

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 242/MP/2017
With IA No.80/2017**

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

Date of Order : 3rd of December, 2018

In the matter of

Petition for declaring the letter of invocation of Bank Guarantee dated 23.10.2017 and thereafter the encashment of the Bank Guarantee dated 23.2.2010 of an amount of Rs. 56.10 crore issued by Axis Bank Ltd. as illegal and for return of the said encashment amount along with damages.

**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
Saudamini, Sector – 29,
Gurgaon – 122001, Haryana

.....**Respondent**

Following were present:

Shri Matrugupta Mishra, Advocate, AMPPGPL
Shri Nishant Kumar, Advocate, AMPPGPL
Ms. Ankita Bafna, Advocate, AMPPGPL
Ms. Suparna Srivastava, Advocate, PGCIL
Shri Tushar Mathur, Advocate, PGCIL
Ms. Jyoti Prasad, PGCIL
Shri Praveen Kumar, AMPPGPL

ORDER

The Petitioner, Aryan MP Power Generation Pvt. Ltd, has filed the present petition under Section 79 (1) (f) of the Electricity Act, 2003 seeking declaration that the

letter of invocation of Bank Guarantee (BG) dated 23.10.2017 issued by PGCIL and thereafter the encashment of the BG dated 23.2.2010 for Rs. 56.10 crore is illegal and for direction to return the encashed BG to the Petitioner along with damage.

Background of the case:

2. The Petitioner who was executing a 1200 MW (4x300 MW) capacity of 1200 MW (4x300 MW) at Amelia, District Siddhi in the State of Madhya Pradesh, was granted LTA for 1200 MW. A BPTA dated 24.2.2010 was signed between the Petitioner and PGCIL. As per the BPTA, the evacuation system is to be executed by the Petitioner and the common transmission system was to be executed by PGCIL. For various factors, the Petitioner abandoned the project and requested PGCIL not to construct the transmission lines for its project. The transmission line with the scope of PGCIL declared COD on 1.4.2014. The provisional transmission charges for the said transmission lines were determined vide order dated 18.12.2013 in Petition No. 289/TT/2013. The Petitioner filed a Review Petition No. 5/RP/2014 which was disposed of vide order dated 25.3.2014. The Petitioner also filed a substantive Petition (Petition No. 69/MP/2014) for relinquishment of the LTA. The main prayers in the said petition were 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.”

3. The Commission after considering the submissions of the Petitioner and PGCIL, in its order dated 31.10.2017 framed the following issues and replied as under:

(a) 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?

(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?.

4. On the first issue, the Commission held as under:

“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 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.”

5. With regard to second issue, the Commission observed as under:

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

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 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.”

6. With regard to third issue, the Commission held as under:

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

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.”

7. The Petitioner filed review petition against the said order dated 31.10.2017 on the ground that the Commission did not adjudicate the prayer of the Petitioner for direction to PGCIL to return its bank guarantee. The Commission in its order dated 23.7.2018 rejected the Review Petition. Relevant portion the said order dated 23.7.2018 is extracted as under:

“7. One of the prayer of the Review Petitioner in Petition No.69/MP/2014 was to direct PGCIL to return the Bank Guarantee for an amount of Rs. 56.10 crore issued by Axis Bank Limited on behalf of the Petitioner. Before issue of the impugned order, it came to the notice of the Commission through the writ petition and orders passed by the Hon“ble High Court on the writ petition that PGCIL invoked the BG on 25.10.2017 and thereafter, the Review Petitioner withdrew the writ petition which was disposed of as withdrawn....

Thus, the Review Petitioner did not pursue the writ petition before the High Court after encashment of bank guarantee and sought liberty to file appropriate proceedings for which liberty was granted by the High Court. After the order of the High Court came to the notice of the Commission, the Commission considered the fact of encashment of BG and in the light of the said development, the prayer of the Review Petitioner to direct PGCIL not to encash the BG no more survived and accordingly, the Commission decided that no direction was required to be issued with regard to the Bank Guarantee. This was a conscious decision of the Commission and is not an error apparent on the face of the record. Therefore, there is no ground of review for review of the impugned order.”

