

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 69/MP/2014**

**Coram:**

**Shri Gireesh B. Pradhan, Chairperson**

**Shri A.K. Singhal, Member**

**Shri A.S. Bakshi, Member**

**Date of Order : 31<sup>st</sup> October 2017**

**In the matter of**

Petition for the relinquishment of the long term open access under the Bulk Power Transmission Agreement dated 29.7.2009 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**

Aryan MP Power Generation Pvt. Ltd.  
129, Transport Centre,  
Rohtak Road, Punjabi Bagh,  
New Delhi-110 035

**.....Petitioner**

**Vs**

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

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

**.....Respondents**

**Parties Present**

1. Shri Sanjay Sen, Senior Advocate, SCPL
2. Shri Matrugupta Mishra, Advocate, SCPL
3. Shri Ashok Pal, PGCIL
4. Miss. Seema Gupta, PGCIL

## **ORDER**

The petitioner, Aryan MP Power Generation Private Ltd 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) seeking relinquishment of long term access without any liability under Bulk Power Transmission Agreement (BPTA) dated 24.2.2010.

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

2. ACB (India) limited (hereinafter "ACB") which was formerly known as Aryan Coal Beneficiation Private Limited, has created Aryan MP Power Generation Pvt Limited as a Special Purpose Vehicle (SPV) for setting up of thermal power generating station at Amelia, District Siddhi in the State of Madhya Pradesh. ACB entered into a Memorandum of Understanding (MOU) dated 16.1.2007 with Government of Madhya Pradesh to establish and operate 500 MW (2x250 MW) project. The MOU was further amended on 26.12.2007 whereby the installed capacity of the project was enhanced to 1200 MW (4X300 MW). ACB and Government of Madhya Pradesh entered into an Implementation Agreement on 27.5.2008 for setting up the project as per clause 25 of the MOU. ACB made application to District Collector, District Sindhi for acquisition of 445.36 hectares of private land and diversion of 56.34 hectare of Government land; to the executive Engineer, Water Resources department, government of Madhya Pradesh for enhancement of waster requirement form the existing in principle approval of 36.60

CUSEC to 44 CUSEC from Banas river; to Chairman, Standing Linkage Committee for long term coal linkagr of 6.2 Million Tonne per annum.

3. ACB made an application dated 28.5.2008 to CTU in accordance with the Central Electricity Regulatory Commission (Inter-State Open Access in Transmission) Regulations, 2004 for grant of long-term open access for transfer of power from its project to MSEDCL/GUVNL, MP, PSEB, HUVPNL and RUVPNL. PGCIL vide its letter dated 4.7.2008 intimated to ACB that there is a necessity for system studies for augmentation/strengthening of transmission network and ACB vide its letter dated 1.8.2008 paid Rs.1643518/- for system studies. PGCIL vide its letter dated 29.7.2009 granted LTOA to ACB for 1200 MW with 765 kV/400 kV pooling station at Vindhyachal as inter-connection point and asked the Petitioner to enter into BPTA for the said capacity which was accepted by ACB vide its letter dated 6.8.2009. ACB vide its letter dated 9.2.2009 informed PGCIL about formation of the Petitioner as SPV and also indicated that the Petitioner would sign the BPTA. The Petitioner (alongwith four generating station and two trading companies) entered into BPTA with PGCIL on 24.2.2010 for the said capacity and executed the bank guarantee of Rs. 56.10 crore @ Rs.5 lakh/MWh. As per the BPTA, the transmission system for evacuation of power from the generating units of the Petitioner till the pooling point would be executed by the Petitioner. Further, the common transmission system to evacuate and despatch power to respective beneficiaries from the projects would be built, owned, operated and maintained by PGCIL. As per the BPTA, the common transmission systems to be built by PGCIL and shared by the Petitioner alongwith other generators and trading licensees

in the Northern Region and Western Region in proportion to their allocations are as under:

Northern Region

- (a) Bina-Gwalior 765 kV S/c (3<sup>rd</sup>)
- (b) Gwalior-Jipur 765 kV S/c (2<sup>nd</sup>)
- (c) Jaipur-Bhiwani 765 S/c

Western Region

- (a) Indore-Vadodara 765 kV S/c
- (b) Vadodara-Pirana 400 kV D/c (Quad)
- (c) 765/400 kV 2X150 MVA pooling station at Vadodara

According to the BPTA, the project developers agreed to share and bear the applicable transmission charges as decided by this Commission of the total transmission scheme as noted above from the scheduled date of commissioning of the respective generating units, irrespective of their actual date of commissioning. As per Annexure 4 of the BPTA, the commissioning schedules of both units of the generating station of the Petitioner are March 2014 and September 2014. Clause 7.0 of the BPTA states that in order to monitor/review the progress of the generating units alongwith its direct evacuation lines and also the common transmission system, Joint co-ordination meeting with the representative of each developer and PGCIL shall be held at regular interval after signing of the BPTA.

