

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.122/MP/2017

Coram:

Shri P.K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I.S. Jha, Member

Date of Order: 30.8.2019

In the matter of

Petition for relinquishment of 250 MW of Long Term Access Agreement dated 14.12.2011 under Regulation 18 read with Regulation 32 of Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access and Medium Term Open Access in inter-State Transmission system and related matters) Regulations, 2009 (Connectivity Regulations) of the identified transmission system by the Essar Power Gujarat Limited (4X660 Phase-II) Thermal Power Plant at District Jamnagar in the State of Gujarat.

And

In the matter of

ESSAR Power Gujarat Limited
Essar House, 11 K K Marg,
Mahalaxmi, Mumbai – 400034

.....Petitioner

Vs.

1. Power Grid Corporation of India Limited,
“Saudamini”, Plot No. 2, Sector – 29,
Gurgaon – 122 001

2. Central Electricity Authority
Sewa Bhawan,
Sector-1, R.K. Puram,
NewDelhi-110066

3. Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan
Race Course Circle
Vadodara-390 007

.....Respondents



Parties Present:

For Petitioner:

Shri Prashanto Sen Gupta, Sr. Advocate, EPGL
Shri Sumant Nayak, Advocate EPGL
Ms. Kritika Angirish, Advocate, EPGL
Shri Aslam Ahmed, Advocate, EPGL
Shri Kaustubh Singh, Advocate, EPGL
Ms. Shruti Verma, Advocate, EPGL

For Respondent:

Shri M.G.Ramchandra, Advocate, GUVNL
Ms. Ranjitha Ramachandran, Advocate, GUVNL
Ms. Suparna Srivastava, Advocate, PGCIL
Ms. Jyoti Prasad, PGCIL

ORDER

The Petitioner, Essar Power Gujarat Limited (EPGL), who is operating a thermal power plant at District Jamnagar in the State of Gujarat, has filed the present petition seeking relinquishment of 250 MW Long Term Access (LTA) rights under LTA Agreement dated 14.12.2011 with PGCIL (Respondent No. 1) on the grounds of stated impracticability and impossibility to utilize the transmission system identified under the LTA Agreement due to long delay in grant of Environment Clearance (EC), delay in getting pollution clearances, issues related to financial closure and viability of present tariff.

Background

2. The Petitioner has a Thermal Power Plant having capacity of 1200 MW at District Devbhumi Dwarka in Gujarat. The Petitioner had envisaged expansion of the installed capacity of the project to 4440 MW comprising of development in three phases. The Generation Project was envisaged with Captive Jetty at Salaya and a dedicated corridor of about 20 km for Coal conveyor and Sea Water pipeline for the



purpose of cooling the Generation Project, which required environment clearance from Ministry of Environment and Forest (MOEF).

3. Phase I has installed capacity of 1200 MW (2X600) out of which 1000 MW was already contracted to GUVNL as per PPA-1 and 200 MW was estimated as auxiliary consumption. Phase I has been commissioned since June 2012. Phase II has proposed installed capacity of 2640 MW out of which 800 MW of the installed capacity has been contracted with GUVNL under PPA-II. Phase III has proposed capacity of 600 MW (4x150 MW), however, there was no power tie-up for Phase III. Phase II was to be commissioned by March 2014. However, construction for both Phase II and III has not commenced till date.

4. Out of the envisaged project capacity of 4440 MW, 1000 MW was already contracted under PPA-I and 200 MW was estimated as auxiliary consumption. Therefore, for the remaining capacity of 3240 MW under Phase II and Phase III, the Petitioner requested PGCIL to carry out evacuation study vide letter dated 2.7.2009. Subsequently, the Petitioner vide letter dated 18.7.2009 intimated the proposed revision of the per unit capacity of the project from 660 MW to 800 MW whereby generation capacity in the Petitioners' Salaya Power Generation Project was slated to be enhanced from 4440 MW to 5000 MW and accordingly, PGCIL was requested to carry out evacuation study of 3800 MW in the transmission system.

5. On 9.2.2010, the Petitioner applied to PGCIL for grant of connectivity and LTA for 3040 MW in Western Region in line with Commission's Order No. L-1/(3)/2009-CERC dated 31.12.2009. In the 12th Meeting of WR Constituents held on 8.7.2010, connectivity for 2240 MW was approved, considering that 800 MW capacity was contracted with GUVNL in terms of its PPA-II with the Petitioner. The PGCIL also

intimated the Petitioner to apply afresh for LTA since there was a material change in quantum of LTA considering the PPA-II for 800 MW contracted capacity with GUVNL. The PGCIL vide its letter dated 14.9.2010 conveyed the approval for connectivity to the Petitioner for 2240 MW effective from 1.6.2012 at 400 kV Bachau Sub-station through 400 kV Essar TPS-Bachau D/C (Triple) line subject to signing of requisite Connectivity Agreement and fulfillment of other specified conditions. Pursuant to the connectivity approval, the Petitioner entered into a Transmission Agreement dated 3.1.2011 with PGCIL which provided for grant of connectivity for 2240 MW through the connectivity line namely, 400 kV Essar (Salaya) TPS-Bachau D/c (Triple line). It was decided that the implementation of the connectivity line was to be taken up by the Petitioner and the dedicated line comprised therein was to be constructed and terminated at ISTS by the Petitioner. However, when the Petitioner entered into a Transmission Agreement with PGCIL on 3.1.2011, the responsibility of constructing the 400 kV D/C (triple) line from generation switchyard to Bachau was undertaken by PGCIL, reason thereof being explicitly mentioned and submitted before the Commission by way of a report in Petition No. 187/MP/2015.

6. The Petitioner applied to PGCIL for grant of long term access in ISTS for 250 MW vide letter dated 3.3.2011. In the 14th Meeting of WR Constituents regarding Connectivity/Open Access Applications held on 13.5.2011, the application of the Petitioner for grant of LTA for 250 MW with target beneficiaries in Southern Region was considered with necessary system strengthening in SR-WR corridor with effect from March, 2014 subject to signing of BPTA and fulfilment of other conditions mentioned therein. PGCIL vide its letter dated 5.8.2011 gave an LTA intimation for 250 MW to Southern Region effective from March, 2014 or commissioning of identified system strengthening scheme whichever is later. In the

said intimation, it was indicated that the Petitioner would provide a bank guarantee of ₹112 cr. for connectivity @ ₹ 5 lakh for 2240 MW for development of the transmission line for connectivity. Pursuant to grant of LTÂ, the Petitioner signed an LTA Agreement dated 14.12.2011 with PGCIL for 250 MW valid for a period of 25 years. As per the LTA dated 14.12.2011, the target date for completion of project was scheduled as March, 2014.

7. However, vide letter dated 17.8.2012 the Petitioner intimated PGCIL that forest clearance for 4.6 hectares land for existing 2X600 MW Phase-I of EPGL near Salaya Jetty is pending for approval from MOEF as the same is subject to pending confirmation from State Board of Wild Life (SBWL) to the effect that the stated project land is not in eco-sensitive zone (ESZ). The Petitioner has submitted that the ESZ demarcation has since then been given by SBWL and MoEF is reviewing the same for final notification. Further, the Phase II expansion (2 X 660 MW) EC is pending due to linking of obtaining the Phase I EC as a pre-condition for grant of EC of Phase II and hence, final MoEF clearance was stated to be expected tentatively by end of December 2013. Accordingly, the Petitioner vide letter dated 17.8.2012 requested PGCIL to extend the connectivity and the LTA request date to March, 2016 instead of March, 2014. Subsequently, vide letter dated 6.7.2013 the Petitioner again intimated PGCIL about the delay in obtaining forest clearance asserting that the delay in commissioning of the project is on account of force majeure events beyond the control of the Petitioner as provided under Article 8.0 of the Transmission Agreement and accordingly, requested that the transmission line may be kept in abeyance till the time the project is actually able to start. However, PGCIL vide its letter dated 26.7.2013 replied that the construction of the transmission line had been taken up in line with the Connectivity Agreement and



once the construction work is started, it is not possible to put the work in abeyance and the referred force majeure events are not attracted by the Clause 8 of the Connectivity Agreement and requested the Petitioner to sign the TSA.

