

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 96/MP/2015

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M.K Iyer, Member

Date of Order : 8th March 2017

In the matter of

Petition under Section 79 (1) (c) and (f) and other applicable provision of the Electricity Act, 2003 read with Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in the inter-State transmission and related matters) Regulations, 2009 against the cancellation of LTA granted by the respondent and encashment of bank guarantee.

And

In the matter of

Chettinad Power Corporation Ltd.
Rani Seethai Building
603 Anna Salai, Chennai

....Petitioner

Vs

Power Grid Corporation of India limited
"Saudamini", Plot No. 2,
Sector 29, Gurgaon (Haryana) – 122001

...Respondent

Parties present:

Shri Anand K. Ganesh, Advocate for the Petitioner

Shri Sithesh Mukherjee, Advocate, PGCIL

Ms. Akansha Tyagi, Advocate, PGCIL

Ms. Ashima Mandla, PGCIL

Ms. Jyoti Prasad, PGCIL

Shri Ruth Elwin, PGCIL

ORDER

The Petitioner, Chettinad Power Corporation Ltd. (CPCL), has filed the present petition under Section 79 (1) (c) and (f) of the Electricity Act, 2003 read with the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in the inter-State transmission and related matters) Regulations, 2009 (hereinafter referred to as “Connectivity Regulations”) seeking direction to Power Grid Corporation of India Ltd. (hereinafter referred to as the Central Transmission Utility or CTU) not to encash the bank guarantee of Rs. 1.11 crore furnished by the petitioner in favour of CTU.

2. The Petitioner proposed to set up a 2x600 MW sub-critical thermal power plant (hereinafter referred to as “the Project”) at Erukkatanchery, Kazhippanallur and Manickapangu villages in Tharangambadi Taluk of Nagapattinam district in Tamil Nadu Village. The project was scheduled to be commissioned in the year 2015. The petitioner made an application dated 23.9.2010 to CTU for grant of connectivity and long term access for 1110 MW accompanied by application fee and a bank guarantee of Rs. 1.10 crore at the rate of Rs. 10,000/MW. CTU, after carrying out the necessary system studies, decided to grant long term access to the petitioner. CTU vide its letter dated 23.12.2011 intimated about the grant of connectivity/long term access to the petitioner for 1110 MW with effect from July 2015 and requested the petitioner to enter into long term access agreement within 30 days and furnish requisite bank guarantee failing which LTA granted would be treated as cancelled.

3. The Petitioner approached the Ministry of Environment and Forest for environmental clearance to ensure compliance with the Terms of Reference as well as Environment Impact Assessment Notification, 2006. Based on the recommendation of the Environment Assessment Committee, the project was accorded Environmental Clearance (EC) vide MOEF letter dated 20.1.2011. The grant of EC was challenged before the National Green Tribunal (NGT) in Appeal No. 12/2011. NGT vide its order dated 30.5.2012, without scrapping the EC, disposed of the appeal with certain direction with regard to EIA studies and EIA report. On the basis of the report of the Environment Assessment Committee, MOEF issued a corrigendum dated 13.6.2013 to the EC adding several conditions to be followed by the petitioner in the establishment and operation of the thermal power plant. An appeal being Appeal No. 114/2013 was filed before the NGT, Southern Zone challenging the EC dated 13.6.2013. The said appeal was transferred to the NGT, Principal Bench, New Delhi and has been re-numbered Appeal No. 87/2014. The appeal is presently pending.

4. The Petitioner has submitted that since the Petitioner is yet to receive the clearance from the MOEF and matter is still pending before the NGT, the petitioner appraised CTU about the development with regard to the grant of EC and sought extension, from time to time to sign the LTA Agreement. The Petitioner has submitted that CTU after considering the pendency of the appeal before the NGT has granted extension for signing the LTA Agreement from time to time.

5. The Petitioner has submitted that it received on 11.3.2015 a communication dated 5.3.2013 informing about the convening the 18th meeting of the Southern Region regarding connectivity and LTA and in the agenda for the said meeting, withdrawal/cancellation of LTA granted to the petitioner was proposed. The petitioner has further submitted that on 5.3.2015, CTU has issued a notice to the petitioner directing it to sign the LTA within 15 days failing which its bank guarantee would be encashed.

6. The Petitioner has submitted that it did not get an opportunity of hearing in the said meeting and if the petitioner has been provided with an opportunity to present its case, it would have succeeded in demonstrating that it would be entitled for a further extension.

7. The Petitioner has submitted that the bank guarantee given by the petitioner is not liable to be encashed for the following reasons:

(a) As per Para 23.5 of the Detailed Procedure under Connectivity Regulations, the nodal agency may encash the bank guarantee if the applicant fails to sign the LTA Agreement. The Petitioner is constrained to delay in signing of the LTA Agreement due to pendency of the Appeal No. 87 of 2014 before the NGT, Principal Bench, New Delhi and in the circumstances, it would be in the interest of justice, if CTU is restrained to encash the bank guarantee and cancel/withdraw the LTA granted to the Petitioner until the disposal of said appeal before the NGT.

(b) The Petitioner is entitled to a further extension of time until conclusion of the legal proceedings before the NGT as it would then be possible for it to proceed further in the project and obtain financial closure. No hardship or prejudice would be caused to the CTU by grant of such extension as the Petitioner has already conveyed its keenness and extension is being sought only because the delay is beyond the control of the Petitioner which qualifies as a force majeure event.

