

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 246/MP/2016

Coram:

Shri P.K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I. S. Jha, Member

Date of Order: 5th February, 2020

In the matter of:

Petition for relinquishment of the Long-term Open Access under the Bulk Power Transmission Agreement dated 24.2.2010 under the Regulation 18 read with Regulation 32 of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009

And

In the matter of

Coastal Energen Private Limited (CEPL)
5th Floor, Buhari Towers
4 Moores Road
Chennai-600006

.....Petitioner

Vs

Power Grid Corporation of India Limited
B-9, Qutab Industrial Area
Katwaria Sarai
New Delhi-110016

.....Respondent

Parties present:

- 1) Shri Sanjay Sen, Senior Advocate, CEPL
- 2) Shri Hemant Singh, Advocate, CEPL
- 3) Shri Lakshyajit Singh, Advocate, CEPL
- 4) Shri Ali Moid, Advocate, CEPL
- 5) Ms. Suparna Srivastava, Advocate, PGCIL
- 6) Ms. Nehul Sharma, Advocate, PGIL
- 7) Dr. V.N. Paranjape, PGCIL
- 8) Ms. Jyoti Prasad, PGCIL



ORDER

The Petitioner Coastal Energen Private Limited (CEPL) has filed the present Petition under the Regulation 18 read with Regulation 32 of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (Connectivity Regulations) seeking relinquishment of the Long-term Open Access granted to the Petitioner under the Bulk Power Transmission Agreement dated 24.2.2010.

Brief Facts of the Case:

2. The Petitioner is a generating Company under Section 7 of the Electricity Act, 2003 (the Act) and has set up a 1200(2X600) power plant at village Tuticorin in the State of Tamil Nadu. For the purpose of evacuating power from its generation project, the Petitioner approached CTU for grant of LTA for 111 MW on target region basis (820 MW in Southern Region and 280 MW in Western Region). The Petitioner's generation project was located in the vicinity where a number of generation projects were envisaged including Ind-Bharat Power (Madras) Pvt. Ltd., Tuticorin-JV and Kudankulam APP Expansion. Based on the generation envisaged in the region, CTU evolved a comprehensive transmission system and granted LTA to the Petitioner and other generators in the region. The Petitioner entered into a Bulk Power Transmission Agreement (BPTA) dated 24.2.2010 with CTU. As per the provisions of the BPTA, the Petitioner was required to implement the Generation Switchyard-Tuticorin pooling station 400 kV D/C quad/high capacity line and 2nos. of 400 kV bays each at its generation switchyard and Tuticorin pooling station of PGCIL. PGCIL was required to implement the various transmission lines and sub-stations towards system strengthening for evacuation of power from the generation

project of the Petitioner as per the details given in Annexure-3 of the BPTA. Subsequent to the signing of the BPTA, the power supply scenario in the region underwent a change due to delays or non-materialization of generation capacity additions in the Southern Region. CTU undertook a mid-course correction in the transmission systems by eliminating certain elements of the transmission system and adding some new elements. Consequently, an amended Annexure-3 to the BPTA was signed between the Petitioner and the Respondent on 8.9.2011. As per Annexure-1 to the BPTA, the commissioning schedule of the units of the generation project of the Petitioner was March, 2012. The Petitioner vide its letter dated 25.3.2013 sought re-scheduling of the commercial operation of Unit-1 and Unit-2 of the generating project to October, 2013 and March, 2014 respectively on account of delay in receipt of the Term Loan Disbursement from the Banks. The Petitioner in the said letter requested for change of target region from Western Region to Southern Region in order to supply the entire quantity of 1100 MW to Tamil Nadu. CTU vide its letter dated 17.4.2013 agreed to revise the Annexure-1 to the BPTA to effect the changes in the date of commercial operation. CTU however informed the Petitioner that the LTA granted to the Petitioner could get effective only after commissioning of the identified transmission systems and till that time, the Petitioner was required to separately apply for Medium/Short Term Open Access as per the applicable regulations of the Commission. With regard to the change of target region, CTU clarified that the target beneficiaries cannot be changed against another set of target beneficiaries. The Petitioner applied for Medium Term Open Access to transfer 558 MW of power to Tamil Nadu which was granted by CTU for the period from 1.7.2015 to 30.6.2018.

