacity which accrues on account of the giving up of the LTA by the generator. Therefore, determination of stranded capacity is a pre-requisite before any determination of relinquishment charges under Regulation 18 of the Connectivity Regulations. The Petitioner has submitted that bank guarantee furnished by it is an obligation under the BPTA which has been complied with. Therefore, the bank guarantee should be returned to the Petitioner by PGCIL.

11. During the course of hearing, learned senior counsel for the Petitioner submitted that rights and obligations of parties in relation to LTA is covered both under the terms of the agreement as well as the provisions of the Connectivity Regulations. In order to invoke the liability, PGCIL has to establish existence of stranded capacity in terms of Regulation 18 of the Connectivity Regulations. Only after it establishes stranded capacity, PGCIL would be in a position to make a claim of compensation. Learned senior counsel further submitted that PGCIL is discharging statutory functions under Section 38 of the Act, in the capacity of CTU. PGCIL is contemplating laying of transmission lines

or taking steps towards system strengthening not on the basis of its independent study of the particular region or sector, rather on the basis of the applications received towards grant of LTA. Learned senior counsel further submitted that the Act does not mandate/sanction levy of relinquishment charges. The charges that are leviable for open access to the transmission system are expressly specified in Sections 38 and 40 of the Act. Once the Act specifies the charges connected with open access, there is no jurisdiction of the Commission to introduce a charge by way of a regulation which is not expressly sanctioned by the parent statute. Learned senior counsel submitted that under the Connectivity Regulations, there is no regulatory charges and stranded capacity is not a transmission charge. Learned senior counsel relied upon the Commission's order dated 8.6.2013 in Petition No. 118/MP/2012 (Lanco Babandh Power Ltd. Vs. Power Grid Corporation of India Limited and others) and submitted that the Commission in the said case concluded that surrender of capacity neither causes stranding of transmission capacity nor does it affect the liability of others for payment of PoC charges. Learned senior counsel submitted that facts and decision would also apply to the present case and petitioner cannot be treated differently than Lanco Babandh case more so when the petitioner had submitted that there is no stranded capacity and as such, there is no contradiction by PGCIL.

12. Learned counsel for PGCIL submitted that the failure on the part of the Petitioner to enter into PPAs does not come under the purview of a force majeure event. Such failure or alleged lack of opportunity to enter into long term PPAs is a commercial/business risk that all IPPs undertake and, therefore, the force majeure clause under the BPTA cannot be invoked in respect of the

same. Learned counsel for PGCIL submitted that during the subsistence of the BPTA, both parties are obliged to adhere to the terms and conditions of the BPTA, and any alleged financial hardship is not a ground for the avoidance of the obligations under the BPTA by any party to the agreement. Learned counsel for PGCIL relied upon the judgment of the Hon`ble Appellate Tribunal for Electricity dated 15.4.2015 in Appeal No. 197 of 2014 (in Jayaswal Neco Urja Limited Vs. Power Grid Corporation of India Ltd) and submitted that Hon`ble Appellate Tribunal has categorically held that the Connectivity Regulations do not anywhere state that if the applicant is able to prove the existence of any circumstances beyond its control or existence of any force majeure conditions, which prevented it from performing the contract, its Bank Guarantee should not be encashed. Learned counsel submitted that the petitioner cannot seek judicial review of the regulations as the same would be possible in proceedings under Article 226 of the Constitution of India before the Hon`ble High Court.

13. The Petitioner in its written submission *inter-alia* has submitted that it is settled proposition of law that if the regulation/subordinate legislation is contrary to statute then the Regulatory Commission or any other Appropriate Court can ignore the applicability of the regulations. In this regard, the petitioner has relied upon the judgments of the Hon`ble Supreme Court, ATE and CERC in Bharathidasan University & Anr. Vs. All-India Council for Technical Education & others Damodar Valley Corporation Vs. Central Electricity Regulatory Commission & others and Lanco Babandh Power Ltd. Vs. PGCIL.