8. While PGCIL has declared the commercial operation of Essar (Salaya)-TPS Bachau D/C (Triple line) on 2.4.2016, the Petitioner has not implemented the generation project till date. In this context, the Petitioner had earlier filed Petition No. 187/MP/2015 before the Commission where the Petitioner had raised objections mainly premised on the ground that PGCIL has constructed the transmission lines in clear disregard to its statutory obligations under clauses (b) (iv) and (c) of sub-Section (2) of Section 38 of the Act and in spite of the prior intimation regarding prevailing force majeure conditions faced by the Petitioner. Separately, the Petitioner has raised the dispute in the present petition under the Transmission Agreement dated 3.1.2011 between the Petitioner and PGCIL and has sought direction/declaration that the referred LTA has become void / frustrated in view of provisions of Section 56 and/or Section 32 of the Indian Contract Act, 1872 in view of the prevailing force majeure conditions and therefore, the Petitioner be relieved and discharged from performing any of its obligations under the said LTA and further the Petitioner be allowed to relinquish its access rights to the extent of 250 MW without any liability for payment of relinquishment charges under Regulation 18 of the Connectivity Regulations. The Petitioner has alleged that on account of stated intimation of the existence of force majeure conditions preventing the Petitioner from initiating work on Phase II of the generation project, PGCIL could have stopped/delayed/redesigned the transmission system to ensure optimum and economic use of resources instead of going ahead with the transmission project. The Petitioner has thus contended that PGCIL has made an imprudent investment



and as such, the Petitioner should not be saddled with the cost of investment or the transmission charges for the identified transmission project and instead, may be allowed to relinquish the LTA for 250 MW without incurring any financial liability.

The Petitioner has made the following prayers in the present Petition:

- a) Declare that the LTA has become void / frustrated in view of provisions of Section 56 and/or Section 32 of the Indian Contract Act and/or force majeure conditions;
- b) Declare that the Petitioner is relieved and discharged from performing any of its obligations under the LTA;
- c) Declare that the Petitioner is entitled to relinquish its access rights to the extent of 250 MW without any liability for payment of relinquishment charges under Regulation 18 of the Connectivity Regulations;
- d) pass any order directing PGCIL to return/refund the Bank Guarantee pertaining to 250 MW LTA;
- e) In the interim, grant a stay on the Respondent from raising any invoice for transmission charges pending disposal of the present petition and to restrain the Respondent No.1 from taking any steps towards encashment of the bank guarantee furnished by the Petitioner.”

Submissions of the Petitioner (EPGL)

9. The Petitioner has submitted that it had envisaged expansion of the installed capacity of the project to 4440 MW which was subsequently revised to 5000 MW to be constructed in three phases. The LTA for 250 MW to the target region was granted to the Petitioner vide letter dated 5.8.2011 subject to signing of Bulk Power Transmission Agreement and fulfillment of other specified conditions.

10. The Petitioner has submitted that LTA agreement with PGCIL was signed on 14.12.2011 and all necessary requirements were also fulfilled viz. acquisition of the required project land for Phase II and Phase III of the Generating Project, signing of an agreement with Essar Bulk Terminal Salaya Limited, Gujarat (“EBTSL”) for supply of coal received through its ports and seawater to Phase I and Phase II of the Generation Project, building the unloading bay and conveyer corridor for



transportation of coal which required a stretch of 20 km of land divided into three parts, namely (i) the offshore area; (ii) onshore/mangrove area measuring 4.6 Ha ("Jetty Land") which was to be utilised for both Phase I and Phase II of Generation Project; and corridor area measuring 14 km. The environment clearance for the Phase I of the Generation Project along with the 20 km coal-cum-water corridor was sought in 2007 and the same was granted on 17.7.2009 subject to fulfillment of certain other conditions corresponding to the Jetty Land for the purpose of the Sea Water pipeline and Coal conveyor corridor. The Petitioner vide letters dated 23.7.2009 and 23.11.2009 requested MOEF to amend environment clearance stipulations in approval dated 17.7.2009. The request of the Petitioner was rejected by MoEF vide letter dated 9.2.2010 based on the recommendation of Expert Appraisal Committee ("EAC").

11. The Petitioner has submitted that MoEF vide Office Memorandum dated 2.12.2009 issued the procedure for consideration of proposals for grant of environmental clearance for projects located within 10 km from National Park/Wildlife sanctuary. The procedure prescribed by MoEF mandated that the environmental clearance shall be subject to obtaining prior clearance from forestry and wild life including clearance from Standing Committee of the National Board for Wildlife ("NBW").

12. The Petitioner applied for Terms of Reference ("TOR") to EAC of MoEF on 14.1.2010 which was considered by EAC in its 69th meeting where it was decided that the Petitioner should first submit the compliance of conditions in Environment Clearance of Phase-I dated 17.7.2009 qua approval from NBW, and only thereafter the proposal for expansion would be considered.

13. The Petitioner has emphasized that in the minutes of meetings of 7th JCC meeting held on 25.2.2013, it is recorded that PGCIL acknowledged the fact that Petitioner is not taking up 2x660MW unit. Therefore the installed capacity of the Project was to be reduced from 3240MW (4x150+4x660MW) to 1920MW (4x150+2x660MW) and accordingly, quantum for connectivity also needed to be reduced. In addition to this, it was also acknowledged by PGCIL that the 2x660 MW Project of Petitioner was facing environment clearance issues and the clearances from MOEF were still pending including forest clearance of coal/water corridor. It is also recorded in the minutes that in addition to the environmental clearances, the PGCIL also acknowledged other specifics related to delay due to pending pollution clearances from State Pollution Control Board, pending financial closure for 2x660MW Project, reassessment of the project on account of unviability due to delay in project approvals and unviability of present tariff and reappraisal due to pending approvals. In the aforesaid JCC minutes of meeting it is also mentioned that the discussion with GUVNL is in progress for extension of delivery date due to delay in approval beyond Petitioner's control, revision in tariff considering the Indonesian coal price hike and also that the project is on hold due to pending approvals and no power off-take beneficiaries were in place. The Petitioner has relied on the aforesaid Minutes of Meeting to emphasize that on account of stated reasons it became impossible for the Petitioner to complete the project work within the agreed time frame.

14. The Petitioner has further submitted that the corridor land is passing through Government Land, Private Land and Gauchar Land and since there was no specific policy of Government of Gujarat for allocation of Gauchar Land, the same was



required to be formulated and notified by the State Government. As a result, the land allotment could be made only in February 2015. However, the same was challenged by way of Public Interest Litigation (PIL) in the Hon'ble High Court of Gujarat. Hon'ble High Court dismissed the PIL in 2016 and the Appeal in the Hon'ble Supreme Court was also dismissed whereupon, the Allotment of Government and Gauchar Land could attain finality only in 2016 i.e. after over 6 years from the Petitioner's date of Application. The Petitioner has contended that the delay in this regard was beyond its control.