8. The Petitioner has filed the present petition with the following prayers:

“(a) Declare the letter of invocation of Bank Guarantee dated 23.10.2017 and thereafter the encashment of the subject Bank Guarantee dated 23.2.2010 of an amount of Rs. 56.1 crore issued by the Axis Bank Ltd., as illegal;

(b) Direct PGCIL to return the amount encashed under 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 with interest.

(c) Direct PGCIL to pay damages of Rs. 10,00,00,000 to the Petitioner towards the business loss, loss of goodwill, reputation, bankability of the assets and creditworthiness due to the illegal invocation and encashment of Bank Guarantee by PGCIL.”

Submission of the Petitioner:

9. The Petitioner has mainly submitted as under:

(a) The Petitioner filed Petition No. 69/MP/2014 seeking adjudication of the issue of its failure to perform its obligation under the BPTA due to force majeure events. Before the issue of the order for adjudication of the dispute, PGCIL encashed the BG. PGCIL could not have pre-empted on its own and decided the issue in its own favour and should not have consequently invoked the subject BG illegally and encashed Rs. 56.01 crore.

(b) PGCIL had issued the letter dated 23.10.2017 to the Bank for encashment of the BG with an intention to overreach the outcome of the order which was reserved at the time of invocation of BG. Such conduct of PGCIL is nothing but tantamount of an abuse of the process of law and also goes to the root of questioning of judicial propriety of the regulatory body.

(c) The issue of failure of the Petitioner to perform under BPTA now has been settled by the Commission in its order dated 31.10.2017 in favour of the Petitioner. In such eventuality, the encashment of BG which was invoked when the such issue was pending adjudication before the Commission should be declared illegal post-facto.

(d) The issue of relinquishment of LTA is pending adjudication in the Petition No. 92/MP/2015 to which PGCIL is a party, PGCIL has arbitrarily with malafide intention invoked the BG without any cause of action and also in violation of the ROP dated 21.7.2015 in Petition No. 92/MP/2015 wherein the Commission directed all the concerned LTA applicants to keep their BG valid till the decision with regard to relinquishment charges is taken by the Commission .

(e) The Commission in its order dated 31.10.2017 in Petition No. 69/MP/2017 has not made an observation or finding on the relief sought qua return of subject BG. In such circumstances, encashment of BG has vitiated or pre-empted the outcome of the Petition No. 69/MP/2017, wherein return of BG is one of the relief sought.

(f) The principle of equity demands that the parties to a pending proceeding should not resort to any act or omission which would directly or indirectly affect the rights and interest of the other party, which is subject matter in the pending proceedings. Such principle is emanating out of the public policy that unless the parties continue the status quo discipline, any kind of interference would amount to interfering with the judicial process by pre-empting or nullifying the outcome of the court order.

10. Notice was issued to the respondent, Power Grid Corporation of India Limited (PGCIL). Reply to the Petition has been filed by PGCIL and the Petitioner has filed rejoinder thereof.

11. PGCIL in its reply dated 14.3.2018 has submitted as under:

(a) At the time of making the LTA Application, the Petitioner was well aware and was intimated that based on its request of LTA, PGCIL would evolve an optimal transmission system and would make arrangements for implementing the same after due confirmation from the Petitioner, the Petitioner would be required to enter into contractual arrangement for paying the necessary transmission charges.

(b) After receipt of the application for grant of LTA, PGCIL vide its letter dated 4.7.2008 informed the Petitioner that there was a need for augmentation/strengthening of transmission network, for which extensive systematic studies were required to be carried out. Accordingly, the Petitioner paid the charges in this regard.

(c) The Petitioner (along with other IPPs) was granted LTA vide letter dated 29.7.2009 for 1200 MW with 900 MW and 300 MW to the identified beneficiaries in the Western Region and Northern Region respectively. In the said letter, the Petitioner was further informed to provide adequate security with PGCIL in the form of bank guarantee which would be liable to be encashed in the event the Petitioner abandoned the project or undue delay of project.