(c) The respondent by its conduct is estopped from refusing the extension when it had granted extension on the same granted earlier. There has been no change in the circumstances.

(d) Before coming to a decision, an opportunity should have been granted to the Petitioner. Further no reasons have been provided for refusing to grant further extension.

(e) In such circumstances as prevailing in the present case, the Petitioner cannot be forced to execute the LTA and the encashment of bank guarantee would cause irreparable hardship to the Petitioner. It would also result in the LTA coming to an end and when the Petitioner is able to proceed further after conclusion of the legal challenge before the NGT, it would have to start from the inception thereby causing substantial delay. The Petitioner has undertaken to keep the bank guarantee alive and therefore, no hardship would be caused to the CTU by such extension.

(f) The State of Tamil Nadu is reeling under a substantial power deficit since 2008 with little improvement. The Petitioner's proposed project is only among a couple of projects which is at the advanced stage after having obtained the clearances. Therefore, there is a ground of public interest to grant extension of time to the Petitioner for signing LTA Agreement.

8. In the above background, the Petitioner has filed the present petition with the following prayers:

“(a) Call for the records of the respondent comprised in the proceedings for the 18th Southern Regional meeting dated 5.3.2015, in so far as it relates to the Petitioner and the letter dated 5.3.2015 bearing No. C/CTU/Plg/LTA/N-LTAA/Chettinad and quash the same as arbitrary and illegal and direct the provision of extension to the Petitioner to execute the LTA until disposal of Appeal No. 87 of 2014 pending before the Hon`ble NGT, Principal Bench, New Delhi upon such terms and conditions as this Hon`ble Commission may deem fit and pass such further or other orders as this Hon`ble Commission may deem fit in light of the facts and circumstances of this case and thus render justice.

(b) Issue an interim injunction restraining the Respondent, its men and agents from in any manner seeking to enforce the decision arrived at in the 18th Southern Regional meeting dated 05.03.2015 with respect to the Petitioner's project pending disposal of the petition

(c) Issue an interim stay of the Respondent's communication dated 05.03.2015 bearing No. C/CTU/Plg/LTA/N-LTAA/Chettinad and all proceedings pursuant and consequent thereto pending disposal of this petition upon such terms, including extension of the Bank Guarantee of a value of Rs. 1,11,00,000.

9. During the hearing of the petition on 24.3.2015, the Commission directed CTU not to encash the bank guarantee subject to the further extending the validity of the

bank guarantee. Both Petitioner and CTU were directed to file certain information which has been filed.

Reply of CTU

10. CTU in its reply has refuted the claims of the Petitioner and has submitted that the Petitioner's pleas are untenable either for injunction against the encashment of bank guarantee seeking or quashing of withdrawal of LTA granted. With regard to specific averments of the Petitioner, CTU has submitted as under:

(a) In December, 2011, the Petitioner made an application to CTU seeking LTA for the project. CTU on receipt of the application, carried out system study as per 13 Regulation of the Connectivity Regulations read with para 24 of the Detailed Procedure and vide letter dated 23.12.2011, intimated to the Petitioner about the grant of such LTA with tentative date of July, 2015 which would be effective only on execution of LTA Agreement or BPTA and upon furnishing the construction BG by the Petitioner. Further, the intimation contained the details of the transmission system placed to be strengthened for grant of LTA. Before grant of LTA, the Petitioner's readiness was assessed in the meeting held on 20.10.2011 and it was found that the Petitioner had met four out of the five milestones such as land, fuel, MOEF and forest clearance.

(b) As per Paragraph 24 (b) (i) of the Detailed Procedure read with intimation letter, an LTA applicant is required to sign the LTA Agreement within 30 days from the date of grant of LTA and in the event of failure, connectivity would be

treated as cancelled and fresh application would be required. Further in terms of Para 25.2 (i) of the Detailed Procedure, implementation of transmission system strengthening can be initiated only after signing of the LTA Agreement. Therefore, it is mandatory for the Petitioner to sign the LTA Agreement with CTU in order to avoid encashment of the bank guarantee.

(c) During the 15th meeting of the SR Constituents held on 4.1.2013, the issue of non-satisfactory progress of the LTA applicants including the Petitioner was discussed. While such of the connectivity/LTA applications were closed, extension of time of six months was granted to such of the LTA applicants/customers including the Petitioner. In the 16th meeting of the SR constituents held on 4.9.2013, the Petitioner stated that the project received necessary clearance and it will sign the LTA Agreement within one month of the meeting. In the 17th meeting of the SR Constituents held on 31.7.2014, the Petitioner and CTU agreed that CTU may encash the bank guarantee on or after 1.2.2015 if the Petitioner does not get EC from NGT. In the 17th meeting held on 31.7.2014, the Petitioner has given its acceptance towards encashment of bank guarantee subject to an extension till end of February. The Petitioner by its letter dated 30.1.2015 sought one month extension i.e. till the end of March 2014 unequivocally accepting that the CTU would be at liberty to encash the bank guarantee. In response to the said letter, CTU informed the Petitioner vide its letter dated 6.2.2015 that the request of the Petitioner would be tabled and discussed in the next meeting of SR Constituents and the decision shall be based on the deliberations during the said meeting. On 5.3 2015, CTU sent a

notice to the Petitioner giving a final opportunity to sign the LTA Agreement within 15 days failing which bank guarantee would be invoked. In the 18th meeting of the SR Constituents held on 7.3.2015, it was decided that the connectivity and LTA applications would be closed in accordance with the Connectivity Regulations and Detailed Procedure and after obtaining all required clearances, the applicant may apply again with a fresh application.