15. Further, a certain portion of land falling in the alignment of the Coal Conveyor corridor and the Sea water pipeline was acquired by the Irrigation and Salinity Control Department of Government of Gujarat for a 'Bhandara Yojana' (Irrigation Project) in the year 2002. The Petitioner considering the ownership of said land being vested with the Irrigation and Salinity Control Department entered into an Agreement with R&B Department on 4.2.2010 for Right of Use / Right of Way for the Coal conveyor and Sea Water pipeline project. The land owners whose land was acquired in 2002, challenged the Award of the Revenue Department before the High Court of Gujarat on the grounds that they were neither paid the Compensation by the Government of Gujarat nor the same was deposited with the designated court. The High Court set aside the Award by its order dated 28.10.2015 and directed the lands so acquired and covered by the said award to be restored to the original owners in pursuance of 'The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, (Land Acquisition Act, 2013)'. The Petitioner has submitted that the above-mentioned pending court proceedings have led to further delay in the compliance of Environment Conditions prior to obtaining TOR for Phase – II, as the Petitioner is now required to go through



the process of land acquisition in terms of Land Acquisition Act, 2013. The Petitioner has further submitted that the Petitioner has initiated the said process of land acquisition, obtained exemption from the applicability of provisions relating to Social Impact Assessment (SIA) and has also initiated a process of obtaining consent in pursuance of a Notification issued under Section 11 of 'The Land Acquisition Act, 2013' and the overall process is expected to take anywhere between 15 to 18 months and resultantly, the Petitioner is yet not able to approach the MoEF with compliance of conditions stipulated as part of Phase I clearance which is a pre-condition for issue of TOR for Phase II.

16. The Petitioner has submitted that in view of the stated reasons for delay in commissioning of the generation project which were beyond its control, the Petitioner had apprised the Respondent about delays in grant of approvals and clearances and other factors from time to time through various communications and meetings. In this reference, the Petitioner has vehemently submitted that owing to pendency in Environmental Clearance by MOEF since 14.1.2010, the Petitioner vide letter dated 17.8.2012 i.e. within a period of 8 months from the date of signing of LTA, apprised the Respondent about the then present status of the 2x660 MW generation project and in particular the status of environment clearance detailing that forest clearance for 4.6 Hectares land for existing 2x660 MW phase-I of EPGL near Salaya jetty is pending for approval from MOEF due to pending confirmation from State Board of wild life (SBWL) that 'the Land is not in eco-sensitive zone (ESZ)'. The ESZ demarcation has since then been given by SBWL to MOEF and draft notification for public comments released by MOEF. The Public comments have been received by MOEF in July 2012 and comments received have been clarified by GOG and now MOEF is reviewing the same for final notification. The

Phase 2 expansion (2x660MW) environmental clearance is pending due to linking of the above to Phase 2 expansion project by MOEF. The environment clearance for Phase 2 is hence expected to start after the above EC process for Phase I gets completed and it was expected that final MoEF clearance may be granted tentatively by end of December 2013. In the same letter dated 17.8.2012, the Petitioner further intimated that considering above explained project status of 2x660 MW (Phase-II), it will be practically difficult to evacuate power by March-2014 due to issues beyond its control and therefore, requested PGCIL to extend the connectivity and the LTA request date from March, 2014 to March, 2016.

17. The Petitioner has thus contended that it was anticipating the delay in scheduled commissioning of the Generation Project and therefore, apprised PGCIL about such delays on account of environmental clearance. The Petitioner has submitted that following the letter dated 17.08.2012, the Petitioner reiterated the fact of delay due to pending environmental clearance vide letter dated 06.07.2013 and further requested for review of the long term open access date of the Petitioner. The Petitioner has further submitted that in the said communication, it had clearly highlighted the reasons for delay in commissioning of the Generating Project and had requested PGCIL that the transmission line may be kept in abeyance till the time the Project is actually able to start and also requested to keep the LTA in abeyance till further confirmation by the Petitioner. The Petitioner has submitted that in the stated circumstances and its repeated requests PGCIL should have kept the LTA in abeyance.

18. The Petitioner has submitted that in view of the aforesaid circumstances that were beyond the control of Petitioner, it had become impossible for the Petitioner to

commission the Generation Project in the agreed time period. Considering the prevailing circumstances, PGCIL ought to have considered the request of the Petitioner with reference to the provisions in Transmission Agreement as well as the LTA and should have acceded to the request of Petitioner so that both the Agreements could have been kept in abeyance and the timelines for implementation of transmission project could have been suitably extended and other prudent measures taken to mitigate any losses pertaining to the transmission project, which was at the time only in its early stages.

19. The Petitioner has further submitted that on 31.1.2014, the Petitioner again wrote a letter to the Respondent No.1 setting out the various reasons and circumstances beyond the control of the Petitioner in detail and pursuant thereto requested PGCIL to permit the Petitioner to approach its Chief Operating Officer so as to explain the impossible circumstances being faced by the Petitioner. However, PGCIL did not consider the above-mentioned request and categorical intimation regarding the impending force majeure circumstances surrounding the generation project leading to delay in its commissioning and instead continued to construct the Transmission Project. It is further submitted that the issue regarding delay in the project was also conveyed to and acknowledged by PGCIL in the 18th Meeting of Western Region Constituents held on 29.8.2013 and in the 7th Joint Coordination Committee Meeting (JCC Meeting) held on 25.2.2014. However, PGCIL for the reasons best known to itself chose to ignore the aforesaid intimations and the caution notice given in August 2012 and July 2013 and instead decided to continue the construction of the transmission project by summarily rejecting the claims of force majeure by the Petitioner. The Petitioner has submitted that PGCIL has thus incurred imprudent costs and acted in an inefficient manner by continuing the

construction activities even after knowing that the linked Generation Project was getting delayed for the reasons beyond the control of Petitioner.

20. The Petitioner has further submitted that in the 18th WR Constituents meeting, it had informed the Respondent No.1 about the status of the Project as well as the circumstances which were beyond the control of the Petitioner causing delay in Project, which are recorded in the minutes of the said meeting.

21. The Petitioner has submitted that vide letter dated 12.03.2014, CEA/ Respondent No. 2 was apprised about the apparent and subsisting impossible circumstances faced by the Petitioner and the correspondences exchanged between the Petitioner and the Respondent No.1 in this regard and Respondent No.2 was requested to intervene in the then prevailing circumstances.

22. The Petitioner has submitted that Respondent No.1 was under the obligation to comply with the Connectivity Regulations and was obligated to commence construction of different phases matching with the generating capacity and since the Respondent No.1 was duly intimated and thus was fully aware of the circumstances leading to delay in commissioning of the Generation Project, which were beyond the control of the Petitioner, the Respondent No.1 ought to have kept the corresponding Transmission Project and system strengthening under abeyance and or cancelled the same in consultation with the Petitioner and other stake holders. The Petitioner has submitted that since the Petitioner had apprised PGCIL about the force majeure conditions as early as 17.8.2012 and 6.7.2013, the PGCIL could have diverted its men and material towards other projects rather than insisting on continuing with the stated transmission project. The Petitioner has contended that such an approach is



clearly inconsistent with the mandated functions of Respondent No.1 under Section 38 (2) (b) (iv) and 38 (2) (c) of the Electricity Act, 2003.

23. EPGL vide letter dated 9.6.2016 conveyed to PGCIL (CTU) that the project is affected by force majeure conditions and the project is unviable, due to which EPGL is not able to firm up beneficiaries in the target region (SR) and at the same time, CTU has not performed system strengthening to effectuate LTOA of 250 MW, therefore, BPTA be declared as extinguished. In the said letter, EPGL also communicated that since CTU is denying LTOA applications for SR on the grounds of inadequate transmission capacity of the region's transmission systems, therefore, there would be no stranded capacity of the transmission systems under the applicable laws if EPGL relinquishes its LTOA rights of the identified target region. Based on the aforesaid assertions, EPGL submitted that it was impossible and impractical to utilize transmission systems under LTAA and therefore, requested PGCIL (CTU) to take necessary actions to enable relinquishment of the LTOA of 250 MW under Regulation 18 of the 2009 Connectivity Regulations with no liabilities on either side since the Generation project is suffering from force majeure events and there will be no stranded capacity on account of relinquishment and to exempt EPGL from payment of any transmission charge applicable for 250 MW in view of the force majeure events.