14. PGCIL in its written submission has submitted that the present petition is not a challenge to the vires of Regulation 18 of the Connectivity Regulations which provides for imposition of relinquishment charges. Moreover, the question of vires of the regulations framed by the Commission cannot be raised and/or determined by the Commission. PGCIL has relied upon the judgment of the Hon`ble Supreme Court in PTC India Limited Vs. Central Electricity Regulatory Commission [(2010) 4 SCC 603] and has submitted that the contention of the Petitioner challenging the validity of the regulations is stated only to be rejected, *in limine*, in as much as the same can be done only in judicial review proceedings. PGCIL has submitted that the Petitioner has relied upon the judgment of the Commission in Lanco Babandh Power Ltd. Vs. PGCIL to avoid payment of relinquishment charges. However, in the Lanco`s case, there was a particular finding that there would be no stranded capacity in case Lanco was allowed to surrender transmission capacity. In the present case, the stage to assess stranded capacity and determine compensation has not arisen till date. Therefore, the Commission is, at this stage, not seized with the issue whether the relinquishment of transmission capacity by the Petitioner will result in stranded capacity or not, unlike in the Lanco`s case, but whether, in principle, generators can seek exemption from the statutory payment of relinquishment charges on the ground of force majeure. PGCIL has submitted that the Petitioner is seeking relinquishment of the entire capacity of 1044 MW of LTA granted to it, *inter-alia*, on the ground that it had no opportunity to enter into long term PPA, since there were hardly any long term bids for the utilities. The petitioner had entered into a long term PPA with KSEB for supply of 100 MW power for a period of 25 years on 29.12.2014, i.e. before the filing of the

present petition. However, this fact was not disclosed in the present petition and the same was brought on record by the petitioner vide its IA, after the same was pointed by PGCIL in its reply dated 10.4.2015.

Analysis and Decision:

15. We have considered the submissions of the parties. The following issues arise for our consideration:

- (a) **Whether the force majeure event claimed by the petitioner relieves the petitioner from its obligation under the BPTA dated 13.5.2010?**
- (b) **Whether the Petitioner is entitled for return of Bank Guarantee?.**

These issues have been analyzed and discussed in the succeeding paragraphs.

Issue No. 1: Whether the force majeure event claimed by the petitioner relieves the petitioner from its obligation under the BPTA dated 13.5.2010?

16. The Petitioner made an application to CTU for grant of LTA on 23.11.2007 for 1200 MW. PGCIL after carrying out system studies, vide its letter dated 14.5 2009 granted LTA to the Petitioner for 1044 MW (210 MW for Western Region and 834 MW for Northern Region). On 13.5.2015, the Petitioner entered into BPTA with PGCIL and furnished the bank guarantee of ₹ 52.20 crore. As per the BPTA, Unit-I and II were scheduled to be commissioned on March 2012 and June 2012 respectively. On 24.1.2013, the Petitioner entered into FSA with the Ministry of Coal and the conditions precedent for operationalization of FSA is that the petitioner would enter into PPA with the distribution companies. The Petitioner has submitted that due to

lack of long term PPA bid by utilities, it could not enter into PPAs with the distribution companies. Subsequently, the Hon`ble Supreme Court vide its judgment dated 24.9.2015 cancelled the Mandakini-A coal block allocated to Unit-II (600 MW) of the Petitioner`s project. However, the Hon`ble Supreme Court clarified that the cancellation would be effective from 31.3.2015.

17. The Petitioner vide its letter dated 24.11.2014 by invoking the clause 9 of the BPTA sought relinquishment of the entire quantum of LTA granted by PGCIL due to technical difficulties in the machinery provided by BHEL, de-allocation of Mandakini-A coal block by the Hon`ble Supreme Court and failure to enter into long term PPAs with the distribution companies and requested to return the bank guarantee.

18. Let us first consider the provisions of clause 9 of the BPTA with regard to force majeure event which provides as under:

“9. 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 the party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and given written notice of 30 days to the other party to this effect. Transmission/drawal of power shall be started as soon as practicable by the parties conferred after such eventuality has come to an end or ceased to exist.”

As per the above provision of the force majeure, no party is required to claim any loss or damages on account of its failure to carry out the terms of the agreement which is attributable to any of the enumerated force majeure events or any other event beyond the control of the defaulting party. The use of the

words “no party shall be liable to claim any loss or damage” relieves both the parties from claiming any loss or damage arising out of the failure to carry out the terms of the agreement by defaulting party. The words “defaulting party” refers to a party who is unable to carry out its obligations under the LTA Agreement on account of being affected by force majeure or any other reason beyond its control. In other words, if either the Petitioner or PGCIL is affected by force majeure or reason beyond its control which results in its failure to carry out the terms of the agreement, then neither party is liable to claim or pay any loss or damages to the other party.

19. The Petitioner has submitted that it had executed the BPTA of 1044 MW with the intention that it would subsequently enter into PPAs with various State utilities. The LTA was granted for the evacuation of 210 MW of power to utilities in the Western Region and 834 MW of power to utilities in the Northern Region. However, due to the fact that in the years subsequent to the execution of the BPTA and the grant of the LTA, the Petitioner had no opportunity to enter into long term PPAs since there were hardly any long term bids called for by utilities. The Petitioner has further submitted that due to cancellation of Mandakini-A coal block by the Hon`ble Supreme Court, which was primary source of fuel for the unit-II, the entire project has been jeopardized. Accordingly, the Petitioner vide its letter dated 24.11.2014 invoking the provisions of Clause 9 of the BPTA informed PGCIL that due to the existence of the force majeure events, the Petitioner is not able to utilize the LTA under the BPTA and accordingly, requested to relinquish the LTA and to return the Bank Guarantee. In response, PGCIL vide its letter dated 2.1.2015 informed

the Petitioner that technical snags and hitches cannot be treated as force majeure. PGCIL has submitted that the Hon`ble Supreme Court deferred the cancellation till 31.3.2015 to allow the utilities, including the Petitioner to be able to discharge their functions till re-allocation of coal block. PGCIL has submitted that LTA cannot be relinquished without payment of relinquishment charges as per the Connectivity Regulations.