(d) The word 'may' appearing in clause (5) of Regulation 12 of the Connectivity Regulations and Paragraph 23.5 of the Detailed Procedure can be interpreted as 'shall' in order to uphold the legislative intent of the provision of bank guarantee i.e. to ensure that only serious players apply for LTA. Paragraph 23.5 of the Detailed Procedure specifies that the BG may be encashed by the nodal agency if the LTA applicant fails to sign the LTA Agreement with PGCIL. The intention behind this provision is to foster seriousness in the process of grant of LTA and to ensure commitment of the project developers to use the transmission line for which LTA has been sought and that there is no abuse of process for grant of LTA, which is the scenario in the instant case.

(e) As regards the clearance from the Pollution Control Board, the Petitioner has consistently led CTU to believe that it was very close to obtaining the same and therefore, the requests for extensions for signing of LTA were granted from time to time by CTU. However, all such extensions were allowed after examining

the requests of the Petitioner during the meetings of Southern Region constituents, Central Electricity Authority, Regional Power Committee, etc.

(f) Force majeure, in the absence of a contractual documents, cannot be a ground for non-signing of LTA Agreement. It is a settled principle of law that a force majeure claim is a creature of contract or clause in a contract that allocates risks resulting from frustration of the underlying contract and any interpretation and meaning of force majeure is purely based on principles of contractual interpretation. In the present case, the force majeure cannot be a ground for non-signing of the LTA Agreement and for restraining the CTU from encashment of bank guarantee. The Appellate Tribunal for Electricity in *Jayaswal Neco* has held that the Connectivity Regulations are so clear that force majeure cannot be a ground for non-signing of the LTA.

(g) CTU granted extensions considering the hardship faced by the Petitioner and despite extensions, the Petitioner has failed to obtain required clearances. There cannot be estoppels against the law and in the present case, the demand for extension of time is not in the consonance with the Connectivity Regulations and Detailed Procedure. Therefore, CTU cannot be compelled to do something which is contrary to law. The request of the Petitioner for an ad infinitum extension for signing of LTA Agreement should be rejected in the overall interest of power sector.

11. The Commission directed CTU to submit certain information such as date of coming into effect of the LTA granted to the Petitioner, reasons for grant of extensions of time to the Petitioner, whether notices have been issued to the generators similarly situated as the Petitioner, status of the transmission system, coordination activity undertaken by CTU for development of the transmission system matching with the commissioning of the generation project. CTU vide its affidavit dated 22.4.2015 has submitted the required information which are noted hereinafter. As regards the date from which LTA would be effective, CTU has submitted that the Petitioner was granted LTA on 23.12.2011 with effective date of LTA as July 2015 subject to the signing of the LTA Agreement and furnishing of construction bank guarantee. With regard to reasons for grant of extension of time to the Petitioner to sign LTA Agreement, CTU has submitted that the Petitioner was granted LTA on the basis of it having already met four major milestones out of five and with respect to the pending milestone i.e. environmental clearance from Ministry of Environment & Forest which was pending adjudication before NGT, the Petitioner consistently led CTU to believe that it was very close to obtaining all the necessary approvals and therefore, based on the specific requests made by the Petitioner from time to time, the extension for signing of LTA agreement was granted.

12. CTU has submitted that in a number of cases where extension was granted to Individual Power Producers (IPPs) in the past for similar reason, IPPs have been able to come up with their generation projects within a reasonable time. In the year 2012-13 and 2013-14, the generation by IPPs has overtaken Central Sector Generating Stations in capacity-addition, thus justifying the CTU's intention behind grant of extensions in the

past in case of genuine problems being faced by IPPs in obtaining necessary clearances. With regard to withdrawal/cancellation of the LTAs granted on similar grounds, CTU has submitted that in eleven cases including the Petitioner where the signing of LTA Agreement had fallen overdue, CTU issued notices to all generators on 5.3.2015 giving a final opportunity to sign the LTA Agreement within 15 days and informing the applicants that failure to execute LTA Agreement would entail the cancellation of LTA and invocation of bank guarantee. CTU has submitted that none of the eleven applicants have entered into LTA Agreement. With regard to efforts undertaken by CTU to deal with the application of LTA made by eleven LTA applications including the Petitioner, CTU has submitted that CTU was obligated to process the Petitioner's application in a time bound manner under Regulation 12 of the Connectivity Regulations and conducted system studies under Regulation 13. As identified in the LTA intimation, CTU proposed the transmission elements required to cater to the LTA granted to the Petitioner. After intimation, CTU has consistently tried, in discharge of its planning and coordination function qua the ISTS, to ensure the signing of LTA Agreements by defaulting LTA applicants in the various meetings of Southern Region Constituents.