Submissions of PGCIL

24. The Respondent No.1 in its reply vide affidavit dated 21.5.2018 has principally submitted that it has acted prudently by constructing the subject transmission system as the construction was carried out pursuant to signing of the Transmission Agreement on 3.1.2011 after the grant of connectivity to the Petitioner and PGCIL is



liable for obligations flowing from the Transmission Agreement, Regulation 18 of Connectivity Regulations and under the applicable provisions of Electricity Act, 2003. The submissions of PGCIL are as under :

a) The Petitioner applied for LTA of 250 MW on 30.3.2011 which was granted on 5.8.2011 after its approval in the 14th meeting of Western Region constituents held on 13.5.2011. Subsequently, upon receipt of the letter dated 16.8.2011 from the Petitioner requesting to advance the commissioning schedule of the connectivity line, it obtained regulatory approval from the Commission vide order dated 13.12.2011 in Petition No. 154/2011 whereupon, investment approval was accorded by its Board on 14.12.2011 and subsequently, the letter of award for the transmission project was placed in January, 2012. Respondent No.1 has strongly contended that once the contract has been placed, the work on the transmission project cannot be stopped.

b) That with reference to the Transmission Agreement, the letter of the Petitioner dated 17.8.2012 is not a notice of Force Majeure as the same is only a request to delay the operationalization of LTA. PGCIL has submitted that the Petitioner vide its letter dated 6.7.2013 for the first time asked for keeping the commissioning of the transmission system in abeyance. PGCIL has submitted that petitioner's response had been contrary to the stated notices of force majeure in 2012 and 2013. In the subsequent period i.e. 2014 and beyond, the Petitioner continued to take account of the activities being conducted by PGCIL and also submitted the underlying project's status, which is contrary to its stated request to keep the LTA in abeyance. In this reference, PGCIL has further submitted that in all subsequent coordination committee meetings as well as



WRPC meetings, it was amply clarified that the Petitioner would be liable to pay the transmission charges on construction of the subject transmission system which was not objected to by the Petitioner.

c) PGCIL was under no obligation to put in abeyance all the activities related to the transmission system merely because the letter dated 17.8.2012 had been received from the Petitioner. It is submitted that PGCIL is under the statutory obligation to proceed to implement the transmission system as per the connectivity and LTA granted. If the Petitioner did not want the LTA, it could have relinquished the same by following the procedures prescribed in the Connectivity Regulations and having not done so, the Petitioner cannot escape the liability to pay transmission charges to Respondent No.1.

d) After rejection of Petitioner's claim of force majeure by PGCIL in 2013, the Petitioner could have challenged the said decision at the relevant time. However, the Petitioner did not challenge the same.

e) That in Petition No. 440/MP/2014 filed by the Petitioner for reduction in amount of bank guarantee with respect to the subject transmission system, the Petitioner did not make even a whisper about being confronted with Force Majeure events on account of which there is no requirement of the subject transmission system, in any of the pleadings or the hearings of the said petition,.

f) Clause 8 of the Transmission Agreement provides that no party shall be liable for any claim for any loss or damage on account of defined force majeure events. The events referred in the present petition are not covered by Clause 8 of Transmission Agreement. Further, PGCIL is only claiming the tariff which it can rightfully recover from the person for whom the subject transmission system is



being set up. There is no force majeure affecting the Phase II of the generating station of the Petitioner under the terms of TSA.

g) The reliance of the Petitioner on the amended proviso under the Connectivity Regulations regarding execution of the dedicated transmission line by PGCIL only after investment of 10% of the contract value of the plant packages of the generating station is misconceived as the Petitioner in the Coordination Committee meeting held on 9.7.2012 and thereafter has confirmed that *“EPC award for BTG placed with Global supplies (FZE) on 25.2.2010. Award for BoP placed with ESSAR projects India Ltd. on 25.2.2010.”*

h) The second proviso to Regulation 8 of the Connectivity Regulations provides that *“the transmission charges for such dedicated transmission line shall be payable by the generator even if the generation project gets delayed or is abandoned”*. Respondent No.1 has further submitted that the corresponding obligation of the generator have been provided for in Clause 5 (b) of the transmission agreement dated 3.1.2011 whereas the reverse obligation of PGCIL i.e. in the event of delay in commissioning of transmission system have been provided in Clause 5 (d) of the transmission agreement.

i) No case of force majeure has been made out under Transmission Agreement and the Petitioner has no case to seek a declaration to that effect. As regards the prayer to keep the connectivity and LTA in abeyance, there is no such provision in Connectivity Regulations and the only option is to relinquish the LTA as per the procedure specified.

j) There was no inter-se obligation agreed to or recorded in Transmission Agreement as regards the Petitioner’s commissioning of its project.



k) As regards, Petitioner's prayer requesting to extend the date of LTA and keep the transmission line in abeyance till the commissioning of the generation project, citing force majeure conditions, the transmission line was taken up for construction by PGCIL in line with Connectivity Agreement. Once the line construction work is started, it is not possible to put the work in abeyance. Further, the events or disability narrated by Petitioner do not fall in the category of force majeure events under the Connectivity Agreement.

Rejoinders of the Petitioner

25. The Petitioner in its Rejoinder, filed vide affidavits dated 5.7.2018 and 15.3.2019, has submitted that Respondent No.1 has not followed prudent developer practices and has violated the provisions of the applicable Regulations and the Transmission Agreement dated 3.1.2011 while proceeding with the construction work of the transmission line even after being informed about the impediments faced by the Petitioner in setting up of the Generation Project due to delay in grant of environmental clearance. The Petitioner in the Rejoinder has further submitted that the notice of Force Majeure need not be in a specific form and if the stated letter dated 17.8.2012 mentions the occurrence or existence of any force majeure event, the same may be considered as Notice of Force Majeure. The Petitioner has further submitted that PGCIL is statutorily bound to seek information from the Petitioner with regards to 10% advance payment towards Main Plant Packages, under Proviso to Regulation 8 (8) of the Connectivity Regulations, 2009 as amended in March, 2012, either through letters or through JCCs before proceeding with the construction of the transmission lines. The Petitioner has submitted that PGCIL has failed to create balance between its two roles, i.e. Central



Transmission Utility as planner and service provider as transmission licensee. It was incumbent upon PGCIL (CTU) to direct PGCIL (Service Provider) to either re-optimize or divert its men and material towards other transmission projects under construction. The discriminatory conduct of PGCIL is apparent and manifest by its lack of attempts or efforts to synchronize the commissioning of the Transmission Project with the Generation Project.