3. The Petitioner vide its e-mail dated 23.9.2016 requested CTU to permit it to transmit the entire quantum of 1100 MW power under LTA. CTU circulated an agenda note on 17.11.2016 for the 21st Meeting of Southern Region Constituents on Connectivity and Long Term Access to be held on 19.11.2016. In the said agenda, CTU informed that all the elements planned under common transmission system have been commissioned except for Salem (New)-Madhugiri 765 kV S/C line and in the light of the Commission's order dated 16.2.2015 in Petition No. 92/MP/2014 that operationalisation of part capacity is permissible, CTU sought to operationalize 1100 MW LTA of the Petitioner. In the said meeting, the Petitioner submitted that since no Case-1 bids were being invited by the States, it was not in a position to tie up firm long term beneficiaries and sought to relinquish 542 MW (WR 280 MW and SR 262 MW). However, CTU did not agree to the relinquishment and it was decided to operationalize 1100 MW with target beneficiaries as Southern Region (820 MW) and Western Region (280 MW). The Petitioner vide its letter dated 28.11.2016 intimated the CTU that it has tied up for sale of 558 MW to TANGEDCO on long term basis and the same was being scheduled through MTOA till June, 2018 and the Petitioner has relinquished 542 MW (280 MW-WR and 242 MW-SR) w.e.f. 19.11.2016 without any relinquishment charges on account of force majeure event due to absence of long term procurement bids and requested the Petitioner to carry out necessary changes in the BPTA. The Petitioner also requested CTU to return the bank guarantee corresponding to 542 MW due to relinquishment. CTU vide its letter dated 1.12.2016 operationalized the LTA for 1100 MW (Firm: Tamil Nadu-558 MW, Target: SR-262 MW and WR-280 MW) and requested the Petitioner to sign the applicable agreement and establish the payment security mechanism. CTU vide its letter dated 13.12.2016 rejected the claim of the Petitioner that the non-availability of the long

term procurement bid is covered under force majeure under Article 9 of the BPTA. Aggrieved by the decision of PGCIL not to accept the relinquishment of 542 MW of LTOA without relinquishment charges, the Petitioner has filed the present petition with the following prayers:

- “(a) hold and declare that the LTA of 542 MW under BPTA dated 24.02.2010 stands relinquished with effect from 19.11.2016, without any liability to the Petitioner;
- (b) hold and declare that the Petitioner is not liable to pay any relinquishment charges in view of the fact that the Petitioner has relinquished 542 MW LTA on account of Force Majeure reasons;
- (c) direct the Respondent, being PGCIL to defer operationalizing 558 MW LTA, until the assets to be developed/commissioned by PGCIL, as listed under Annexure-3 to BPTA, are completed in their entirety;
- (d) direct Respondent, being PGCIL, to seek reduction of the bank guarantee bearing no. 0999910BG0000152 dated 20.02.2016 for an amount of Rs. 55,00,00,000/-issued by State Bank of India, on behalf of the Petitioner, corresponding to the quantum of 542 MW of LTA relinquished by the said Petitioner;
- (e) quash the letters dated 02.12.2016 and 07.12.2016 issued by PGCIL for opening of letter of credit to the Petitioner;
- (f) in the interim, grant prayer (d)”

Submissions of the Petitioner

4. The Petitioner in support of its contention and prayers in the petition has submitted as under:

- (a) Grant of LTA to a generator does not guarantee flow of power or operationalisation of the LTA. A firm long term PPA is a condition precedent for operationalisation of the LTA which is evident from Clause 7.1 of the Billing, Collection and Disbursement Procedure (BCD Procedure) issued under the Connectivity Regulations read with the order dated 2.12.2013 in Petition No. 244/MP/2012. Since the year 2009, there have been only three successful long term bids floated by the Discoms in the Western Region till December, 2014 with a requisitioned capacity of around 10,000 MW as

against 42471 MW of installed capacity commissioned by the Independent Power Producer (IPPs) in the country.

(b) At the time of applying for quantum of 1100 MW LTA in 2009, the Petitioner relied on the reports of CEA with regard to the target regions where power supply was deficient and accordingly planned its generation project so that the Petitioner could capitalize on the said deficiency. However, pursuant to the execution of the BPTA on 24.2.2010, the Petitioner made best efforts to formalize long term Power Purchase Agreements (PPAs) but could only succeed upto 50% of the total capacity of its generation project. Since the long term power purchase in the target regions is substantially disproportionate to the commissioned IPPs, the situation is beyond the control of the Petitioner and tantamounts to force majeure events. Therefore, the inability of the Petitioner to enter into long term PPAs is a glaring event of force majeure rendering the LTA impossible to perform/operationalize. Under the circumstances, the Petitioner was constrained to relinquish LTA of 542 MW under BPTA dated 24.2.2010 on account of non-availability of long term bids.

(c) Under Regulation 18 of the Connectivity Regulations, the Petitioner has a statutory right to relinquish the Long Term Access before the expiry of the full term LTA subject to payment of compensation towards the stranded capacity resulting from such relinquishment in the manner provided in the said regulation. The question of stranded capacity in the present case does not arise as per the Connectivity Regulations read with the BCD Procedure since the LTA granted to the Petitioner cannot be implemented in the absence of

adequate number of long term power procurement exercise being conducted by the Discoms and consequently, no relinquishment charges are payable by the Petitioner.