13. Learned counsel for the Petitioner submitted during the hearing that the Petitioner could not sign the LTA Agreement due to the pendency of the appeal before NGT, since the very environmental clearance granted to the Petitioner was under challenge and therefore, the financial closure and all further steps were dependent upon the same. The said disability was beyond the control of the Petitioner and was

demonstrably due to action of court. Learned counsel submitted that the basic premise of CTU that the bank guarantee is in the nature of liquidated damages to be appropriated by CTU is misconceived. The bank guarantee furnished was only in the nature of security provided by the Petitioner in favour of PGCIL. Learned counsel submitted that the regulations provide for an enabling clause for encashing the bank guarantee in case the applicant does not fulfil the conditions of execution of LTA and withdrawn the LTA application, which was to secure any damages which had been caused to CTU. Learned counsel submitted that there is no provision whatsoever for the amount of bank guarantee to be in the nature of liquidated damages. Unless and until CTU is in a position to prove any loss suffered, it is not open to CTU to contend that it is entitled for bank guarantee as liquidated damages. Learned counsel submitted that CTU has proceeded on the basis that there was a default on the part of the Petitioner to enter into the LTA Agreement and therefore, coercive steps should be taken at this stage. However, CTU itself appreciated the factual position being beyond the control of the Petitioner and granted extension of time since 2011 for execution of the LTA Agreement.

14. Learned counsel for CTU submitted that as per Regulation 15 of the Connectivity Regulations and Detailed Procedure approved thereunder, the Petitioner is required to sign LTA agreement within 30 days of grant of LTA. However, since 2012 no action has been taken by the Petitioner towards signing the LTA Agreement. Learned counsel submitted that CTU has been accommodating the request of the Petitioner on the ground of force majeure events and other special clearances in consultation with all the constituents. The Petitioner in its letter dated 14.8.2014 had informed CTU that its

management has decided to give its acceptance towards invocation of bank guarantee, upon failure to sign the LTA Agreement within stipulated extended period i.e. end of February, 2015. Learned counsel of CTU referred to para 68 of Statement of Reasons of Connectivity Regulations and submitted that the reason for furnishing of the bank guarantee is to bring seriousness among the LTA applicants.

Analysis and Decision:

15. We have considered the submissions of the Petitioner and the respondent and perused documents on record. First, the facts of the case briefly recapitulated are as follows: The Petitioner applied for connectivity on 23.9.2010 and on 15.2.2011 LTA for 1110 MW accompanied by a Bank Guarantee of Rs.1.10 crore in accordance with the Connectivity Regulations. In the 13th Meeting of the Southern Region Constituents regarding Connectivity and LTA applications, the Petitioner was granted connectivity and LTA for 1110 MW. The Petitioner was advised by CTU vide letter dated 23.12.2011 to sign the LTA Agreement within a period of 30 days of the issue of the letter. On the basis of the recommendations of Environment Appraisal Committee, Ministry of Environment & Forest, the Petitioner was granted environmental clearance on 20.1.2011. The said environmental clearance was challenged before National Green Tribunal (NGT) and vide its order dated 30.5.2012, NGT observed that the Petitioner was in substantial compliance and directed the Petitioner to rectify certain procedural errors. After compliance with the directions, MoEF issued a corrigendum dated 13.6.2013 to the environment clearance. The said corrigendum dated 13.6.2013 was challenged by certain organizations before NGT, South Zone. The matter was

transferred to Principle Bench and was numbered as Appeal No. 87 of 2014. The matter is presently sub-judice before NGT. In the 17th meeting of the SR Constituents held on 31.7.2014, the Petitioner and CTU agreed that CTU may encash the bank guarantee on or after 1.2.2015 if the Petitioner did not get Environment Clearance from NGT. In the said meeting held on 31.7.2014, the Petitioner had given its acceptance towards encashment of bank guarantee subject to an extension till end of February. Relevant portion of the said meeting held on 31.7.2014 is extracted as under:

“6.5 DGM (CTU) informed that LTA was granted to Chettinad Power Corporation Ltd. (2x600 MW) ON 27.12.2011 but the generation developer failed to sign LTA agreement and furnish Bank Guarantee till date. The representative from Chettinad Power Corporation informed that they have received all necessary clearances but the final hearing of NGT order on environment clearance for their project has not yet received and so, they requested for time extension of six months for execution of the LTA Agreement and furnishing of construction stage BG. In this regard, Director, CEA suggested that Chettinad Power may submit a letter within say one week mentioning that CTU may encash their BG on after 1.2.2015 if they still do not get environmental clearance from NGT, which was agreed by CTU and M/s Chettinad Power.

As per discussion held in the said meeting on 31.7.2014, the Petitioner vide its letter dated 14.8.2014 gave its acceptance to CTU towards encashment of Bank Guarantee subject to an extension till the end of the month of February, 2015. The relevant portion of the said letter dated 14.8.2014 is extracted as under:

“In the light of the views taken by the August Committee, we have left with no other option and yet in order to retain the healthy business relationship between us, our management has decided to give it acceptance towards invocation of Bank Guarantee, upon failure to enter the Long term Access Agreement within the stipulated extended period, i.e. until the end of February, 2015. However, such acceptance has been given by us, without prejudice to our other rights, remedies, and contentions available under law from time to time.”

Further, the Petitioner vide its letter dated 30.1.2015 requested CTU for extension of time till March, 2015 to sign the LTA Agreement. Relevant portion of the said letter dated 30.1.2015 is extracted as under:

“For the foregoing reasons, we request you to extend the time for signing of LTA Agreement and also request you not to invoke the Bank Guarantee No. 61/2010-11, as stated by you in the Minutes of Meeting, otherwise we will be put to great hardship and irreparable loss. On the other hand, we hereby agree and accept that PGCIL shall be at liberty to invoke the Bank Guarantee on the expiry of the final deadline fixed by PGCIL.”