20. PGCIL has submitted that a mere reading of the clause 9 of the BPTA makes it amply clear as to the nature of events contemplated to constitute an event of force majeure and the BPTA such as war, rebellion, fire, flood, etc. which are clearly beyond the control of the parties and none of the events stated above, which in the nature of commercial/business risk and hardships at best, are covered within the scope of force majeure events under the BPTA.

21. We have considered the submissions of the Petitioner and PGCIL. Both units of the generating station have been commissioned and have been generating and supplying power on short term basis. Cancellation of coal block by the Hon`ble Supreme Court cannot be treated as force majeure event as the Petitioner has the other options to source coal such as participation in the bidding process for allocation of coal block, e-auction and imported coal. The Hon`ble Supreme Court had given a breather till 31.3.2015. As regards the non-signing of long term PPA by the distribution licensees, it is a business call to be taken by the Petitioner and inability to enter into PPA cannot be considered as a ground for not performing the obligations under the BPTA. Moreover, the language of para 9 of the BPTA shows that the parties are to resume the transmission or drawl of power as soon as practicable after the

eventuality comes to an end or cease to exist, and it does not provide that parties shall rescind the BPTA on account of the force majeure event. The provision of Bank Guarantee has been made to ensure seriousness among the LTA applicants. The Petitioner has vehemently argued that due to reasons beyond its control it is not able to utilize the LTA under the BPTA. This argument cannot be accepted as the CTU has in no way contributed to the impossibility of performance of contract. This issue has also been dealt with by the Hon`ble Appellate Tribunal in Appeal No. 197 of 2014 (Jayaswal Neco Urja Limited Vs Power Grid Corporation of India Ltd. & Another) as under:

33. Assuming that the Appellant's contention about the existence of force majeure conditions is correct, so long as Respondent No.1 by its acts of omission or commission has not contributed to the Appellant's being unable to commence operation of its power plant, Respondent No.1 cannot be held responsible for it and encashment of Bank Guarantee cannot be faulted on that count."

In view of the above finding of the Hon`ble Appellate Tribunal, it cannot be said that since, CTU by its acts of commission or omission has contributed to the Petitioner's inability to operationalize the LTA. Therefore, CTU cannot be held responsible for it.

22. Learned Senior Counsel for the Petitioner submitted that sub-section 4 of Section 42 of the Act authorises a distribution licensee to provide open access on payment of an additional surcharge in addition to the charges for wheeling to enable the distribution licensee to meet the fixed cost of such distribution licensee arising out of its obligation to supply. Therefore, a compensatory provision has been made in the Act in respect of the distribution licensee whereas similar provision is absent in Section 38 of the Act in case of the CTU. Learned Senior Counsel submitted that the relinquishment charges

which are in the nature of compensatory charge cannot be levied by the CTU in the absence of any provision in the Act permitting the CTU to levy such charge. In this connection, learned senior counsel relied upon the judgment of the Hon`ble Supreme Court and ATE in Bharathidasan University & Anr. Vs. All-India Council for Technical Education & others and Damodar Valley Corporation Vs. Central Electricity Regulatory Commission & others.

23. The submission of learned senior counsel for the Petitioner has been examined. In case of distribution licensees, they have a universal supply obligation to supply power under Section 43 of the Act and therefore, any provision seeking open access for supply of power from a person other than the distribution licensee is required to pay the additional surcharge to meet the fixed cost of such licensee arising out of its obligation to supply. Under Section 38 (2) (d) of the Act, CTU is obliged to provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of transmission charges. Therefore, grant of open access by the CTU to its system is contingent upon payment of transmission charges. When CTU has built a transmission line on the basis of the commitment of a long term open access customer, it becomes the obligation of the said open access customer to pay the transmission charges for the use of the transmission system. If the transmission system built or reserved for an open access customer remains unutilized on account of the relinquishment of open access by the open access customer, then the said open access customer becomes liable to pay the transmission charges to the extent of stranded capacity. This has been clearly provided in the Regulation 18 of the Connectivity Regulations and has also been included in the BPTA. Therefore, payment of relinquishment