4. The progress of the generating units alongwith direct evacuation system and common transmission system executed by PGCIL were assessed in various Joint Co-ordination Committee (JCC) Meetings as under:

(a) In the minutes of the 1<sup>st</sup> JCC Meeting held on 24.9.2010, the following were recorded:

“(v) Aryan Power Generation Pvt Ltd. (2X600 MW)

- Representative of M/s Aryan MP informed that about 13% of land has been acquired, however they are yet to obtain the fuel linkage, environmental clearance etc.
- As per the BPTA, commissioning schedule of the project is progressively from March, 14.
- In the meeting, it emerged that as key milestones are yet to be achieved by the developer, commissioning schedule looks uncertain for the time being.”

(b) In the minutes of the 2<sup>nd</sup> JCC Meeting held on 17.2.2011, the following were recorded:

“(v) Aryan Power Generation Pvt Ltd. (2X600 MW)

- Representative of M/s Aryan MP informed that about 15% of land is under possession out of the total acquired 1050 acre land. They have applied for fuel linkage which is held up for non-acquisition of land. TOR for environmental clearance done and public hearing held. EC deferred as coal linkage is not available.
- As per the BPTA, commissioning schedule of the project is progressively from Mar'14.
- In the meeting, it emerged that as key milestones are yet to be achieved by the developer, commissioning schedule looks uncertain for the time being.”

(d) In the minutes of the 4<sup>th</sup> JCC meeting held on 9.7.2012, the following were recorded:

“(v) Aryan Power Generation Pvt Ltd. (2X600 MW)

- Representative of M/s Aryan MP informed that 100% of land is under possession. They have applied for fuel linkage to MoC.
- TOR for environmental clearance done and public hearing held. EC deferred as there is uncertainty for coal linkage. Water linkage obtained. Forest clearance not required.
- EPC for BTG under finalisation.

- They indicated commissioning schedule of the project as U#1- Mar'14, U#2- Sep'14.
- 35% of the power sale to MP is as per MoU. Balance Power to be sold through Competitive bidding under case-I and through Merchant sale.

Aryan MP stated that there is very low possibility that Aryan MP Power Generation Pvt. Ltd. will get fuel linkage in the 12<sup>th</sup> plan. Also, they do not have environment clearance; hence, the implementation of the project seems uncertain. POWERGRID informed that if the project doesn't make any progress till 1.11.12, the LTOA application of Aryan MP shall be closed."

(e) In the minutes of the 5<sup>th</sup> JCC meeting held on 19.2.2013, the following were recorded:

"(v) Aryan Power Generation Pvt Ltd. (2X600 MW)

- Representative of M/s Aryan MP submitted the status of the project in the meeting as under:
- Land: Entire 1050 Acres land is in possession.
- Fuel Linkage: Domestic fuel. Coal linkage applied to Ministry of Coal.
- Water linkage: 44 MCM allocated from Banas River.
- Environmental Clearance: TOR issued on 10.02.09. Public Hearing held on 07.10.09. Final EIA report submitted on 5.11.2009. EC deferred due to want of coal linkage.
- EPC Award: Under finalisation.
- Financial Closure: Under process.
- Commissioning Schedule: Commissioning Schedule as indicated by developer is  
Unit-I: March, 2017; Unit-II : September, 2017."

5. The Petitioner has also placed on record three letters in support of its contention that its generation project is unviable. Firstly, there is a letter dated 24.5.2012 under which the Petitioner replied PGCIL with reference the latter's advice about installation of OPGW and PMU in the generation switchyard. In the said letter, the Petitioner has informed PGCIL that "the project has not been granted coal linkage and the

environment clearance has also been linked with the grant of coal linkage. So the 1200 MW Aryan M.P. Project is a non-starter at present.” Secondly, the Petitioner has written a letter dated 27.7.2012 to PGCIL in which the Petitioner has apprised about the non-grant of environmental clearance till the coal linkage is confirmed; revision of the commissioning schedule of its generating units from September/December 2014 to March/September 2017; and request to PGCIL not to make any investment for erecting transmission system associated with the Petitioner’s project. Thirdly, the Petitioner has placed on record a letter dated 11.9.2013 from Central Water Commission, Government of India in which the proposal of Government of MP for allocation of water by to the Petitioner from Banas sub-basin has been declined as total utilisation by erstwhile State of MP in Rihand and Banas sub basins is more than its share as decided in inter-State meeting called by Chairman, CWC in June 1975.