(d) The transmission system identified for grant of LTA to the Petitioner's project inter-alia required development of High Capacity Power Transmission Corridor (HCPTC-IV). The Commission while granting the regulatory approval vide its order dated 31.5.2010 in Petition No. 233/2009 in which the Petitioner's project was also considered, emphasized the mandate under Tariff Policy which required PGCIL as CTU to undertake network expansion after identifying the requirements in consonance with the National Electricity Plan and in consultation with the stakeholders. Therefore, based on the progress of their respective projects as submitted by the generators on affidavit to PGCIL, the Commission examined the PGCIL's proposal for construction of various transmission corridors along with their tentative cost estimates and approved implementation of the same. Therefore, as per express direction from the Commission, PGCIL proceeded to

implement the transmission corridors for evacuation of power from various projects including the Petitioner's project. Having constructed the corridors as per the regulatory mandate to meet the power evacuation demands of the IPPs, PGCIL was necessarily to be paid transmission charges in accordance with the applicable regulations. Accordingly, the availability of adequate payment security mechanism with PGCIL became imperative.

(e) As per clause 2 of the BPTA, long term transmission customer is required to share and pay the transmission charges of the transmission system. The above clause set out the rights and obligations of both the Petitioner and PGCIL qua the use of open access and corresponding responsibility to pay the transmission charges.

(f) Clause 9 of the BPTA provides that if any of the parties to the BPTA failed to carry out the terms of the BPTA on account of any of the specified force majeure events, then they were not liable for any claim for loss or damage arising out of such failure. The only 'terms' of the BPTA related to providing of open access by PGCIL for the agreed quantum from the scheduled date of open access in the manner mentioned in the BPTA, and payment of transmission charges by the Petitioner for availing such access in the manner provided under the regulations from the scheduled date of commissioning of the generation project irrespective of its actual date of commissioning. Therefore, the inter-se rights and obligations under the BPTA were with respect to providing of open access and payment of transmission charges from the agreed date and open access had been made

available, irrespective that power from the transmission system was actually being evacuated or not.

(g) There was no inter-se obligation agreed to or recorded in the BPTA as regards the Petitioner`s implementation of its generation project so that the BPTA could not be said stated to be frustrated on that account. The furnished BG of Rs. 56.01 crore which was extended from time to time by the Petitioner was valid upto 31.3.2018. In terms of the BG, the Petitioner agreed that in the event there was any failure /delay in constructing the generating station or that it abandoned or exited the project, PGCIL had the right to collect the transmission charges and/or resultant damages by taking recourse to the BG without any reference to the Petitioner.

(h) The Petitioner filed Petition No. 69/MP/2014 in which the Petitioner inter-alia stated that a comprehensive transmission corridor, namely HCTC IV had been planned for evacuation of power from the generation projects coming up in Madhya Pradesh and Chhattisgarh in the Western Region in the which the project of the Petitioner was also included. The Petitioner in the said petition submitted that various generation projects were already delayed considerably from their original commissioning schedule and the Petitioner requested for relinquishment of 1122 MW LTA from its generation project without any liability.

(i) Since, the Petitioner did not make any further progress with its project implementation, in the 8th JCC meeting held on 9.1.2015 it decided to relinquish the LTA. In the 9th JCC meeting held on 25.5.2017, the Petitioner informed that its project had been abandoned and a Petition for cancellation of LTA had been

filed before this Commission. Since, from the 10th JCC meeting onwards, the Petitioner stopped attending the meeting and 12th JCC meeting onwards, there was no coordination with the Petitioner on account of its abandonment/relinquishment, PGCIL vide its letter dated 23.10.2017 invoked the BG in accordance with the provisions of the BPTA.

(j) As the terms of the BG furnished by the Petitioner itself indicated, its encashment could be made notwithstanding any difference between the Petitioner and PGCIL or any dispute pending between them. In support of its contention, PGCIL has relied upon the Hon`ble Supreme Court judgment in Ansal Engineering Projects Ltd. Vs Tehri Hydro Development Corporation Ltd. and Another [(1996) 5SCC 450].