In response to the said letter dated 30.1.2015, CTU vide its letter dated 6.2.2015 informed the Petitioner that its request would be discussed in the next meeting of SR Constituents and any decision in this regard would be based on the deliberations during the said meeting. CTU in its letter dated 5.3.2015 granted a final opportunity to the Petitioner to sign the LTA on the following terms:

Thus, your obligation to sign the Long Term Transmission Agreement is patently in the Regulations and the Detailed Procedure. However, despite the fact that Long Term Access was granted to you on 17.08.2011, you have not signed the LTA Agreement. It may be noted that you have had several opportunities for doing the same. However, you have failed to sign the LTA agreement.

A final opportunity is given to you to sign the LTA Agreement within 15 days of receipt of this notice, failing which the Bank Guarantee shall be liable to be invoked and the Long Term Access granted to you shall be liable to be cancelled.”

In the 18th meeting of SR Constituents regarding LTA and Connectivity Applications in Southern Region held on 7.3.2015, it was decided and agreed to close the connectivity and LTA granted to the Petitioner. Relevant portion of the said meeting dated 7.3.2015 is extracted as under:

“AGM (CTU-Planning) explained that LTA application for Chettinand Power Corporation Private Limited was discussed during 17th meeting of Southern Region constituents regarding Long Term Access and Connectivity applications wherein time extension up to February`15 was granted for signing of LTA

Agreement. The applicant till date has not signed the LTA agreement even after repeated reminders. Representative from Chettinad Power Corporations Private Limited requested for further time extension of two months for signing of LTA agreement.

CTU explained that as per the CERC regulations, 2009, the LTA Agreement has to be signed within 30 days from grant of Long Term Access. As POWERGRID is to abide with CERC Procedure/Regulations, therefore, the granted LTA may be cancelled. It was discussed and agreed that the Connectivity and LTA application shall be closed in accordance with provisions in regulations and Detailed Procedures.

However, after obtaining all the required clearances, the applicant may apply again with a fresh application.”

The Petitioner has challenged the letter dated 5.3.2015 in the present petition and has sought extension of time for signing of LTA Agreement till disposal of the Appeal pending before the National Green Tribunal.

16. In the first prayer, the Petitioner has sought directions to call for the records of the 18th Meeting of the Southern Region constituents held on 7.3.2015. PGCIL vide its affidavit dated 30.4.2015 has placed on record the minutes of the 18th meeting of SR Constituents regarding LTA and Connectivity Applications in Southern Region held on 7.3.2015. Copy of the minutes of the said meeting has also been endorsed to the Petitioner. It is apparent from the minutes of the meeting dated 7.3.2015 that the proposal of the Petitioner for further extension of time for signing of the LTA Agreement was discussed in the presence of the representative of the Petitioner and was not agreed to by the CTU. Detailed reasons have also been recorded for the decision to cancel the LTA. The letter dated 5.3.2015 and minutes of the meeting dated 7.3.2015 are neither arbitrary nor illegal. In fact, from the sequence of events narrated in para 16 above, it clearly emerges that the issue of signing of LTA Agreement has been

discussed in the various meetings of the Southern Region on LTA and Connectivity and several correspondences between the Petitioner and the Respondent. Even though there is no provision in either the Connectivity Regulations or Detailed Procedure to grant time for signing of LTA Agreement beyond the stipulated period of one month, PGCIL has accommodated the requests of the Petitioner and extended the time for signing of LTA Agreement from time to time.

17. The Petitioner has sought a direction for extension of time for signing the LTA Agreement till the disposal of the Appeal No.87 of 2014 pending before the National Green Tribunal, Principal Bench, New Delhi. The Petitioner has submitted that the Petitioner has conveyed its keenness to execute the project and extension is being sought on account of the fact that delay was beyond the control of the Petitioner which qualifies as force majeure. Let us examine the provisions of the Connectivity Regulations and Detailed Procedure to see whether the statutory framework allows extension of time as sought by the Petitioner to execute the LTA Agreement on the ground of force majeure. Regulation 12 of the Connectivity Regulations deals with application for long term access. The said regulation is extracted as under:

“12. Application for long-term access

(1) The application for grant of long-term access shall contain details such as name of the entity or entities to whom electricity is proposed to be supplied or from whom electricity is proposed to be procured along with the quantum of power and such other details as may be laid down by the Central Transmission Utility in the detailed procedure:

Provided that in the case where augmentation of transmission system is required for granting open access, if the quantum of power has not been firmed up in respect of the person to whom electricity is to be supplied or the source from which electricity is

to be procured, the applicant shall indicate the quantum of power along with name of the region(s) in which this electricity is proposed to be interchanged using the inter-State Transmission system;

Provided further that in case augmentation of transmission system is required, the applicant shall have to bear the transmission charges for the same as per these regulations, even if the source of supply or off-take is not identified;

Provided also that the construction of such augmentation of the transmission system may be taken up by the CTU or the transmission licensee in phases corresponding to the capacity which is likely to be commissioned in a given time frame after ensuring that the generating company has released the advance for the main plant packages i.e. Turbine island and steam generator island or the EPC contract in case of thermal generating station and major civil work packages or the EPC contract in case of hydro generating stations for the corresponding capacity of the phase or the phases to be commissioned, subject to a minimum of 10% of the sum of such contract values:

Provided that a generating company after firming up the beneficiaries through signing of long term Power Purchase Agreement(s) shall be required to notify the same to the nodal agency along with the copy of the PPA:

Provided also that in cases where there is any material change in location of the applicant or change by more than 100 MW in the quantum of power to be interchanged using the inter-State Transmission system or change in the region from which electricity is to be procured or to which supplied, a fresh application shall be made, which shall be considered in accordance with these regulations.