6. PGCIL filed Petition No.289/TT/2013 for determination of provisional tariff in respect of Vadodhara Pirana transmission line. Provisional tariff was granted provisional tariff vide order dated 18.12.2013. Aggrieved by the provisional tariff order, the Petitioner filed Review Petition No.5/RP/2014. The Petitioner filed the present substantial petition to relinquish the BPTA and for return of the bank guarantee. The petitioner has made the following prayers as under:

“(a) Direct relinquishment of the long term open access under the Bulk Power Transmission Agreement dated 24.2.2010 without any liability on the petitioner;

(b) Direct the Respondent No. 1 to return the bank Guarantee bearing No. 00070100004994 dated 23.2.2010 , for an amount of Rs. 56.10 crore, issued by Axis Bank Ltd., on behalf of the petitioner;”

### **Submissions of the petitioner and Respondent PGCIL:**

7. The petitioner has submitted that it made all efforts possible for the implementation and commissioning of the project. However, the issues in the nature of force majeure events emerged before the Petitioner were beyond its reasonable control and despite of reasonable efforts made by the Petitioner, such events could not be cured or mitigated. The Petitioner has submitted that it made timely all applications to relevant authorities pertaining to acquisition of land both private and governmental, allocation of water required for the project, grant of coal linkage, environmental clearance etc. The Petitioner has submitted that though all above clearances and other requirements of the project were achieved on time by the Petitioner, the Ministry of Coal despite repeated efforts did not grant linkage to the Petitioner. The Petitioner has submitted that MOEF issued TOR on 10.2.2009 and conducted public hearing on 7.10.2009, pursuant to which final EIA report was submitted by the Petitioner Company on 5.11.2009. The environmental clearance was not granted to the Petitioner due to want of coal linkage, since the grant of environmental clearance was linked to availability of coal linkage, which in turn was linked with the allocation of water which has now been denied. The Petitioner has submitted that in its letter dated 27.7.2012, the Petitioner has informed PGCIL that it made a request to MOEF during a meeting to import 100% coal till the coal linkage is granted. However, MOEF discarded the proposal and denied grant of EC since the source of coal was not firmed up. The Petitioner has submitted that even though the water required for the project was granted but Central Water Commission refused to grant no-objection for drawal of water from Banas River. The Petitioner has submitted that the above facts make it abundantly clear



that the Petitioner at no point of time has been negligent in implementing the project. The Petitioner has submitted that non-availability of coal linkage, deferment in grant of environmental clearances due to non-availability of coal linkage and denial of grant of no-objection by the Central Water Commission to draw water from the Banas River for the project are circumstances beyond the control of the Petitioner being force majeure events within the meaning of clause 9.0 of the BPTA. The Petitioner has submitted that relinquishment of long term access on the part of the Petitioner shall not lead to stranding of transmission capacity and further, the Petitioner in its independent communication and representations in the JCC Meetings requested PGCIL for not erecting the transmission system associated with the Petitioner's project. As regards the stranded capacity, the Petitioner has submitted that the number of IPPs connected to the said transmission system would utilise the capacity. The Petitioner has submitted that unless the long term access granted to the Petitioner pursuant to the BPTA is relinquished, the Petitioner shall be subjected to payment of transmission charges.

8. Notice was issued to PGCIL for filing reply to the Petition. PGCIL was further directed to examine "whether transmission capacity will be stranded on account of the proposed relinquishment of the LTA by the Petitioner and include the same in its reply.

9. PGCIL has not filed any reply to the petition. However, in response to the directions of the Commission regarding the stranded capacity on account of proposed relinquishment of LTA, PGCIL has submitted as under:

“3.1 A comprehensive transmission system, namely High Capacity Transmission Corridor-IV has been planned for evacuation of power from the generation projects coming up in Madhya Pradesh and Chhattisgarh in Western Region. The list of projects who have signed BPTA with Powergrid for this corridor is as under:

Sl.	Generation Developer/ Open Access Application	Original Comm. Schedule.	Ins. Cap. [MW]	LTOA Quantum [MW]	Current Comm. Schedule
A.	Chhattisgarh IPPs				
1.	Maruti Clean Coal Pvt. Ltd.	Dec' 12	300 [1x300]	171	To be Commissioned shortly
2.	Dheeru Powergen Ltd.	Sep '13 Dec '13 March 14	1050 [3x350]	450	Uncertain
3.	Chhattisgarh State Power Trading Co. Ltd.	--		432	
	Subtotal [Chhattisgarh Projects]		1350	1053	
B.	Madhya Pradesh				
1.	Jaiprakash Power Ventures Ltd.	May 13 Nov. 13	1320 [2x660]	1240.8	To be Commissioned shortly
2.	Aryan MP Power Generation Pvt. Ltd.	March'14 Sep '14	1200 [2x600 MW]	1122	Uncertain
3.	Bina Power Supply Co. Ltd.	Sep '11 Dec '11	500 [2x250]	265.35	Commissioned
	Subtotal [Madhya Pradesh Projects]		3020	2628.15	
	Total [Chhattisgarh + MP]		4370	3681.15	

3.2 Various generation projects are already delayed considerably from their original commissioning schedule. Dheeru Powergen is uncertain. Bina Power Supply Co. has also requested for relinquishment of long term access. Aryan MP

Power has requested for relinquishment of 1122 MW of LTA quantum from their generation project.

3.3 In view of the uncertainty surrounding the generation development due to number of reasons, it becomes very unpredictable that which region shall be surplus or deficit for future time frame. Also in the present scenario, the power flow situations are very much dynamic and occurring in unpredictable manner due to increasing share of short term and medium term transactions. Keeping in view the requirement of power transfer for a long-time frame as well as the uncertainty for such a long period, it is difficult to ascertain the utilization/non-utilization of transmission corridors. CTU has been consistently saying that in such an uncertain scenario, identification of stranded elements for each project in meshed network shall be subjective and open to dispute.

3.5 Keeping the above in view, 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. In view of the difficulty in identification of the stranded capacity as stated above, the Hon'ble Commission may take a view to address the issue of relinquishment of LTA for the instant as well as future applications based on quantum of power for which LTA is withdrawn. It is preferable that the charges may be collected upfront.”

10. The Petitioner in its rejoinder has submitted that the Petitioner from time to time has brought the constraints in the way of implementation of its project to the knowledge of PGCIL in various JCC meetings from time to time. The Petitioner has submitted that PGCIL has recorded the concerns shown by the Petitioner from time to time without paying any heed to the request of the Petitioner to relinquish the LTA under BPTA. The Petitioner has referred to its letters dated 24.5.2012 and 27.7.2012 and has submitted that under the letter dated 27.7.2012, the Petitioner has invoked force majeure under clause 9.0 of the BPTA due to non-availability of coal and incessant delay in grant of environment clearance by MOEF and prayed to the PGCIL for relinquishment of LTA and return of bank guarantee. The Petitioner has submitted that PGCIL has consciously chosen not to respond to any of the letters and representations made from time to time by the Petitioner. The Petitioner has also submitted that the denial of environmental clearance, non-allocation of coal by the Standing Linkage Committee and withdrawal of the no-objection by Central water Commission are force majeure events beyond the control of the Petitioner and therefore, the Petitioner is entitled to be discharged from all obligations under the BPTA by virtue of clause 9.0 of the BPTA. The Petitioner has relied upon the judgement of the Appellate Tribunal for Electricity (Appellate Tribunal) in Appeal No.123 of 2012 (GUVNL Vs. GERC & others) in support of its claims for force majeure. The Petitioner has further submitted that apart from the contractual remedy force majeure available under the BPTA, the Petitioner has a statutory remedy under Regulation 18 of the Connectivity Regulations and in exercise of such relinquishment, the Petitioner shall be only be liable to pay compensation as per the calculation provided in the said regulation provided the relinquishment leads to stranding of

transmission capacity. The Petitioner has submitted that PGCIL in its reply to the query of the Commission regarding stranded capacity has admitted its failure to ascertain the stranded capacity and therefore, in the absence of the stranded capacity, compensation cannot be made payable by the Petitioner. The Petitioner has submitted that the request of the Petitioner to impose compensation on the Petitioner is extraneous to the Connectivity Regulations since no stranded capacity was proved or ascertained by PGCIL. In support of its contention, the Petitioner has relied upon the order of the Commission dated 8.6.2013 in Petition No.118/MP/2012 (Lanco Babandh Power Limited Vs. PGCIL & Others) and order dated 27.9.2012 in Petition No.128/2012.