(k) The Hon`ble Supreme Court in the case of Himadri Chemicals Industries Ltd. Vs. Coal Tar Refinery Company [(2007) 8SCC 110] has laid down the principle that on the enforcement of BG or LC, the bank giving such a guarantee is bound to honour it as per its terms irrespective any dispute raised by its customer. The existence of any disputes between the parties is not a ground to restrain the enforcement of BG of LC.

(l) The settled legal position is that the ongoing dispute between the parties has no bearing on invocation of BG. Therefore, the Petitioner`s contention that PGCIL could not have encashed the BG during the pendency of Petition No. 69/MP/2014 is completely misplaced and untenable.

(m) Even otherwise, the Commission in its order dated 31.10.2017 in Petition No. 69/MP/2014 has held that the force majeure provisions under the BPTA cannot be available for relinquishing the LTA and a generator cannot be discharged from its liability to pay transmission charges for the common transmission system covered under the BPTA. The Commission has recorded a categorical finding in Para 19 of the order dated 31.10.2017 in Petition No. 69/MP/2014 that the investment approval for the transmission project 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 and 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. In view of the categorical finding of the Commission, there cannot be said to exist any illegality in invocation of BG by PGCIL. In the garb of alleged illegal invocation of BG, the Petitioner cannot be permitted to re-agitate the issues that already stand adjudicated vide order dated 31.10.2017 in Petition No. 69/MP/2014.

12. The Petitioner in its rejoinder dated 19.4.2018 has reiterated the submissions made in the Petition.

Analysis and Decision:

13. In the light of the submissions of the parties, the following issues arise for our consideration:

(a) Whether invocation of the BG by PGCIL during the pendency of the Petition No. 69/MP/2014 by PGCIL is illegal and arbitrary.

(b) Whether the Petitioner is entitled to refund of the BG in the facts of the case and in the light of the order of the Commission in Petition No. 69/MP/2014.

Issue No. 1: Whether invocation of the BG by PGCIL during the pendency of the Petition No. 69/MP/2014 by PGCIL is illegal and arbitrary?

14. Petition No. 69/MP/2014 was heard and order was reserved. There was no stay on the encashment of BG. Therefore, PGCIL was at liberty to encash the BG at any time in terms of the provisions of the BPTA. Clause 6 of the BPTA Provides 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. The developer shall furnish a Bank guarantee from a nationalized bank for an amount which shall be equivalent to Rs. 5 (five) Lakhs/MW to compensate such damages. The bank guarantee format is enclosed as Annexure-Y. The details and categories of bank would be in accordance with clause 2 (h) above. The Bank guarantee would be furnished in favour of POWERGRID in accordance with the time frame agreed during the meeting held at CEA on 1.2.2010.

(b) This bank guarantee would be initially valid for a period upto six months after the expected date of commissioning schedule of generating unit(s) mentioned at Annexure-1 (however, for existing commissioned units, the validity shall be the same as applicable to the earliest validity applicable to the generator in the group mentioned at Annexure-1) The bank guarantee would be encashed by POWERGRID in case of adverse progress of individual generating unit(s) assessed during coordination meeting as per para 7 above. However, the validity should be extended by concerned Long Term transmission customer(s) as per the requirement to be indicated during co-ordination meeting.”

15. In terms of the above provisions in the BPTA, PGCIL issued a letter dated 23.10.2017 to the Petitioner for invocation of BG on account of adverse progress of the generating station of the Petitioner. The said letter is extracted as under:

“Ref: CC/Comml/CBG/Axis Bank/AMPGPL

Dated 23.10.2017

To,
Branch Manager,
Axis Bank. Ltd.
Credit Management Centre, Corporate Banking, New Delhi
Ground, 2nd and 13th Floor, Satesman House,
148 Barakhamba Road, New Delhi-110 001

Sub: Claim against b Bank Guarantee issued by Axis Bank Ltd. in favour of M/s Power Grid Corporation of India Limited.