(2) The applicant shall submit any other information sought by the nodal agency including the basis for assessment of power to be interchanged using the inter-State Transmission system and power to be transmitted to or from various entities or regions to enable the nodal agency to plan the inter-State transmission system in a holistic manner.

(3) The application shall be accompanied by a bank guarantee of Rs 10,000/- (ten thousand) per MW of the total power to be transmitted. The bank guarantee shall be in favour of the nodal agency, in the manner laid down under the detailed procedure.

(4) The bank guarantee of Rs. 10,000 /- (ten thousand) per MW shall be kept valid and subsisting till the execution of the long-term access agreement, in the case when augmentation of transmission system is required, and till operationalization of long-term access when augmentation of transmission system is not required.

(5) The bank guarantee may be encashed by the nodal agency, if the application is withdrawn by the applicant or the long-term access rights are relinquished prior to the operationalization of such rights when augmentation of transmission system is not required.

(6) The aforesaid bank guarantee will stand discharged with the submission of bank guarantee required to be given by the applicant to the Central Transmission Utility during construction phase when augmentation of transmission system is required, in accordance with the provisions in the detailed procedure.

Perusal of Regulation 12 of the Connectivity Regulations reveals that application for long term access shall be submitted containing such details as provided in the Detailed Procedure issued under Regulation 27 of the Connectivity Regulations. The application shall be accompanied by a bank guarantee of Rs 10,000/- (ten thousand) per MW of the total power to be transmitted in favour of the nodal agency, in the manner laid down under the Detailed Procedure. If as a result of system studies, it is found that no further augmentation of the transmission system is required, the applicant will be required to sign an LTA Agreement and the Bank guarantee already paid will remain valid till operationalisation of the LTA. If it is found that augmentation of transmission system is required, then the applicant will be required to enter into LTA Agreement, submit a fresh Bank Guarantee for construction period calculated as per Detailed Procedure and the bank Guarantee given earlier along with the application for LTA shall stand discharged. Regulation 15 deals with execution of LTA Agreement by the LTA applicant consequent to grant of LTA. Regulation 15 provides as under:

“15. Execution of Long-term Access Agreement

The applicant shall sign an agreement for long-term access with the Central Transmission Utility in case long-term access is granted by the Central Transmission Utility, in accordance with the provision as may be made in the detailed procedure. While seeking long-term access to an inter-State Transmission licensee, other than the Central Transmission Utility, the applicant shall sign a tripartite long-term access agreement with the Central Transmission Utility and the inter-State Transmission licensee. The long-term access agreement shall contain the date of commencement of long-term access, the point of injection of power into the grid and point of drawal from the grid and the details of dedicated transmission lines, if any, required. In case augmentation of transmission system is required, the long-term access agreement shall contain

the timeline for construction of the facilities of the applicant and the transmission licensee, the bank guarantee required to be given by the applicant and other details in accordance with the detailed procedure.”

Clause 24 of the Detailed Procedure provides the timeline for entering into LTA Agreement as under:

“24. Processing of Applications

ii) Where system strengthening is involved

(ii) The nodal agency shall intimate grant of long term access on format [FORMAT LTA- 5] indicating identified system strengthening with direction to the applicant to enter into Long term access agreement, Bulk Power Transmission Agreement (BPTA) with CTU within thirty days.”

In accordance with the above provisions of the Connectivity Regulations and Detailed Procedure, the applicant who has been granted long term access is required to sign LTA Agreement with the CTU and if any other inter-State transmission licensee is involved, then the applicant is required to enter into a Tripartite LTA Agreement with CTU and the inter-State transmission licensee within a period of 30 days. Where system strengthening is involved, the applicant shall be required to submit a fresh bank guarantee and the bank guarantee submitted along with the application shall stand discharged.

18. In the Statement of Reasons to the Connectivity Regulations, the Commission has explained the purpose of bank guarantee as under:

“68. We are of the view that furnishing of Bank Guarantee is required to bring seriousness to the applications made by applicants. However, a provision has been made requiring the bank guarantee to stand discharged with the submission of bank guarantee required to be given by the applicant to the Central Transmission Utility during construction phase when augmentation of transmission system is required, in accordance with the provisions in the detailed

procedure. Furthermore, the amount of Bank Guarantee has been reduced from the originally proposed Rs. 1 lakh per MW to Rs. 10,000 per MW.”

It may be observed that in the draft regulations, the Commission had proposed a bank guarantee of Rs.1 lakh/MW which was reduced to Rs.10,000/MW. The said bank guarantee would be discharged when the applicant gives the bank guarantee required for construction phase. The purpose of prescribing bank guarantee is to bring seriousness to the applications made by the applicants. The seriousness of the applications has been sought to be ensured by making the provisions in the Connectivity Regulations and Detailed Procedure that the bank guarantee would be encashed in certain circumstances.