11. During the hearing, learned senior counsel for the Petitioner submitted that the generation project has been delayed due to non-availability of coal linkage by Ministry of Coal and deferment in the grant of environmental clearance which are beyond the control of the Petitioner and are in the nature of force majeure within the meaning of clause 9 of the BPTA. Learned Senior counsel has further submitted that the Petitioner has a statutory right under the Connectivity Regulations to seek relinquishment of transmission charges under Regulation 18 of the Connectivity Regulations. The Representative of the Petitioner submitted that the transmission system associated with the Petitioner is a high capacity transmission Corridor-IV and has been planned for evacuation of power from the generation projects coming up in Chhattisgarh and Madhya Pradesh. He submitted that the various generation projects are already delayed considerably from their original commissioning schedules. The representative of the Petitioner submitted that the force majeure clause is not applicable to non-completion of

the projects and the hardship cannot be taken as an excuse. The representative of PGCIL further submitted that the Petitioner had not categorically communicated to PGCIL that the commissioning of the project would be abandoned and only the status and development of the project in the Joint Coordination Committee Meetings.

**Analysis and Decision:**

12. The Petitioner claims to have been affected by force majeure on account of various constraints faced by the Petitioner in setting up the generation project which are beyond the control of the Petitioner and accordingly, the Petitioner had been apprising PGCIL about these constraints in the various JCC Meetings and through letters. The Petitioner has submitted that it has statutory rights under the Connectivity Regulations to relinquish the LTA subject to payment of relinquishment charges for the stranded capacity and only if stranded capacity is assessed and proved. Accordingly, the Petitioner has prayed for relinquishment of LTA under the BPTA dated 24.2.2010 without any liability and for a direction to PGCIL to return the Bank Guarantee of Rs.56.10 crores.

13. Based on the pleadings in the petition, the following issues arise for our consideration:

- (a) Whether the Petitioner can be discharged from its liability to pay the transmission charges in terms of Clause 9.0 of the BPTA on account of non-grant of fuel linkage and environment clearance and cancellation of water linkage?
- (b) Issue No.2 : Whether the petitioner is entitled to relinquish the LTA under BPTA dated 24.2.2010 without any liability?

- (c) Issue No.3: Whether any direction is required to be issued for refund of Bank Guarantee in this case?.

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

**Issue No. 1:** Whether the Petitioner can be discharged from its liability to pay the transmission charges in terms of Clause 9.0 of the BPTA on account of non-grant of fuel linkage and environment clearance and cancellation of water linkage?

14. The Petitioner has entered into BPTA with CTU 24.2.2010 for LTA for 1200 MW. As per the BPTA, PGCIL has agreed to construct certain transmission lines (extracted in para 3 of the order) in the Western and Northern Region for a group of generators including the Petitioner and these Project Developers are required pay the transmission charges for these transmission lines. Clause 7.0 of the BPTA provides as under:

“7.0. In order to monitor/review the progress of generating units alongwith its direct evacuation lines and also the common transmission system, Joint Coordination meeting with the representative of each developer and POWERGRID shall be held at regular interval (preferably quarterly) after signing of this Agreement.”

The above provision provides that the progress of the generating units and direct evacuation lines which are within the scope of the project developers and the common transmission system developed by PGCIL would be monitored or reviewed. The purpose is to ensure coordinated development of the generating units as well as the transmission systems and to obviate the possibility of the generation capacity or the transmission capacity getting stranded on account of non-availability of transmission system or generating units, as the case may be. The Petitioner has placed on record the Minutes of the First, Second, Fourth and Fifth JCC meetings held on 24.9.2010, 17.2.2011, 9.7.2012 and 19.2.2013 respectively. Minutes of no other JCC meetings have been placed on record either by the Petitioner or by PGCIL. In the said meetings,

only the status of the progress of the generating units have been recorded with particular reference to land acquired, fuel linkage, water linkage, EPC contract etc. The status of the common transmission systems developed by PGCIL has not been recorded. In the First and Second JCC meetings, uncertainty of the generation project has been taken note of as under:

“In the meeting, it emerged that as key milestones are yet to be achieved by the developer, commissioning schedule looks uncertain for the time being.”

In the Fourth JCC Meeting held on 9.7.2012, the Petitioner has clearly indicated the implementation of the project was uncertain due to lack of fuel linkage and environmental clearance. PGCIL in the said meeting gave a deadline that if the Petitioner did not make any progress till 1.11.12, LTOA application of the Petitioner would be closed. It is not clear what PGCIL meant by LTOA application would be closed since the Petitioner had already been granted LTOA and the Petitioner had signed the BPTA. It can only mean that LTOA of the Petitioner would be closed if its project did not make any progress till 1.11.2012 in respect of fuel linkage and environmental clearance. Before the expiry of the deadline of 1.11.2012, the Petitioner vide its letter dated 27.7.2012 intimated to PGCIL as under:

“Aryan M.P. Power Generation Pvt. Ltd. (AMPPGPL) was granted Long Term Open Access vide your letter No. C/ENG/SEF/TAL/W/09/001 dated 29.7.2009 from 765/400 kV Pooling Station Vindhyachal. We had signed the BPTA on 24.2.2010. The Bank Guarantee of Rs. 56.10 crores was deposited while signing the BPTA.