Dear Sir,

1.0 This has reference to Bank Guarantee issued by your bank in favour of M/s Power Grid Corporation of India Limited(POWVERGRID) as per the following details:

BG No.	Amount (in Rs. crore)	Date of issue	Expiry Date	Issued on behalf of
00070100004994	56.1	23-Feb-2010	31-March-2018	M/s Aryan M.P. Power Generation Pvt. Ltd.

2.0 M/s Aryan M.P.Power Generation Pvt. Ltd. (AMPGPL)- the Developer, have signed a Bulk Power Transmission Agreement (BPTA) with POWERGRID on 24.2.2010 for 1122 MW Long Term Access (LTA) for its generation project and submitted above stated construction bank guarantee as per the Clause 6.0 of the said Agreement, towards collection of transmission charges and/or damages, in case developer fails to construct the generating station/dedicated transmission system or make an exist or abandoned its project.

3.0 M/s AMPGPL has failed to construct its generation units and dedicated line and has abandoned the above project as recorded in the minutes of Joint Coordination Committee Meetings conducted by CTU with generation developers.

4.0 As per clause 6.0 of the BPT Agreement dated 24.02.2010 signed by M/s AMPGPL.... The bank guarantee would be encashed by POWERGRID in case of adverse progress of individual generating unit(s) assessed during coordination meeting....

5. Accordingly, we are lodging our formal claim for encashment of Bank Guarantee mentioned at para 1.0 above and deputing our officer Shri Kamal Kumar Jain, Chief Manager (Commercial), Power Grid Corporation of India Ltd., Gurgaon for encashment of above mentioned Bank Guarantee. He is fully authorized to complete all necessary formalities and procedures on behalf of POWERGRID and collect proceeds against the encashment of above mentioned bank guarantee. Signature of Shri Kamal Kumar Jain is attested as below.

6.0 You are, therefore, requested to remit the full guaranteed sum of Rs. 56,10,00,000/- (Rupees Fifty Six Crore and Ten Lakh only) towards proceeds of security in the form of demand draft in favour of "Power Grid Corporation of India Ltd.", payable at Gurgaon/New Delhi or wire transfer into POWERGRID Account in Axis Bank in Gurgaon as per the details as below:

Beneficiary Name: Power Grid Corporation of India Ltd.
Current Account No. 911020062303780
Axis Bank Ltd., DLF Gurgaon Branch
IFSC Code:UTIB0000131

Please make arrangement to immediately reemit proceeds against BG to POWERGRID as above.”

It is evident from the above letter that BG has been encashed as per the provisions of the clause 6 of the BPTA on account of the adverse progress of the generating station.

16. The settled legal position is that the BG is an independent contract between the bank and beneficiary and is not dependent on the dispute between the parties, in case of the breach. In this context, the judgment of the Hon`ble Supreme Court in the case of Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd & Anr [(1996) 5 SCC 450] is relevant:

“4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was and the beneficiary. Unless fraud or special equity exists, is pleaded and prime facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the Works undertaken in furtherance thereof. The Bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of the bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power cannot interfere with enforcement of bank guarantee/ letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief...”

17. The only exception to encashment of BG is where very foundation of BG is violated by fraud and when it would result in irretrievable harm or injustice to one of the parties concerned. In this connection, the Hon`ble Supreme Court in the case of U.P. State Sugar Corporation vs Sumac International Limited [AIR 1997 SC 1644 (1997) 1 SCC 568] has held as under:

“12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.”

18. Since, there is neither any fraud nor special equity in favour of the Petitioner which would require interference in the encashment of BG. The Petitioner has unconditionally agreed in the BPTA that in case of adverse progress, the BG shall be encashed by PGCIL. The Commission in the order dated 31.10.2017 in Petition No. 69/MP/2014 has come to the conclusion that the Petitioner cannot be granted any relief from its liability for payment of transmission charges under clause 9 of the BPTA. Since, PGCIL has encashed the BG for adverse progress of the generating station, we do not find any infirmity or illegality in the action of PGCIL for invocation of BG.