26. The Petitioner in its Rejoinder vide affidavit dated 5.7.2018 has refuted the contentions of the Respondent No.1 and submitted that the statutory scheme under the LTA Agreement entered into between the parties obligated the PGCIL to regularly monitor and review the project to confirm if commissioning of the project was likely. In this context, it is submitted that third proviso to Regulation 12 of the Connectivity Regulations inter-alia provides that augmentation of transmission system shall be taken up by the PGCIL or the transmission licensees in phases corresponding to the capacity which is likely to be commissioned in a given time frame. Correspondingly, clause 3 of the LTA Agreement provides for PGCIL to hold JCC meetings to enable PGCIL to phase out the commissioning of the transmission line as per the generation project. The Petitioner has further relied on clause 2.0(c) of the Standard Form LTA which provides that the LTA customer shall pay the applicable transmission charges from the date of commissioning of the respective transmission system which would not be prior to the schedule commissioning date of generating units. The Petitioner has further submitted that on account of failure of PGCIL to comply with its obligation of regular monitoring and review of the project and rejection of the request of the Petitioner vide letters dated 17.8.2012 and 6.7.2013, the PGCIL is claiming transmission charges for a lapse made by the PGCIL itself in not carrying out due diligence in construction of the transmission



line. It is further contended that the 400 kV D/C (triple line from generation switchyard to Bachau) was to be completed by December 2013. However, the transmission system is yet not connected to generator end and thus it is still not commissioned. Further, it is reiterated that the contract stood frustrated as the LTA which was to commence from March, 2014 became impossible to perform since the necessary approvals were not granted. It is also restated that as per Regulation 18 of the Connectivity Regulations, relinquishment charges are in the nature of compensation to restitute PGCIL for any stranded capacity caused due to relinquishment of open access rights and therefore, PGCIL is required to demonstrate the existence of stranded capacity and the extent of loss caused thereby and since, in the present case there is no stranded capacity, the question of payment of charges is ruled out. In this context, the Petitioner has relied on *Judgment in Sea Angel Case (2007) 2 Lloyds Report 517* to underline that various factors are to be considered while determining whether a contract stands frustrated. The Petitioner has further relied on *Anglo Russian Merchant Traders Case, [1917] 2K.B. 679* to state that since the fundamental permission was not obtained despite making reasonable efforts, the Petitioner stands relieved of any contractual liability.

Interlocutory Application by Gujarat Urja Vikas Nigam Limited (GUVNL)

27. GUVNL filed an Interlocutory Application seeking impleadment as party to the present Petition. GUVNL submitted that if the Petitioner would not be held liable for payment of relinquishment charges, then the burden to pay the same would fall on all the beneficiaries and therefore, being a beneficiary, it is necessary and proper to implead GUVNL in the instant matter as it would facilitate the adjudication of the issues involved in the relinquishment of LTA by the Petitioner. The Commission



heard the parties and decided to allow the IA and directed that GUVNL be arrayed as a respondent to the petition.

Reply of GUVNL

28. Gujarat Urja Vikas Nigam Limited (Impleaded Respondent) vide Affidavit dated 15.3.2019 has principally submitted that the transmission system under reference is related to the Petitioner and accordingly, GUVNL cannot in any manner be held liable for such transmission system or pay the concerned charges for the same. Further, GUVNL cannot be affected in any manner by the relinquishment or non-payment of transmission charges. Premised on the above arguments, GUVNL has made following submissions:

a) Subsequent to the hearing in the present matter, the Commission has decided Petition No. 92/MP/2015 vide Order dated 8.3.2019 dealing with the relinquishment and surrender charges and therefore, the related issues involved in the present Petition No. 122/MP/2017 have to be decided consistent with the above Order dated 8.3.2019.

b) Under the LTA Agreement as well as Connectivity Regulations, the Petitioner is obligated to pay the transmission charges, even if it fails or delays to utilize the open access/connectivity or exits/abandons the project. Similarly, if the Petitioner relinquishes the right of open access, it is required to pay compensation as per the Regulations. The liability for transmission charges arises on commissioning of the transmission system and the commissioning of generating station or the same being affected by any force majeure is irrelevant to the obligations of the Petitioner under the Agreement as well as Regulations.



c) The Commission vide Order dated 11.10.2017 in Petition No. 187/MP/2015 held that the Article 8 of the Transmission Agreement does not absolve the Petitioner from paying transmission charges after the transmission system has been commissioned and further held that the events claimed by the Petitioner are not force majeure events. In this context, the decision of the Appellate Tribunal in *Jayaswal Neco Urja Ltd.* in Appeal No. 197 of 2014 dated 15.4.2015 has also been relied upon by GUVNL where it is inter-alia held that “*the Connectivity Regulations do not anywhere state that if the applicant is able to prove the existence of any circumstances beyond its control or existence of any force majeure conditions, which prevented it from performing the contract, its Bank Guarantee should not be encashed*”. Similarly, there is no provision in the Connectivity Regulations that if the Open Access Customer is able to prove existence of any force majeure conditions, it is not required to pay relinquishment charges. The Regulations clearly provide for relinquishment of open access on payment of certain charges.

d) The consistent scheme of the Inter-State transmission is that the transmission charges should be paid to the transmission licensee and further the burden should not be passed on to the customers who have no use for the transmission system.

e) The contention of the Petitioner that the contract is frustrated under Section 56 of Contract Act, 1872 is misconceived as the liability of the Petitioner is to pay transmission charges irrespective of whether it uses the line or not. Therefore, the fact that the Petitioner did not or even could not use the line cannot be a frustrating event.

f) In Petition No. 1532 of 2015 before the Gujarat Electricity Regulatory Commission, the Petitioner has claimed force majeure in terms of the PPA with

GUVNL which has been refuted by GUVNL. The PPA between GUVNL and Petitioner has been terminated and GUVNL has claimed the liquidated damages and encashed the bank guarantee in this regard.

g) So far as viability or non-viability of the power project and arrangement of financing/financial closure by the Petitioner are concerned, the same are commercial aspects and are to the account of the Petitioner. They cannot be the reason to claim frustration, particularly for the transmission agreement.

h) In case there is any failure on part of the PGCIL, the same is between the Petitioner and the PGCIL and there can be no consequences of the same on GUVNL for failures of PGCIL.

Rejoinder of Petitioner to Reply of GUVNL (Impleaded Respondent)

29. In response to the reply of GUVNL, the Petitioner has made following submissions:

a) The present petition for relinquishment, pertains to the right of a generating entity to relinquish its open access rights under the LTA agreement, which is even otherwise a statutory right of the said entity. As such, the present dispute pertains to the contractual arrangements between the Petitioner and PGCIL and is to be determined on the facts and circumstances of the case, and GUVNL not being a party to the said arrangement, does not have any locus to comment on the dispute under reference. Further, the said determination qua stranded capacity and the subsequent liability of the Petitioner to pay the relinquishment charges, is no ground for entertaining GUVNL's apprehension that it may become liable to pay increased charges or suffer any technical implication in future as a result of the adjudication of the present petition.

b) In any event, since the transmission corridor is facing issues of congestion, relinquishment of 250 MW by the Petitioner will not lead to any stranded capacity as the same will be available for power flow from Western Region to Southern Region. Thus, the Petitioner is not liable to pay any relinquishment charges.

c) The entire case of GUVNL proceeds on assumptions and presumptions and therefore its contentions cannot not be allowed to prejudice the Commission, especially since GUVNL's case is based on commercial interest as opposed to a legal requirement. GUVNL cannot seek a relief on the basis of its apprehensions of becoming liable to pay increased charges or probability of suffering any technical implication, that too in future, in the present petition which has been preferred by the Petitioner to enforce its statutory rights.

d) The Petitioner is not trying to avoid transmission charges as is being suggested by GUVNL and in fact owing to the force majeure events faced by the Petitioner, it is not required under the Transmission Agreement to pay any transmission charges. It is further submitted that, in case the Commission makes a finding that the Petitioner is not liable to pay any relinquishment charges in the absence of any stranded capacity upon relinquishment of the LTA by the Petitioner, the PGCIL would not be bearing any burden and nor would any costs be passed on to other users of the inter-State transmission system even when the capacity relinquished by the Petitioner is not required by other users. Accordingly, there is no question of any unfair or inequitable scenario or any severe implications on the functioning of the inter-State transmission licensees or creation of undue burden on the users of the transmission system and the consumers at large.