We had gone ahead with the development of the project on the premise that coal linkage would be made available to the project, since the project was conceived as part of 12<sup>th</sup> Plan projects. The total land on 1050 acres for the project has been acquired. Water allocation has been made and other statutory clearances except EC have been obtained. Regarding Environment Clearance, Ministry of Environment and Forest issued the ToR for the project vide their letter dated



10.2.2009. The Public Hearing was conducted on 7.10.2009. The detailed EIA study was submitted to the Environment Ministry vide our letter dated 18.1.2010. as per policy of MoEF, Environment Clearance can be given only for those projects who have been granted coal linkage. Since coal linkage has not been granted by Ministry of Coal to our Project, we gave the presentation to Environment Ministry during its Meeting held on July, 7-9, 2010, wherein we had proposed to operate the plant with 100% imported coal till coal linkage is granted. However, the Environment Clearance was denied by MoEF considering the fact that the source of coal was not firmed up.

Keeping in view the fact that as per current policy of MoEF, Environment Clearance cannot be granted till coal linkage is confirmed by MoC, we have been forced not to proceed with the construction and erection of project and therefore it shall not be possible to commission the project by September, 2014/December, 2014 as per the schedule given in the BPTA.

Further, as per the provision of the Force Majeure Clause 9.0 of BPTA, the condition of non-grant of coal linkage and non-approval of Environment Clearance leading to non-implementation of the project as per the time schedule given in the BPTA, is a cause beyond the control of AMPPGPL. Accordingly, it is requested that the schedule of commissioning of our project agreed under the BPTA may be amended and revised as per the schedule given below:

1<sup>st</sup> Unit-March, 2017  
2<sup>nd</sup> Unit-September, 2017

It is further requested that no investment be made by PGCIL for erecting transmission system associated with our project. We shall continue to make efforts for obtaining coal linkage and Environment Clearance. AMPPGPL undertakes to inform PGCIL at least 36 months prior to the firm commissioning schedule so as to enable PGCIL to execute the transmission system associated with our Project.”

In the above letter, the Petitioner has apprised PGCIL that on account lack of environment clearance and coal linkage, it is not possible on the part of the Petitioner to commission the project by September 2014/December 2014. The Petitioner has requested to amend the BPTA to revise the schedule of Unit 1 and Unit 2 as March 2017 and September 2017 respectively. The Petitioner has made a specific request that no investment in transmission system associated with the generating station of the

Petitioner should be made. The Petitioner has submitted that after getting the environmental clearance and fuel linkage, the Petitioner would inform PGCIL at least 36 months in advance of firm schedule of commissioning of its generation project. In other words, the Petitioner requested PGCIL not to consider the LTA granted for its generating station for the purpose of building the common transmission system. PGCIL has not replied to this letter of the Petitioner. Though Fifth JCC meeting was held after receipt of this letter, there is no reference to the request of the Petitioner not to execute the transmission system related to the generating station of the Petitioner. In our view, when PGCIL has given a deadline of 1.12.2012 to the Petitioner to apprise about the progress of the generating station failing which the LTOA would be closed and the Petitioner has responded within that timeline with a request not to make any investment on the transmission system relating to its generating station, it was incumbent on PGCIL to take a decision on the request of the Petitioner and intimate the Petitioner about its decision whether it was possible at that stage to stop investment in the transmission system related to the generating station of the Petitioner, considering the fact that a common transmission system was being developed for a group of generators including the Petitioner. Further, if the work on the transmission system had already started, PGCIL should have intimated the same to the Petitioner and the financial implications for opting out of the BPTA at that stage. In our view, PGCIL has not taken any such action which was expected of PGCIL in terms of our directions in order dated 31.5.2010 in Petition No. 233/2009 to execute the transmission systems matching with the progress of the generating stations, the provisions of clause 7 of the BPTA and prudent utility practice.

15. The Petitioner has claimed that it has been affected by force majeure in terms of the clause 9 of the BPTA on account of factors beyond its control such as non-grant of fuel linkage and environment clearance. The Petitioner has sought to be discharged from its liability under the BPTA on account of force majeure. Clause 9 of the BPTA 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 give 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.”

