

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**I.A. No. 55 of 2018
in
Petition No. 127/MP/2016**

**Coram:
Shri P.K. Pujari, Chairperson
Shri A.K. Singhal, Member
Dr. M.K. Iyer, Member**

Date of Order: 3rd of August, 2018

In the matter of

Application under Section 92 (2) of the Electricity Act, 2003 read with Regulations 111,112 and 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking urgent directions and stay the operation of the LTA termination notice dated 18.6.2018 issued by the Respondent.

And

In the matter of

Ind Barath Energy (Utkal) Limited
Plot No. 30-A, Road No. 1, Film Nagar,
Jubilee Hills, Hyderabad-500 096, Telangana

.....PETITIONER

Vs.

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

....RESPONDENT

The following were present:

- 1) Shri Gopal Jain, Senior Advocate, IBEUL
- 2) Shri Hemant Singh, Advocate, IBEUL
- 3) Shri Nishant Kumar, Advocate, IBEUL
- 4) Mrs. J. Khatri, Advocate, IBEUL
- 5) Shri Sahil single, IBEUL
- 6) Ms. Ranjit Ramachandran, Advocate, PGCIL
- 7) Ms. Joyti Prasad, PGCIL
- 8) Shri V. Srinivas, PGCIL
- 9) Shri K.K. Jain, PGCIL

ORDER

The Petitioner, Ind Barath Energy (Utkal) Limited, has made the present Interlocutory Application (IA) with the following prayers:

“(a) Stay the operation of the LTA termination notice dated 18.6.2018 issued by the Respondent; and

(b) Pass an order quashing the LTA termination notice dated 18.6.2018.

(c) Pass such other and further order or orders as the Commission deems appropriate under the facts and circumstances of the present case”

Background of the case

2. The Petitioner has set up a 700 MW (2X350 MW) thermal power plant at Jharsuguda in the State of Odisha. The Petitioner was granted LTA for 616 MW by Power Grid Corporation of India Limited (PGCIL) in its capacity as Central Transmission Utility (CTU) in terms of Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in inter-State Transmission and related matters) Regulations, 2009 (Connectivity Regulations). The Petitioner entered into a Long Term Access Agreement (LTAA) with PGCIL on 24.2.2010 and paid a BG of Rs. 30.80 crore. The Petitioner has filed the main petition seeking direction to PGCIL to release the Bank Guarantee with respect to Long Term Open Access granted to the Petitioner.

3. The Petitioner filed Interlocutory Application No. 2/2017 in which it was prayed that the Petitioner be allowed to liquidate the outstanding transmission charges to

PGCIL in easy equal installments. The Commission in the Record of Proceedings for the hearing dated 16.5.2017 issued the following directions:

“4. The Commission directed the Petitioner to make payment of Rs.10 crore by 25.5.2017 and the balance outstanding amount including surcharge shall be liquidated in 12 monthly installments starting from July 2017 onwards. Such payments shall be made before the last day of the month.

5. Learned senior counsel submitted that the petitioner shall file an affidavit regarding opening of LC and payment plan.

6. Subject to fulfillment of the direction in para 4 of the Record of Proceedings, supply of power from the generating station of the petitioner under the PPAs executed by the petitioner shall be facilitated by all concerned.”

4. The Petitioner made a payment of Rs.4 crore only to PGCIL. The Petitioner filed IA No.88/2017 seeking modification of the directions through RoP dated 16.5.2017. Learned Senior Counsel submitted during the hearing on 30.1.2018 that the BG and LC had been encashed by PGCIL which added to the financial stress of the Petitioner. Learned Senior Counsel submitted that the Petitioner has found a new investor who had agreed to infuse equity and sought time to resolve the issue with PGCIL. The request was allowed with the directions to the Petitioner to file an affidavit to liquidate the outstanding dues before the next date of hearing. During the hearing on 26.4.2018, it was submitted on behalf of the Petitioner that the lenders had proposed to initiate proceedings before the National Company Law Tribunal (NCLT) in order to effect changes in the management of the Petitioner through another investor under the Corporate Insolvency Resolution Process (CIRP) under Insolvency and Bankruptcy Code, 2016 (IBC). Learned counsel for PGCIL submitted that an amount of Rs.125 crore was outstanding against the Petitioner towards payment of transmission charges

and related charges under the LTA and TSA. The Commission issued the following directions through the Record of Proceedings for the hearing dated 26.4.2018:

“3. After hearing the learned counsels for the Petitioner and PGCIL, the Commission directed the Petitioner to approach PFC who shall convene a meeting of all lenders and PGCIL and try to find out an amicable solution by 11.5.2018. The Petitioner was directed to place on record the outcome of the meeting and the steps taken/ proposed to be taken by it to liquidate the outstanding dues of PGCIL by 15.5.2018.”