19. The Petitioner has submitted that PGCIL has invoked the BG in violation of the Commission`s directions dated 21.7.2015 in Petition No. 92/MP/2015 wherein the Commission directed all concerned LTA applicants to keep their BGs alive till the decision about relinquishment charges are taken by the Commission. Relevant para of the Record of Proceedings for the hearing dated 21.7.2015 in Petition No. 92/MP/2015 is extracted as under:

“ 8. After hearing the learned senior counsels and counsels for the parties, the Commission suggested that a Committee shall be constituted to go into all aspects of the stranded capacity and relinquishment charges with representatives of CTU, CEA, POSOCO, Association of Power Producers and staff of the Commission. The Commission directed the petitioner and respondents to submit their suggestions for deciding the terms of reference for the Committee within one week of issue of RoP. Any suggestion received after 31.7.2015 shall not be considered.

9. The Commission directed that all the concerned LTA applicants shall keep their Bank Guarantee valid till the decision with regard to relinquishment charges is taken by the Commission.”

As per the above directions of the Commission in the ROP dated 21.7.2015, all concerned LTA applicants were required to keep their BGs valid till the decision with regard to relinquishment charges is taken by the Commission in Petition No. 92/MP/2015. The Petitioner is not a party to Petition No. 92/MP/2015 and therefore, the interim direction in the said petition is not applicable in case of the Petitioner. In our view, PGCIL has not violated our directions in the ROP dated 21.7.2015 while invoking the BG.

Issue No.2: Whether the Petitioner is entitled to refund of the BG in the facts of the case and in the light of the order of the Commission.

20. The Petitioner in the second prayer has prayed to direct PGCIL to return the encashed BG. The Petitioner has contended that despite observing the latest

development of invocation and encashment of BG by PGCIL in the order dated 31.10.2017, the Commission did not issue any direction with regard to return of BG. It is pertinent to mention that while finalizing the impugned order, it came to the notice of the Commission through the Writ Petition (C) No. 9386 of 2017 filed by the Petitioner and order passed by the Hon`ble High Court in the said Writ Petition that PGCIL invoked the BG on 23.10.2017 and thereafter the Petitioner withdrew the Writ Petition. Accordingly, the Commission considered the fact of encashment of BG and observed that in the light of the said development, the prayers of the Petitioner to direct PGCIL not to encash the BG no more survived and accordingly, the Commission decided that no direction was required to be issued with regard to return of BG. It is noted that BG given by the Petitioner indicates that the BG can be encashed notwithstanding any difference between the Petitioner and the Respondent or any dispute pending between them. Therefore, pendency of the Petition No. 69/MP/2014 cannot come in the way of PGCIL to encash the BG in the absence of any stay on such encashment.

21. In the third prayer, the Petitioner has prayed to direct PGCIL to pay damage to the Petitioner due to illegal invocation of BG. In view of our findings that there was no infirmity or illegality in the action of PGCIL to encash the BG, this prayer is not sustainable.

22. Since, the Petitioner has relinquished the LTA granted and the liability of the Petitioner for payment of relinquishment charges shall be decided in the light of the decision in Petition No. 92/MP/2015, we are of the view that there is no requirement to direct PGCIL to refund the encashed BG at this stage. However, if any amount becomes due and payable after adjustment of the relinquishment charges, the same

shall be refunded by PGCIL to the Petitioner with 9% interest from the date of encashment till the date of payment.

23. In the IA No. 80/2017, the Petitioner has prayed to pass an ex-parte ad-interim order directing PGCIL to deposit the invoked amount to the Petitioner or in the alternative deposit the same with the Commission. Since we are disposing of the Petition and have held that there is no infirmity or illegality in the encashment of the BG during the pendency of the Petition No. 69/MP/2014, the prayer for refunding the BG amount to the Petitioner is rejected. In view of our decision in the preceding paragraph that the Petitioner shall be refunded the balance amount of BG after adjusting the relinquishment charges, the prayer of the Petitioner to deposit the BG amount with the Commission is also rejected.

24. The Petition No. 242/MP/2017 along with IA. No.80/2017 is disposed of in terms of the above.

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

sd/-
(P.K.Pujari)
Chairperson