e) PGCIL in its reply has completely evaded dealing with the issues concerning the *force majeure* events which impeded the commissioning of Phase II of the Petitioner's project. That apart, the reply of PGCIL is also silent on the Petitioner's contention that in order to claim any relinquishment charges, the PGCIL is required to demonstrate the existence of stranded capacity and the extent of loss caused thereby. In the present case, there is no stranded capacity to be caused due to relinquishment of LTA by the Petitioner and therefore, the question of payment of any charges does not arise.

f) Clause 8 of the Transmission Agreement clearly contemplated a scenario which disentitled the Respondent to lodge any claim for losses, including losses owing to non-payment of transmission charges by Long Term Transmission customer, if such non-payment was owing to *force majeure* conditions which precluded the Long Term Transmission customer to commission its generating station, and consequently, avail the Long Term Access.

g) In the order dated 11.10.2017 in Petition No.187/MP/2015, the Commission expressed its displeasure towards PGCIL for going ahead with the execution of the transmission line despite the fact that the Phase II of the generation station of the Petitioner was making zero progress on the ground. The Commission further directed PGCIL to make appropriate provisions in the contracts with the suppliers as well as in the TSA to take care of such eventuality. In view of the reasons beyond the control of the Petitioner, the Petitioner had apprised the PGCIL of the various delays in commissioning of the Generation Project due to the delay in approvals and clearances and other factors from time to time via various communications and meetings. It is pertinent to mention that Respondent No.1 was under the obligation

to comply with the Connectivity Regulations and accordingly the PGCIL was obligated to commence construction of different phases corresponding to the generating capacity. Further, since the Respondent No.1 was fully aware of the circumstances and reasons that are beyond the control of the Petitioner pertaining to delay in commissioning of the Generation Project, the Respondent No.1 ought to have kept the Transmission Project and system strengthening under abeyance and/or cancelled the same in consultation with the Petitioner and other stake holders.

h) In view of the difficulties faced by the Petitioner which were clearly beyond its control as per Clause 8 of the Transmission Agreement, no claims in the form of any charges or otherwise can be made against the Petitioner. The operation of the LTA was contingent upon the successful commissioning of the Generating Project. It is further submitted that Section 56 of the Contract Act, 1872 related to frustration of contract is attracted in the present case and relieves the Petitioner from its obligations under the said LTA Agreement.

i) The Petitioner has filed Petition No. 1532 of 2015 before Gujarat Electricity Regulatory Commission (GERC) in relation to Salaya-II project, for revision of tariff/termination of PPA, due to change in law and due to change in circumstances leading to impossibility for the Petitioner to perform its obligations under the said PPA. The said petition is pending adjudication before GERC.

j) GUVNL has no locus to comment on the *force majeure* events pleaded by the Petitioner for seeking discharge from performance of its obligations under the LTA executed with the PGCIL. Further, the *force majeure* events which have forced the Petitioner to seek relinquishment of its LTA for 250 MW were known to GUVNL and



it was *inter alia* for the same reasons that the Petitioner had to file the petition for revision of tariff/termination of PPA against GUVNL before the Ld. Gujarat Electricity Regulatory Commission. In fact, recognizing the above *force majeure* events being faced by the Petitioner, GUVNL had also extended the time period for fulfillment of Conditions under Article 3.1.1. of the PPA signed with the Petitioner up to 31.12.2014. Accordingly, it is submitted that GUVNL cannot be permitted to take a contrary stand now after having already accepted the Petitioner's position.

k) The issues under the LTA are between the Petitioner and PGCIL alone and GUVNL cannot respond to the events. It is further submitted that it was the obligation of the Respondent No.1 to exercise reasonable care and diligence in order to mitigate any possibility of its losses on account of the acts and omissions of the Petitioner and as such, the Respondent No.1 cannot benefit from its failure to make any effort to mitigate its losses despite various requests from the Petitioner and therefore any payment of compensation to the Respondent No.1 shall be in violation of the terms of the LTA, against the provisions of the Contract Act and basic principles of equity.

l) The Petitioner has the option under the Connectivity Regulations to relinquish its long term access. The legal dispensation regarding the relinquishment has been provided under Regulation 18 of the 2009 Connectivity Regulations, a plain reading whereof clearly indicates that any charges payable towards relinquishment charges is in the nature of compensation to retribute PGCIL for any stranded capacity caused due to relinquishment of open access. Thus, in order to claim any relinquishment charges, PGCIL is required to demonstrate the existence of stranded capacity and the extent of loss caused thereby. In the present case, there

is no stranded capacity to be caused due to relinquishment of LTA by the Petitioner, the question of payment of any charges does not arise.

Analysis and decisions

30. We have heard the learned counsel for the Petitioner and Respondent at length and examined the pleadings and documents on record in the present petition.

31. The following issues arise for our consideration in the present case:

(a) Issue No.1: Whether the LTA has become void / frustrated in view of provisions of Section 56 and/or Section 32 of the Indian Contract Act and/or force majeure conditions and whether the Petitioner can be relieved and discharged from performing any of its obligations under the LTA?

(b) Issue No. 2 : Whether the Petitioner can relinquish 250 MW LTA without incurring any liability for payment of relinquishment charges under Regulation 18 of the Connectivity Regulations?

Issue No.1: Whether the LTA has become void / frustrated in view of provisions of Section 56 and/or Section 32 of the Indian Contract Act and/or force majeure conditions and whether the Petitioner can be relieved and discharged from performing any of its obligations under the LTA?

32. The Petitioner has filed the present petition on the ground that the LTA has become frustrated in terms of Section 56 and/or Section 32 of the Indian Contract Act, 1872 on the grounds of impossibility to perform its obligations under the contract and consequently, sought to be relieved and discharged from performing any of its obligations under the LTA and has also sought to be allowed to relinquish its long term access rights to the extent of 250 MW without incurring any financial liability towards relinquishment charges under Regulation 18 of the 2009 Connectivity Regulations. The Petitioner has contended that force majeure

conditions prevented the Petitioner from initiating Phase II of the Essar-Salaya Generation Project and vide letters dated 17.8.2012 and 6.7.2013, the Petitioner intimated PGCIL that the transmission line may be kept in abeyance till the time the project is commissioned. The Petitioner has further submitted that the said communications amounted to notices of force majeure under Article 8 of the Transmission Agreement dated 3.1.2011 whereupon, PGCIL could have kept the LTA and the Transmission Agreement in abeyance and should have exercised full diligence and stopped/delayed/re-designed its transmission system to mitigate its losses. The Petitioner has further submitted that PGCIL continued to invest in construction of the transmission project despite being cognizant of the fact that it was under obligation to minimize its cost, investments and possible losses. Thus, the Petitioner's argument is premised on the basis that PGCIL has incurred imprudent and inefficient costs by continuing the construction activities even after knowing that the corresponding generation project was getting delayed on account of certain force majeure events. The Petitioner has further submitted that in the instant matter, to claim any relinquishment charges, PGCIL has to substantiate the same by demonstrating the existence of stranded capacity and the extent of loss caused thereby. The Petitioner has vehemently contended that in the present case, there is no stranded capacity due to relinquishment of 250 MW of Long Term Access and therefore, the Petitioner may be permitted to relinquish the LTA without incurring any liability towards compensation under Regulation 18 of the Connectivity Regulations. The Petitioner has further submitted that PGCIL is statutorily bound to seek information from the Petitioner with regards to 10% advance payment towards Main Plant Packages, under Proviso to Regulation 8 (8) of the Connectivity Regulations, 2009 as amended in March, 2012, either through letters or through



JCCs before proceeding with the construction of the transmission lines. The Petitioner has also sought a direction to PGCIL to keep the stated connectivity in abeyance and not to prefer any claims for transmission charges for connectivity till the Phase II of the generation project of the Petitioner is commissioned.