19. As per the Connectivity Regulations, the bank guarantee may be encashed by the nodal agency, if the application is withdrawn by the applicant or the long-term access rights are relinquished prior to the operationalization of such rights when augmentation of transmission system is not required. Further, Clause 23 (5) of the Detailed Procedure provides that bank guarantee may be encashed by the nodal agency: (i) if the application is withdrawn by the applicant; or (ii) if the long-term access rights are relinquished prior to the operationalization of such long-term access when augmentation of transmission system is not required; or (iii) If the applicant fails to sign the Long Term Access Agreement with CTU or a tripartite agreement with CTU and transmission licensee, as the case may be, and fails to furnish appropriate BG for construction phase, within stipulated time as indicated in the intimation letter;(iv) if the applicant fails to revalidate the earlier furnished BG at least 30 days prior to its expiry;

and (v) If the applicant fails to firm up beneficiaries in terms of clause 22.7, 3 years prior to intended date of Long Term Access.).Thus, not signing the LTA Agreement and not furnishing the bank guarantee for construction phase is a valid ground for cancellation of the grant of LTA and encashment of bank guarantee. The Connectivity Regulations do not provide that if the applicant is able to prove that if it is affected by circumstances beyond its control or is prevented by force majeure event which prevents it from signing the LTA Agreement, its bank guarantee should not be encashed. In other words, the applicant being affected by force majeure or reasons beyond its control cannot be a ground for non-signing of the LTA and if the applicant fails to signs the LTA within the period intimated in the LTA intimation letter, then the bank guarantee shall be encashed by the nodal agency.

20. In the present case, the Petitioner was intimated by CTU vide letter dated 23.12.2011 intimating the tentative date of grant of LTA and the transmission systems planned to be strengthened for the LTA of the Petitioner. In the intimation letter it was clearly mentioned as under:

“Note:

1. Due date for receipt of acceptance: within one week from issue of this letter.
2. In the event of non-signing of LTA Agreement within 30 days of receipt of draft from POWERGRID, the LTA would be treated as cancelled and fresh application would be required.”

21. The Petitioner vide its letter dated 28.12.2011 submitted its acceptance of the LTA and connectivity granted to the Petitioner. The Petitioner was required to sign the LTA Agreement and submit the Construction Bank Guarantee within one month. However, the Petitioner kept on requesting CTU to permit it extension of time till the

matter regarding environment clearance was decided and CTU has obliged by granting extensions from time to time. The Commission is of the view that CTU has not strictly acted in accordance with the Connectivity Regulations and the Detailed Procedure while dealing with the requests of the Petitioner and has given an impression that time for signing of LTA Agreement can be granted if the Petitioner was able to justify the difficulties. Under the Connectivity Regulations and Detailed Procedure, there is no provision for extension of time and CTU should have taken steps to cancel the LTA and encash the bank guarantee after expiry of the stipulated period for signing of LTA. We express our displeasure towards CTU for not complying with the Regulations and Procedure. The Petitioner has always the liberty to make a fresh application for grant of LTA after the problems/disputes with regard to environmental clearance was finally resolved.

22. The issue of encashment of bank guarantee in the light of the provisions of the Connectivity Regulations and the Detailed Procedure came up for consideration of the Appellate Tribunal for Electricity in Appeal No.197 of 2014 (Jayaswal NecoUrja Limited Vs Grid Corporation of India Limited and Another) and the Appellate Tribunal in its judgement dated 15.4.2015 held as under:

“32. Since the Appellant did not sign the LTAA, the Bank Guarantee was encashed. The question is whether the alleged force majeure conditions furnishes a good ground for the Appellant to contend that the Bank Guarantee ought not to have been encashed. 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. The Connectivity Regulations do not prohibit the LTA applicant from withdrawing its LTA application. The Connectivity Regulations provide that in the event the LTA applicant withdraws LTA application, it will not be required to

sign the LTAA but it will have to forgo the Bank Guarantee furnished by it along with the LTA application. The Bank Guarantee can then be encashed by the nodal agency. The purpose behind this provision is correctly stated in the impugned order and we concur with the said reasoning. The purpose behind the requirement of furnishing Bank Guarantee and the provisions for its encashment if the LTAA is not signed is to ensure commitment of the project developer to use the transmission line for which LTA has been sought. It gives assurance to Respondent No.1 that the transmission line would not be stranded after it is built. If the LTA applicants are allowed to withdraw the LTA applications without any deterrent like encashment of Bank Guarantee, then the purpose behind the scheme of grant of LTOA will be frustrated. We, therefore, find encashment of the Appellant's Bank Guarantee to be perfectly legal."

The Appellate Tribunal has held that the Connectivity Regulations do not prohibit an LTA applicant to withdraw its LTA application and in the event the LTA applicant withdraws the application, it will not be required to sign LTA Agreement but it will have to forego the bank guarantee furnished alongwith the LTA application. The Appellate Tribunal has further held that the purpose behind the requirement of furnishing bank guarantee and the provisions for its encashment if the LTA Agreement is not signed is to ensure commitment of the project developer to use the transmission line for which LTA has been sought. It has also been held that if the LTA applicants are allowed to withdraw the LTA applications without any deterrent like encashment of bank guarantee, then the purpose behind the scheme of grant of LTA would be frustrated.