charges for surrender of long term access is both a statutory requirement and a contractual obligation accepted by the Petitioner. The Petitioner by unequivocally accepting that it will be governed by the Connectivity Regulations and the provisions of the BPTA cannot now to say that the provisions of relinquishment charges are not sanctioned by the provisions of the Act. The Petitioner's reliance on the judgments of the Hon`ble Supreme Court and ATE in Bharathidasan University & Anr. Vs. All-India Council for Technical Education & others and Damodar Valley Corporation Vs. Central Electricity Regulatory Commission & others and the Commission`s order in Petition No. 118/MP/2012 in Lanco Banandh Power Ltd. Vs. PGCIL are misplaced as we do not see any contradiction between the provisions of the Act and Connectivity Regulations. Further, by questioning the provisions of the Connectivity Regulations, the Petitioner indirectly challenging the validity of the Regulations made under Section 178 of the Act before the Commission. It is pertinent to note that Hon`ble Supreme Court in PTC India Limited Vs. Central Electricity Regulatory Commission [(2010) 4 SCC 603] has clearly held that a regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the Hon`ble High Court or Supreme Court. Relevant portion of judgment is extracted as under:

“52 (i)

(iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities

as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the Tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the Regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity

(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.”

24. Regulation 18 of the Connectivity Regulations provides 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 atleast 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."

Under the above provisions, long term customer may relinquish long term access rights fully or partly, before the expiry of full term of long term access, by making payment of compensation for stranded capacity as provided herein. It is pertinent to mention that the regulations do not envisage any exemption from payment of compensation in case of relinquishment of LTA on any ground. 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 relinquishment of LTA right by a long term customer and relinquishment charges in terms of the provisions of the Connectivity Regulations.

25. Learned senior counsel for the Petitioner during the hearing of IA No. 31/2015 submitted that the Petitioner has relinquished the entire capacity under the LTA. The Commission after taking note of the submissions of the learned

senior counsel vide order dated 16.12.2015 disposed of the IA and observed as under:

“7. .. In the present case, since the petitioner has relinquished 1044 MW, the said capacity should be utilized for granting the LTA to the pending applications so that capacity does not remain unutilized. The liability for relinquishment charges of the petitioner will be decided in terms of the order in the Petition, and if the petitioner is held liable to pay the relinquishment charges, the quantum of relinquishment charges will be decided in the light of the decision taken on the basis of the recommendation of the Committee.”

26. Since, the Petitioner has relinquished the entire capacity of 1044 MW, the liability for relinquishment charges of the Petitioner will be decided on the basis of the recommendation of the Committee.

Issue No.2: Whether the Petitioner is entitled for return of Bank Guarantee?

27. The Petitioner has submitted that Bank Guarantee is an obligation under the BPTA entered into between the Petitioner and PGCIL. The Petitioner has further submitted that PGCIL is discharging statutory functions under Section 38 of the Act, in the capacity of CTU and while discharging a statutory function it has to conduct itself in manner so as to ensure the establishment of an integrated and dynamic transmission network in the entire country from a planning and co-ordination perspective. Such discharge of function cannot be made subject to contractual prerogatives and PGCIL is restrained from hedging its entire risk akin to a private contractor discharging its contractual obligation qua the parties to the contract.

28. PGCIL has relied upon the judgment of the Hon`ble Appellate Tribunal for Electricity dated 15.4.2015 in Appeal No. 197 of 2014 (in Jayaswal Neco Urja Limited Vs. Power Grid Corporation of India Ltd.) and has submitted that the Hon`ble Appellate Tribunal has categorically held that the Connectivity Regulations do not anywhere state that if the applicant is able to prove the existence of any circumstances beyond its control or existence of any force majeure conditions, which prevented it from performing the contract, its Bank Guarantee should not be encashed. PGCIL has submitted that prayer of the petitioner for return of construction bank guarantee is without any basis and ought to be disallowed.

29. We have considered the submissions of the Petitioner and PGCIL. The Commission vide order 16.12.2015 in I.A. No. 31/2016 directed the Petitioner to keep the BG alive till the issue of relinquishment charges is decided in the light of the recommendation of the Committee. Relevant portion of the said order dated 16.12.2015 is extracted as under:

“8. In view of the relinquishment of the LTA by the petitioner, there is no requirement for the petitioner to open the LC. However, the petitioner is directed to keep the Bank Guarantee alive till the issue of relinquishment charges is decided in the light of the recommendation of the Committee. It is clarified that all other aspects of relinquishment including the date of relinquishment and notice period shall be dealt with in the final order.”

30. 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. However, the Petitioner is directed to keep the BG alive till further order.

31. The Petition is disposed of in terms of the above.

Sd/-
(A.S.Bakshi)
Member

sd/-
(A.K.Singhal)
Member

sd/-
(Gireesh B.Pradhan)
Chairperson