5. PFC convened a meeting of the lenders, the Petitioner and PGCIL on 9.5.2018. However, the issue could not be resolved. PGCIL issued a notice dated 18.6.2018 for termination of the LTA of the Petitioner under clause 16.4.4 for default under clause 16.2.1 of the Transmission Service Agreement on account of non-compliance of Clause 3.6 of the BCD Procedure for not opening the Letter of Credit. The Petitioner has filed the IA No.55/2018 seeking stay on the termination notice.

6. The Petitioner filed the IA through online filing system in the night of 10.7.2018 and mentioned for listing of the IA. The Commission listed the IA for hearing on 19.7.2018. In the meantime, the Petitioner approached the High Court of Delhi in W.P. No. 7276/2018. The Hon'ble High Court in its order dated 16.7.2018 directed as under:

“1. The learned counsel appearing for the petitioner seeks to withdraw the present petition with liberty to press his relief before the CERC at a hearing which is now scheduled to be held on 19.7.2018.

2. The petition is dismissed as withdraw with the aforesaid liberty. It is expected that CERC shall take up the petition and pass appropriate orders (either accepting or rejecting the petitioner's request for an ad interim relief). The applications are also disposed of.”

The IA was heard as scheduled on 19.7.2018 and learned Senior Counsel for the Petitioner and learned counsel for PGCIL advanced their argument respectively in favour of and against the stay on the termination notice.

Submissions in IA No.55/2018

7. The Petitioner has submitted that pursuant to the directions of the Commission in the RoP dated 26.4.2018, the Petitioner approached PFC who organized a lenders' meeting with PGCIL on 9.5.2018. The Petitioner has submitted that in the said meeting, the lenders' consortium stated that considering the financial stress of the company, it is very difficult for the lenders to infuse additional funds in the project and in a most likely scenario, the project may get admitted into NCLT under IBC within the next two months. The lenders requested PGCIL to wait for three to four months when there may be a possibility of direction towards obtaining a resolution plan for the project at NCLT. In the said meeting, one of the lenders, Bank of Baroda informed that it had already initiated proceedings against the Petitioner company. The Petitioner has submitted that PGCIL issued a notice dated 18.6.2018 for termination of LTA of the Petitioner under clause 16.4.4 for default under clause 16.2.1 of the Transmission Service Agreement on account of non-compliance of Clause 3.6 of the BCD Procedure for not opening the Letter of Credit. The Petitioner has submitted that consequent to termination of the TSA, the Petitioner would be ineligible to inject power into ISTS through any form of access. The Petitioner has submitted that the Petitioner's 700 MW power plant has been rendered a mere infrastructure in the absence of any funds from the investors/banks/financial institutions and if PGCIL is allowed to terminate the LTA, then

there will be no possibility of the Petitioner meeting its liabilities. The Petitioner has further submitted that PGCIL would not stand to gain by terminating the LTA, and in the event the LTA is not terminated, or the impugned letter is withdrawn, then PGCIL may be able to recover its dues if it awaits for the insolvency petition to be admitted so that claim of PGCIL can be settled through the resolution process. The Petitioner has submitted that the balance of convenience lies in favour of the Petitioner and if the notice dated 18.6.2018 is not stayed, then serious and irreparable loss would be caused to the Petitioner.

8. During the hearing of the petition on 19.7.2018, learned senior counsel submitted that the Commission in the fact and circumstances of the case should adopt the “future prospect” test and stay the termination notice as continuation of the LTA will facilitate the resolution through CIRP under IBC and help in possible revival of the company. Learned senior counsel argued that termination of LTA would render the PPA infructuous which would adversely affect the saleability of the Petitioner’s Company through the resolution process, and would reduce the chances of PGCIL in getting its payments secured. Learned counsel further pointed out that Hon’ble Allahabad High Court in order dated 31.5.2018 in Writ Petition (C) No. 18170 of 2018 (Independent Power Producers Association of India Vs. Union of India and 5 others) has observed that action may be avoided on the basis of the Circular dated 12.2.2018 issued by Reserve Bank of India against members of the APP subject to certain conditions. Learned senior counsel submitted that the Petitioner is praying for the breathing time for a legitimate purpose, i.e. to get a resolution through CIRP under IBC. We enquired from the learned senior counsel whether the outstanding transmission charges would be at

par with the claims of the lenders in the resolution process. Learned senior counsel explained the CIRP under IBC and submitted that PGCIL can lodge its claim before the Lenders Consortium. Learned senior counsel submitted that since the lenders have sought time for three to four months in the meeting held on 9.5.2018, it would be in the interest of all parties including PGCIL to await the outcome of the resolution process for the revival of the Petitioner's company.

9. Learned counsel for PGCIL took us through the Minutes of the Meeting dated 9.5.2018 convened by PFC in compliance with the directions of the Commission and submitted that the lenders have categorically rejected to take over the liability of the Petitioner towards transmission charges. Learned counsel submitted that although PGCIL in the said meeting made a proposal to the Petitioner to make a payment of at least Rs. 50 crore immediately and give a liquidation plan for making the payment of the balance amount within next six months, the Petitioner did not agree to such a proposal. Learned counsel further submitted that 30 days' notice period given through the termination notice dated 18.6.2018 has already expired and the TSA stands terminated.