16. Clause 9 of BPTA reveals that the party claiming the benefit of force majeure events is required to satisfy the other party of the existence of such events and give a written notice of 30 days. The Petitioner in its letter dated 27.7.2012 has invoked the provisions of Clause 9 of BPTA claiming force majeure on account of non-grant of fuel linkage and forest clearance and has requested PGCIL to reschedule SCOD of both units of its generating station to March 2017 and September 2017 respectively. The Petitioner has further requested PGCIL not to make any investment related to its transmission system. No document has been placed on record as to what action has been taken by PGCIL on the said letter. Therefore, it is not known whether PGCIL was satisfied about the claim of force majeure as required under clause 9 of the BPTA. In the absence of any response of PGCIL on the claim of the Petitioner for force majeure,

we have to examine whether the events are in nature of force majeure and whether relinquishment of the LTOA is permissible under clause 9 of BPTA.

17. The Petitioner in the various Joint Co-ordination Committee meetings held on 24.9.2010, 17.2.2011 and 9.7.2011 has explained the progress on the various milestones such as acquisition of land for the project, fuel linkage, water linkage, environmental clearance, award of contract etc. The Petitioner has also intimated in these meetings that on account of constraints in grant of fuel linkage and environmental clearance, the execution of its generation project is uncertain. Since there was progress on all milestones except fuel linkage and environmental clearance about which the Petitioner was optimistic, there was no indication to PGCIL that the project would not be executed. Only in its letter dated 27.7.2012 that the Petitioner indicated that the investment in the transmission system related to its generation project should not be made. Subsequently, after the cancellation of water linkage by Central Water Commission on 11.9.2013 that the Petitioner decided to give up the project and filed the present petition for relinquishment of LTOA. When the water linkage is a pre-condition for fuel linkage and fuel linkage is a pre-condition for environmental clearance, with the cancellation of water linkage, the possibility of fuel linkage and environmental clearance is extremely negligible. Therefore, the Petitioner was affected by force majeure with effect from 11.9.2013 when the water linkage was cancelled.

18. Next we consider whether the Petitioner is entitled to be discharged from its liability to pay the transmission charges on account of force majeure under clause 9 of

the BPTA. Clause 9 of BPTA says that no party shall be liable to any claim for any loss or damage arising out of the failure of the other party to carry out the terms of the agreement to the extent such failure is on account of force majeure events such as war etc. and any other causes beyond the control of the defaulting party. In our view, losses or damages referred to in clause 9 of the BPTA shall not cover the liability of payment of transmission charges. In this connection, clause 6 of the BPTA is relevant which is extracted as under:

“6.0 (a) In case any of the developers fail to construct the generating station/dedicated transmission system or makes an exit or abandon its project, POWERGRID shall have the right to collect the transmission charges and/ or damages as the case may be in accordance with the notification/regulation issued by CERC from time to time.....”

Thus clause 6 says about both transmission charges and damages. Therefore, if a project developer is affected by force majeure, it will only be discharged from paying the damages only and not the transmission charges. Further, Clause 9 of the BPTA cannot be used to relinquish the LTOA under the BPTA. It is clear from the last sentence of the said clause which says that “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.” Therefore, the situation covered under clause 9 of the BPTA covers a temporary phase when the project developer is unable to utilise the transmission system or the when licensee is unable to make its transmission system available due to any force majeure event. It cannot be used for making an exit from BPTA which is governed in terms of clause 6.0 of the BPTA.

19. There is another reason as to why the Petitioner cannot be discharged from its liability to pay the transmission charges for the common transmission systems covered under the BPTA after the said systems are put under commercial operation except through relinquishment under the provisions of the Connectivity Regulations. We have to consider whether on the date the Petitioner intimated PGCIL for not making any investment in transmission for its generating station, was it possible for PGCIL not to make the transmission system for the Petitioner. PGCIL has not filed the status of the transmission system as on 27.7.2012 when the Petitioner made a request for not making investment in transmission related to its generation. In the absence of any information filed by PGCIL, we are relying on the information available in order dated 8.7.2016 in Petition No. 289/TT/2013 in which both the Petitioner and PGCIL are parties and which pertained to the tariff of one of the common assets executed by PGCIL as per the BPTA. As per the information available in the said order, investment approval for the “Transmission System for IPP Generation projects in Madhya Pradesh & Chhattisgarh” in Western Region on 2.9.2011 and the project was to be completed within 27 months from the date of Investment Approval. Therefore, the scheduled COD of the transmission system was 1.12.2013. As against the scheduled SCOD of 1.12.2013, the actual COD was on 1.4.2014, resulting in a time overrun of 121 days on account of ROW issues leading to the litigation in the courts. The Commission in the said order had condoned the time over-run. For the purpose of this order, it suffices that investment approval for the transmission system was made on 2.9.2011 which is more than 10 months prior to the request of the Petitioner on 27.7.2012 not to make any investment in the transmission system relating to the generation project of the