33. Whereas, PGCIL has submitted that it has acted in a prudent manner while implementing the project and at no point of time, the Petitioner has indicated that it is abandoning the project but rather has only sought deferment of operationalization of connectivity. The Petitioner's letter dated 17.8.2012 is a clear indication of the deferment and not cancellation of the connectivity. PGCIL has further submitted that it has made the investment on the basis of commitment by the Petitioner in the Transmission Agreement and Petitioner's letter dated 16.8.2011, whereupon, it obtained regulatory approval from the Commission vide order dated 13.12.2011 in Petition No. 154/2011 and investment approval was accorded by its Board on 14.12.2011. Subsequently, the letter of award for the transmission project was placed in January, 2012. PGCIL has categorically submitted that once the contract has been placed, the work on the transmission project cannot be stopped as PGCIL is under the statutory obligation to proceed for implementation of the transmission system as per the connectivity and LTA granted. As such, since the construction of the transmission system was carried out pursuant to signing of the Transmission Agreement on 3.1.2011 and further request of the Petitioner to advance the commissioning schedule of the connectivity line vide letter dated 17.8.2012, the Petitioner is liable to pay the applicable charges. Further, PGCIL has submitted that the letter of the Petitioner dated 17.8.2012 is not a notice of Force Majeure as the same is only a request to delay the operationalization of LTA while the Petitioner vide its letter dated 6.7.2013 for the first time asked for keeping the commissioning

of the transmission system in abeyance, even though, subsequently, in the year 2014, the Petitioner continued to take account of the activities being conducted by PGCIL and also provided its own status. PGCIL has further submitted that in all subsequent coordination committee meetings, it was amply clarified that the Petitioner would be liable to pay the transmission charges on construction of the subject transmission system which was not objected to by the Petitioner. PGCIL has vehemently contended that if the Petitioner did not want the LTA, it could have relinquished the same by following the procedures prescribed in the 2009 Connectivity Regulations and having not done so, the Petitioner cannot escape the liability to pay transmission charges to PGCIL. Moreover, after rejection of Petitioner's claim of force majeure by PGCIL in 2013, the Petitioner could have challenged the said decision at the relevant time. However, the Petitioner did not challenge the same. Further, PGCIL has argued that the Petitioner, in the Coordination Committee meeting held on 9.7.2012 and thereafter, has confirmed that EPC award for BTG was placed with Global supplies (FZE) on 25.2.2010 and award for BoP was placed with ESSAR projects India Ltd. on 25.2.2010. This satisfies the second proviso to Regulation 8(8) under the 2009 Connectivity Regulations, which provides for execution of the dedicated transmission line by PGCIL only after investment of 10% of the contract value of the plant packages of the generating station. PGCIL has further relied on the third proviso to Regulation 8(8) of the 2009 Connectivity Regulations, which provides that the transmission charges for such dedicated transmission line shall be payable by the generator even if the generation project gets delayed or is abandoned. So far as the prayer of the Petitioner for force majeure is concerned, the PGCIL has submitted that no case of force majeure has been made out. As regards the prayer to keep the



connectivity and LTA in abeyance, PGCIL has submitted that there is no such provision in 2009 Connectivity Regulations and the only option for the Petitioner is to relinquish the LTA as per the procedure specified.

34. In the light of the submissions of the Petitioner and the Respondents, we proceed to deal with the issue whether the LTA has become void / frustrated in view of provisions of Section 56 and/or Section 32 of the Indian Contract Act, 1872 and/or force majeure conditions. So far as the applicability of force majeure in terms of Article 8 of the Transmission Agreement dated 3.1.2011 is concerned, the same was dealt in the order dated 11.10.2017 in Petition No. 187/MP/2015. The relevant extracts of the Order dated 11.10.2017 in Petition No. 187/MP/2015 are reproduced as under:

“25. In the letter dated 6.7.2012, the Petitioner has not received the forest clearance for development of Salaya jetty which is required for supply of sea water and coal. Phase I is affected on account of environmental clearance and the Petitioner is making alternative arrangement of water from Narmada river and coal by truck from another port. That means, water and coal for Phase II can be arranged through alternative sources though the Petitioner would be required to spend more. Further, the Petitioner has also claimed the hike in price of coal due to Indonesian Regulations as force majeure events. Here also, the Petitioner could have arranged coal from other countries or through e-auction or participation in competitive bidding for coal. The fact that the Petitioner has cancelled the EPC contract awarded shows that the Petitioner has taken a commercial decision to abandon the project. Therefore, the events relied upon by the Petitioner in its letter dated 6.7.2013 cannot be held to be beyond the control of the Petitioner so as to excuse the Petitioner from performance of its obligations under Transmission Agreement dated 3.1.2011. Further, the Petitioner has proposed in the letter dated 6.7.2013 to put the transmission system into use by connecting to the Phase I of the generation project. Therefore, non-execution of the Phase II of the generation project cannot be held to be a reason for non-utilisation of the transmission system.

26.From the above provisions of the Transmission Agreement, the following can be inferred:

- (a) The Petitioner may relinquish its right specified in the Transmission Agreement (connectivity right) subject to compensation in accordance with the Regulations of the Commission issued from time to time.
- (b) If the Petitioner fails or delays to utilize the connectivity provided or makes an exit or abandon its project, PGCIL shall have the right to collect the transmission charges and/or damages in accordance with the Regulations of the Commission.
- (c) The Petitioner shall be required to give bank guarantee for an amount which shall be equivalent to ₹5 lakh/MW to partly compensate the damages. The



bank guarantee shall be encashed in case of adverse progress assessed during the coordination meetings as per Clause 6 of the Agreement.

- (d) In the event of delay in commissioning of the transmission system from its schedule, PGCIL to make alternate arrangement for despatch of power or pay the transmission charges to the Petitioner proportionate to its capacity ready for connection.

27. Thus, the Petitioner carries the liability to pay the transmission charges to PGCIL if it fails or delays to utilise the connectivity granted or makes an exit or abandons the project. If the Petitioner intends to relinquish its connectivity rights, it will be required to pay the compensation as per the regulations. None of the above provisions says that transmission charges are payable on the commissioning of the generating station. The Transmission Agreement provides that transmission charges are payable on commercial operation of the transmission system even if the Petitioner fails/delays to utilise connectivity or makes an exit or abandon the project. In contrast, Article 8.0 provides that a party claiming to be affected by force majeure shall not be liable for any claim of losses or damages arising out of failure to carry out the terms of the agreement. Since the Agreement does not provide that the transmission charges shall be payable on commercial operation of the generating station, failure of the Petitioner to set up the generating station will not absolve the Petitioner from payment of transmission charges under Article 8.0 of the Agreement. Further, the last sentence of Article 8.0 that "all activities related to connectivity shall be started as soon as practicable by the parties concerned after the eventuality comes to an end or ceased to exist" leads us to the conclusion that the force majeure provision is meant for temporary non-utilisation of connectivity after commissioning of generating station as well as connectivity line, and not for deferment of the operation of connectivity ad infinitum as claimed by the Petitioner.

28. In view of the above discussion, we hold that the Petitioner is not affected by force majeure as reasons being pleaded as beyond the control of the Petitioner could be addressed through alternative means and the connectivity transmission system can be put to use by Phase I of the generation project. Moreover, the case of the Petitioner is not covered under Article 8.0 of the Transmission Service Agreement and the Petitioner is liable to pay the transmission charges unless it relinquished connectivity on payment of relinquishment charges for the connectivity line."

35. Accordingly, we hold that the terms of the underlying LTA agreement are neither contingent nor impossible as provided under Section 32 or Section 56 of the Contract Act, 1872.