23. According to learned counsel for the Petitioner, reliance placed by CTU on the decision of the Hon`ble Appellate Tribunal for Electricity in Appeal No. 197 of 2014 (Jayaswal Neco Urja Limited Vs. Power Grid Corporation of India Limited) is misplaced as the question involved in the present petition is whether CTU is entitled to appropriate the amount of bank guarantee in the absence of any proof of loss or damages suffered

and this question was never an issue before Appellate Tribunal. In our view, the case of the Petitioner is squarely covered under the judgement of the Appellate Tribunal in Jayaswal Neco case. In the present case as well as in Jayaswal Neco case, the issue involved was whether non-signing of LTA by an LTA applicant would result in encashment of bank guarantee or not. In both the cases, force majeure have been pleaded in support of the prayers for non-encashment of bank guarantee. On the basis of the provisions of Connectivity Regulations and Detailed Procedure, it was held by the Appellate Tribunal that the purpose behind the provision of bank guarantee and its encashment is to ensure commitment of the project developers to use the transmission line for which LTA has been sought. Further, the Appellate Tribunal has held that the encashment of bank guarantee serves as a deterrent and if the applicants are allowed to withdraw the applications without any deterrent, then the purpose behind grant of LTA would be defeated. Therefore, as per the Connectivity Regulations and Detailed Procedure, the moment the LTA applicant fails to sign the LTA Agreement within the stipulated time, the CTU has been enabled to cancel the LTA application and encash the bank guarantee. The statutory provisions do not require assessment of the loss or damage suffered by CTU as a pre-condition for encashment of bank guarantee. The plain language of the Connectivity Regulations and Detailed Procedure clearly establish that failure of an LTA applicant to sign the LTA Agreement within stipulated period is the sufficient basis for cancellation of the LTA and encashment of bank guarantee. Therefore, we reject the contention of the Petitioner that CTU is not entitled to encash the bank guarantee in the absence of any proof of loss or damages suffered by CTU.

24. The Petitioner has submitted that the CTU has granted extensions from time to time to the Petitioner to sign the LTA Agreement after appreciating the circumstances of the Petitioner and therefore, CTU is estopped from denying extension of time and encashing bank guarantee. CTU has submitted that it granted time to the Petitioner considering the hardship faced by the Petitioner but the extension cannot be ad infinitum which defeats the purpose of the Act and Connectivity Regulations. CTU has further submitted that there cannot be any estoppel against the statute. We are of the view that the Connectivity Regulations prescribes a time period of 30 days for signing the LTA Agreement failing which LTA should have been cancelled and bank guarantee should have been encashed. However, CTU, by taking into account the difficulties faced by the Petitioner has granted extension after discussion of the proposal in the Standing Committee of the Southern Region constituents on Connectivity and LTA. If extension of time for signing of the LTA Agreement for indefinite period is granted, it will defeat the purpose LTA which is the primary basis for transmission planning as per the Connectivity Regulations. CTU is under a statutory obligation to cancel the LTA and encash the bank guarantee if the LTA applicant fails to sign the LTA Agreement. CTU has granted extensions of time to the Petitioner to sign the LTA Agreement even though there is no provision for grant of extension. We agree with the submissions of the learned counsel for CTU that there cannot be any estoppel against the statute. Merely because CTU has granted extensions from time to time cannot be pleaded as estoppel against cancellation of LTA and encashment of bank guarantee since the Connectivity Regulations and Detailed Procedure do not allow any extension of time for signing of

LTA Agreement and necessary consequence with follow for non-compliance of the provisions of the regulations and procedure.

25. The Petitioner has sought a direction to restrain the CTU from encashing the bank guarantee. In this connection, the observations of the Appellate Tribunal in judgement dated 15.4.2015 in Appeal No.197 of 2014 with regard to restrain on encashment of bank guarantee are relevant which are extracted as under:

“34. It is well settled that restrain on encashment of Bank Guarantee can be granted only in exceptional circumstances. There is a long line of judgments of the Supreme Court stating so. The Supreme Court in Himadri Chemicals & Industries Ltd. held that such restrain can be put only if it is proved that there is a fraud in connection with the Bank Guarantee which vitiates the very foundation of the Bank Guarantee and where encashment of Bank Guarantee results in irretrievable harm or injustice to one of the parties concerned. We need not refer to the other judgments which reiterate the same principles.

35. We have not examined whether the force majeure conditions, in fact, existed or whether irretrievable harm or injustice is caused to the Appellant. **As already stated by us, the Connectivity Regulations are so clear that the encashment of the Bank Guarantee cannot be faulted. The rationale behind the encashment of the Bank Guarantee has also been examined by us and it has impressed us.** If as contended by the Appellant, the Appellant has suffered any loss or damages, in our opinion, Respondent No.1 cannot be held responsible for it.”

The above observations of the Appellate Tribunal are applicable in all fours in the present case also. The provisions of Connectivity Regulations and Detailed Procedure clearly provide that failure to sign the LTA Agreement within the stipulated period will result in encashment of bank guarantee. Since the Petitioner has failed to sign the LTA Agreement within the stipulated period, even within the extended period, we reject the prayer of the Petitioner for issuing restrain on invocation of bank guarantee.

26. During the course of proceedings of the present petition, CTU had placed on record a list of generation project developers who have not signed the LTA Agreements. CTU has issued notices to all the project developers for entering into LTA Agreements failing which their LTAs would be cancelled and bank guarantee would be forfeited. CTU has sought guidance of the Commission for dealing with those cases. We direct CTU to deal with those cases in the light of the directions in this order.

27. Petition No. 96/MP/2015 is disposed of in terms of the above.

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

sd/-
(A.S.Bakshi)
Member

sd/-
(A.K.Singhal)
Member

sd/-
(Gireesh B.Pradhan)
Chairperson