Petitioner. Considering a timeframe of 9 months for selection of the contractor, the actual execution of the transmission lines would have possibly started in June 2012 which is prior to 27.7.2012. Since the common transmission system is for a number of generation developers including the Petitioner, it would not have been possible for PGCIL to abandon the project or modify the project on account of the request of the Petitioner. Therefore, considering the involvement of other generation developers in the common transmission system, the Petitioner would be liable for either transmission charges or relinquishment charges to the extent of its LTOA.

20. In the light of the above discussion, we hold that the Petitioner cannot be granted any relief from its liability for payment of transmission charges under clause 9 of the BPTA.

**Issue No.2** : Whether the petitioner is entitled to relinquish the LTA under BPTA dated 24.2.2010 without any liability?

21. The petitioner has submitted that in terms of Regulation 18 of the Connectivity Regulations, the petitioner has a right to relinquish its LTOA and it shall only become liable to pay compensation if it is proved before the Commission that due to exit of the petitioner from the system it creates stranded capacity. The petitioner has submitted that the Commission had directed PGCIL to make an assessment of stranded capacity created due to relinquishment of LTOA proposed by the Petitioner. The Petitioner has submitted that in its reply, PGCIL has shown its inability to ascertain the stranded capacity. The Petitioner has submitted that it has a right under the Connectivity

Regulations to seek relinquishment and the Petitioner is not liable to pay transmission charges due to inability of the PGCIL to ascertain stranded capacity.

22. PGCIL in its reply has submitted that the transmission system associated with the petitioner is a high capacity transmission Corridor-IV and has been planned for evacuation of power from generation projects coming up in Chhattisgarh and Madhya Pradesh. PGCIL has submitted that considering the fact that various projects under High Capacity Transmission Corridor are already delayed, it becomes very unpredictable to determine which region will be surplus or deficit in future timeframe. PGCIL has submitted that keeping in view the requirement of power transfer on a long timeframe as well as uncertainty for such a long period, it is difficult to ascertain the utilisation/non-utilisation of transmission corridors. PGCIL has submitted that keeping the difficulties in identification of stranded capacity in a meshed network, it would be prudent that the compensation may be calculated on the basis of fixed quantum in MW in place of stranded capacity.

23. Regulation 18 of the Connectivity Regulations provide as under:

**“ 18. Relinquishment of access rights**

(1) 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: -

(1) 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. As per regulations, a long term customer is liable to pay compensation of 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 years of access right in case he relinquishes access right before expiry of 12 years upon giving a notice of one year for seeking relinquishment. It is pertinent to mention that assessment of stranded capacity on account of relinquishment of LTA and determination of relinquishment charges shall be as per the directions to be given by the Commission in Petition No.92/MP/2015. There is no embargo in the Connectivity Regulations for relinquishment of LTA but such relinquishment is subject to payment of charges for the stranded capacity. In our view, the Petitioner may relinquish the LTA subject to payment of relinquishment charges which will be decided in Petition No.92/MP/2015.

**Issue No.3: Whether the petitioner is entitled for refund of bank guarantee.**

24. The petitioner has sought a direction to PGCIL for return of bank guarantee of Rs.56.10 crore. The Petitioner has submitted that in the present case, there is no stranded capacity and the Petitioner may be allowed to relinquish the LTA and the bank guarantee may be returned. The Petitioner has referred to the decisions of the Commission in in Petition No.118/MP/2012 (Lanco Babandh Power Limited Vs. PGCIL & Others) and order dated 27.9.2012 in Petition No.128/2012. The said cases were decided on the basis of the facts of those cases and cannot be taken as the precedents for deciding the case of the Petitioner.

25. It has come to the notice of the Commission through the writ petition filed by the Petitioner before the Hon'ble High Court of Delhi that PGCIL had given instructions to the bank on 23.10.2017 to encash the bank guarantee. Further, the bank guarantee has been encashed by PGCIL on 25.10.2017. In view of the encashment of bank

guarantee, the Petitioner has withdrawn the writ petition with liberty to take appropriate steps. In view of the above developments, no direction is required to be issued with regard to bank guarantee.

26. The petition stands disposed of in terms of the above.

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

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

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