Analysis and Decision

10. The Commission in the RoP for the hearing dated 26.4.2018 directed the Petitioner to approach PFC who would convene a meeting of all lenders and PGCIL and try to find out an amicable solution. PFC convened a meeting on 9.5.2018 wherein the representatives of lenders, Petitioner and PGCIL were present. Para 1 of the Minutes of the Meeting dated 9.5.2018 which is self-explanatory is extracted as under:

“1. **Outstanding transmission charges with PGCIL:** In line with the Record of Proceedings (RoP) issued by CERC (Enclosed at Annexure-A), lenders deliberated with PGCIL regarding the outstanding charges. PGCIL informed the lenders consortium that PGCIL had executed a Long Term Open Access (LTOA) agreement with IBEUL and as per the terms of LTOA, IBEUL is liable to bear the ‘Point of Connection’ (PoC) charges from the date of operationalization of LTOA. PGCIL informed the lenders of consortium that the current outstanding as on date is around Rs. 196 cr (Without considering the Bank Guarantee invoked for Rs. 30.8 cr) (and around Rs. 7 to 8 cr are further accumulating each month).

Lenders asked IBEUL about the company’s plan for paying/settling the outstanding dues of PGCIL. IBEUL informed that they are not in position to infuse any funds and requested PGCIL to not take any coercive action in this regard. PGCIL informed that during proceedings in CERC, IBEUL had committed to open LC and settle outstanding dues of POWERGRID, however, despite CERC directions, no payment has been made so far. Therefore, IBEUL should first make at least 50% payment, then POWERGRID shall consider the request of not taking coercive action. Further, POWERGRID informed that if IBEUL relinquishes the LTA which has been operationalized, it shall be liable to pay relinquishment charges from the date of relinquishment. Consortium also deliberated on the issue and informed PGCIL that, the current promoter has totally given up on the project and Lenders have created a corpus for paying even for services of the security agencies at the site. At this juncture, it is very difficult for lenders to infuse additional funds in the project and most likely case, the project may get admitted into National Company Law Tribunal (NCLT) under IBC in next couple of months. Considering this scenario, the lenders have requested PGCIL to wait for another 3 to 4 months when there stated that IBEUK should make upfront payment of at least about Rs. 50 crore immediately and give PGCIL a liquidation plan for making payment of balance amount within next six months, failing which POWERGRID shall be constrained to take coercive action.”

11. It is evident from the above minutes that the Lenders’ Consortium after deliberation of the issue of outstanding transmission charges against the Petitioner informed PGCIL that the current promoter has totally given up on the project and Lenders have created a corpus for paying even for the services of the security agencies at the site and at this stage, it is very difficult for the lenders to infuse additional funds in the project. Lenders have further stated that in the most likely case, the project may get admitted into NCLT under IBC in the next couple of months and requested PGCIL to wait for three to four months when there is a possibility of obtaining a resolution plan from NCLT. PGCIL has kept a condition that the Petitioner should pay at least Rs.50

crore upfront and a payment plan to liquidate the balance amount over next six months. Learned senior counsel on instruction from the representative of the Petitioner submitted that the Petitioner is not in a financial position to give any commitment with regard to part or full payment of the outstanding transmission charges.

12. In our view, in the absence of the commitment from the lenders and in the light of categorical submissions of the Petitioner that it is not in a position to either make part payment or even give a commitment for payment of the transmission charges, the interest of PGCIL cannot be secured. Learned counsel for PGCIL also submitted that granting further time will increase the liability of the Petitioner on account of transmission charges and correspondingly, outstanding unrecovered amount in the books of PGCIL will increase. Even if time as prayed for in the IA is granted, PGCIL is not certain that the outstanding transmission charges would be treated at par with the money of the lenders in the resolution process and thereby secure the interest of PGCIL.

13. In view of the above and since, the TSA permits that for default of payment of transmission charges and non-opening of LC, TSA can be terminated with one month's prior notice, the Commission does not consider it appropriate to interfere with the process as it will adversely affect the commercial interests of PGCIL and other inter-State transmission licensees, if any, in terms of the LTAA and TSA, without any security for the outstanding transmission charges. If PGCIL is unable to recover its outstanding charges, it is at liberty to take any action as permissible under law to secure its interest. If the LTA is terminated, the Petitioner or the new promoter on the basis of the outcome

of the resolution process, can apply for LTA afresh in accordance with the applicable regulations after clearing the outstanding transmission charges. Therefore, the balance of convenience is not in favour of the Petitioner nor any irreparable losses will be suffered by the Petitioner since the Petitioner does not have the right to use the LTA without paying the transmission charges. Accordingly, we reject the prayers of the Petitioner in the I.A.

14. I.A No. 55 of 2018 in Petition No. 127/MP/2016 is disposed of in terms of above.

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

sd/-
(A.K. Singhal)
Member

sd/-
(P.K. Pujari)
Chairperson