36. Moreover, the submissions made by the Petitioner in support of its claim that LTA has become frustrated or void as per Section 56 of the Contract Act, have also been earlier raised in Petition No. 187/MP/2015 which have been considered and adjudicated by the Commission vide order dated 11.10.2017, as noted above. The



underlying matter being same in the aforesaid Petitions, principles of constructive res-judicata are attracted in the present case, which provides that where a plea or a claim could have been taken by a party in a proceeding between him and his opponent, the parties are not permitted to agitate such issues in a later proceedings which could have been raised and decided in an earlier proceeding between the same parties.

37. In the matter under reference, we hold that the plea taken by the Petitioner have been finally determined in the order dated 15.10.2017 in Petition No. 187/MP/2017 and raising further contentions with reference to decided matter of discharge from obligations under the LTA attracts the doctrine of constructive res-judicata.

38. Accordingly, the prayer of the petitioner is disallowed.

Issue No.2: Whether the Petitioner is entitled to relinquish its access rights to the extent of 250 MW without any liability for payment of relinquishment charges under Regulation 18 of the Connectivity Regulations?

39. The issue has been dealt with in the order dated 11.10.2017 in Petition No. 187/MP/2015 where it has been held that the Petitioner carries the liability to pay the transmission charges to PGCIL if it fails or delays to utilise the connectivity granted or makes an exit or abandons the project. If the Petitioner intends to relinquish its connectivity rights, it will be required to pay the compensation as per the regulations. The above-mentioned decision dated 11.10.2017 is based on the provisions contained in Regulation 18 of 2009, Connectivity Regulations, which are as under:

“18. Relinquishment of access rights

(1) A long-term customer may relinquish the long-term access rights fully or partly before the expiry of the full term of long-term access, by making payment of compensation for stranded capacity as follows:-

(a) Long-term customer who has availed access rights for at least 12 years
(i) Notice of one (1) year – If such a customer submits an application to the Central Transmission Utility at least 1 (one) year prior to the date from which such customer desires to relinquish the access rights, there shall be no charges.

(ii) Notice of less than one (1) year – If such a customer submits an application to the Central Transmission Utility at any time lesser than a period of 1 (one) year prior to the date from which such customer desires to relinquish the access rights, such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of a notice period of one (1) year.

(b) Long-term customer who has not availed access rights for at least 12 (twelve) years – such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of 12 (twelve) years of access rights:

Provided that such a customer shall submit an application to the Central Transmission Utility at least 1 (one) year prior to the date from which such customer desires to relinquish the access rights.

Provided further that in case a customer submits an application for relinquishment of long- term access rights at any time at a notice period of less than one year, then such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the period falling short of a notice period of one (1) year, in addition to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of 12 (twelve) years of access rights.

(2) The discount rate that shall be applicable for computing the net present value as referred to in sub-clause (a) and (b) of clause (1) above shall be the discount rate to be used for bid evaluation in the Commission’s Notification issued from time to time in accordance with the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees issued by the Ministry of Power.

(3) The compensation paid by the long-term customer for the stranded transmission capacity shall be used for reducing transmission charges payable by other long-term customers and medium-term customers in the year in which such compensation payment is due in the ratio of transmission charges payable for that year by such long term customers and medium-term customers.”

40. Regulation 18 of the 2009 Connectivity Regulations as above provides for



relinquishment of the long term access rights before the expiry of the full term of the long term access, subject to payment of compensation of stranded capacity. Relinquishment of the access rights without any liability for payment of relinquishment charges, which is the prayer of the Petitioner, is not envisaged under the said Regulations. The matter has been deliberated at length vide order dated 8.3.2019 in Petition No. 92/MP/2015, wherein it has been established that Regulation 18 requires that upon relinquishment, the transmission charges at the specified rates are payable for the stranded capacity. The relevant extracts of the order dated 8.3.2019 in Petition No. 92/MP/2015 are reproduced as under:

“99. Therefore, Regulation 18 statutorily provides for a compensatory mechanism for relinquishment of access rights by long term customers by apportioning the risks between the relinquishing long term customers and the other long term and medium term customers keeping in view the likely utilization of the relinquished transmission assets. It is pertinent to mention that neither BPTA nor Long Term Access Agreements between the long term customers and PGCIL provide for any compensatory mechanism but only mention that it shall be determined as per the regulations of the Commission. In other words, the compensatory mechanism for long term access rights is statutory in nature. Therefore, the Commission does not agree with the contention of relinquishing long term customers that the compensation on account of relinquishment of long term access rights shall have to be decided on the principles of section 73 and 74 of the Indian Contract Act, 1872. Some of the Respondents have argued that the relinquishment compensation is in the nature of penalty or damages and therefore, injury or actual losses have to be proved to claim the compensation. In our view, relinquishment compensation is neither in the nature of penalty nor damages and therefore, actual losses or damages are not required to be proved by PGCIL. Relinquishment of long term access rights is a statutorily permissible option which entails payment of compensation for the stranded capacity on account of such relinquishment. Since the compensation has been designated in the form of transmission charges (net present value) for the period of maximum 12 years if access rights is not availed or for the period falling short of 12 years where access rights is partially availed, compensation under Regulation 18 of the Connectivity Regulations is payment of the share of transmission charges by the long term customers to service the transmission assets comprised in the ISTS in terms of its long term access to the extent it remains stranded consequent to the relinquishment. Stranded Capacity has been defined in Regulation 2(1)(v) of the Connectivity Regulations as “the transmission capacity in ISTS which is likely to remain unutilized due to relinquishment of access rights by a Long Term Customer”. Therefore, relinquishment charges are in the nature of compensation which a long term customer is obliged to pay as transmission charges (net present value) in terms of the mechanism envisaged in Regulation 18 for



relinquishment of the capacity out of its long term access rights to the extent such capacity is likely to remain unutilized. Payment of compensation for relinquishment of long term access rights is a statutory obligation on the part of long term customers relinquishing the access rights, subject to the determination of stranded capacity.”

41. In the aforesaid order dated 8.3.2019, CTU was directed to work out the stranded capacity based on the load flow studies and the compensatory relinquishment charges. The relevant portion of the Order is extracted as under:

“161 (a) The transmission capacity which is likely to be stranded due to relinquishment of LTA shall be assessed based on load flow studies with clearly laid out assumptions. PGCIL is directed to calculate the stranded capacity and the compensation (relinquishment charges) payable by each relinquishing long term customer as per methodology specified in this Order respectively within one month of date of issue of this Order and publish the same on its website. The compensation shall be payable for the years of stranded capacity falling short of 12 years, subject to (g) below.

(b) Notice period for relinquishment shall be considered from the date the application was made to PGCIL for relinquishment and if no application was made, the date from which the Commission directs the PGCIL to accept the relinquishment”

42. We have gone through EPGL’s letter dated 9.6.2016 whereby EPGL conveyed to PGCIL (CTU) that the project is affected by force majeure conditions and is unviable and requested PGCIL (CTU) to take necessary actions to enable relinquishment of the LTOA of 250 MW under Regulation 18 of the 2009 Connectivity Regulations with no liabilities for relinquishment charge. Accordingly, the date for the relinquishment notice in the present case shall be 9.6.2016 i.e. the date of Petitioner’s letter to PGCIL seeking relinquishment of the LTA for 250 MW granted to the Petitioner on the ground of impossibility to perform its obligations under the contract.

43. In terms of the Order dated 8.3.2019 in Petition No. 92/MP/2015 the CTU shall work out the relinquishment charges. The Petitioner is liable to pay the

relinquishment charges in respect of relinquishment of LTA for 250 MW as per computations done by CTU.

44. The Petition No. 122/MP/2017 is disposed of in terms of the above.

sd/-
(I.S. Jha)
Member

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

sd/-
(P.K. Pujari)
Chairperson