- (d) The CTU's letter dated 17.11.2016 informing the Petitioner about operationalisation of the LTA is wholly erroneous in view of the fact that the obligations undertaken by the CTU under BPTA dated 24.2.2010 to complete various sub-stations and transmission lines towards system strengthening for evacuation of power from the power plant of the Petitioner has only been partially commissioned and hence, LTA cannot be operationalized unless and until the system envisaged under the BPTA is commissioned completely. Reliance by CTU on para 129 of the order dated 16.2.2015 in Petition No. 92/MP/2014 with regard to part operationalisation of LTA is misplaced since the said part operationalisation can happen only in case where the delay in completion of the transmission assets is for the reasons beyond the control of CTU.
- (e) From a conjoint reading of Regulation 2(v) and Regulation 18 of the Connectivity Regulations, it becomes evident that the relinquishment charges/compensation sought to be levied are based on the capacity which remain stranded in the transmission system in the event of relinquishment of LTA quantum by an LTA customer. Since there is no methodology in existence for working out the stranded capacity on account of relinquishment of LTA quantum, any relinquishment charges calculated and subsequently imposed by CTU would amount to an arbitrary and misguided imposition.

- (f) PGCIL in its capacity as CTU has to undertake systematic study including reconnaissance and pilot study of the prospective generators and future demand in a particular region to plan its transmission network. CTU is aware that 77% of the LTAs have not fructified due to non-signing of the Long Term PPA and it is the statutory responsibility of PGCIL to review the whole scheme related to transmission services keeping in view the ground realities.
- (g) Since the Petitioner has already relinquished the capacity of 542 MW, CTU vide its letter dated 28.11.2016 could not have raised any invoices pertaining to the transmission charges on account of commissioning of the transmission lines nor could have demanded for opening of Letter of Credit.

Reply of the Respondent

5. The Respondent, (PGCIL/CTU) vide affidavit dated 2.2.2017 has submitted the following:

- (a) As per Clause 2.0(a) of the BPTA, the Petitioner agreed to share and pay to the Respondent the transmission charges in accordance with the Regulations/Tariff Orders issued by the Commission corresponding to the capacity of power contracted from the generation project through open access from the scheduled date of commissioning of the project. Under Clause 5.0, the Petitioner has undertaken not to relinquish or transfer its rights and obligations under the BPTA without the prior approval of PGCIL and the Commission and subject to the payment of compensation in accordance with the Regulations issued by the Commission from time to time. Under Clause 6.0, in case any developer fails to construct the generating station or dedicated transmission system or makes an exit or abandons its project, CTU

shall have the right to collect the transmission charges and/or damages. The developer is required to furnish a bank guarantee for an amount equivalent to Rs. 5 lakh/MW to compensate such damages. Clause 9.0 of the BPTA deals with occurrence of force majeure conditions which is in the context of compliance of the terms of the BPTA. Any issues of the long term customer prior to operationalisation of LTA were neither conceived nor were a matter of contractual agreement with PGCIL under the BPTA which is evident from the last sentence of Clause 9.0 which provides that “transmission/drawal of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist”. Therefore, the BPTA contemplated such events of force majeure owing to occurrence of which the ongoing transmission/drawal of power had been disrupted. In the light of the clear provisions in the BPTA, the Petitioner cannot contend that non-availability of long term bids in the target region was a force majeure condition within the meaning of Clause 9.0 of the BPTA. Therefore, the issues affecting the Petitioner prior to operationalisation of the LTA cannot be covered under Clause 9.0 of the BPTA.

- (b) The immediate evacuation system of the Petitioner’s power project included six assets out of which five assets have been commissioned and one asset which is stuck in RoW issue was anticipated to be commissioned in March, 2017. Study was carried out for dispatch level of SR allocation plus WR allocation and considering Tuticorin pooling station- Dharnapuri (Salem-New) 765 kV D/C line initially charged at 400 kV to analyse the adequacy of the transmissions system for transfer of power to the target regions. It was observed that line loading in the base case as well as contingency conditions

were generally in order. Accordingly, it was proposed by CTU to operationalize the LTA of 1100 MW of the Petitioner subject to fulfillment of necessary regulatory requirements. The Petitioner had also vide its e-mail dated 27.9.2016 requested CTU to operationalize the entire quantum of 1100 MW granted under the LTA. Since non-finalization of firm beneficiaries could not be a ground for force majeure conditions and after considering the request of the Petitioner to operationalize the entire quantum of LTA, CTU decided in the 21st meeting of Southern Region Constituents held on 19.11.2016 to operationalize the Petitioner's LTA of 1100 MW with target beneficiaries as SR-820 MW and WR-225 MW.

(c) Pending operationalisation of LTA, the Petitioner was granted MTOA for 558 MW for transfer of power to Tamil Nadu for the period 1.7.2015 to 30.6.2018. After operationalisation of LTA, 558 MW was required to be relinquished by the Petitioner in accordance with Regulation 24 of the Connectivity Regulations.

(d) As per the load flow studies carried out for analyzing the adequacy of the transmission system, the entire power generated from the Petitioner's project could be transferred through the transmission systems already put in place before operationalisation of LTA. Therefore, the Petitioner's allegation that LTA of 1100 MW was operationalized by CTU without achieving the milestones enumerated under the BPTA is without merit.

(e) Regulation 18 of the Connectivity Regulations provides that the LTA customer may relinquish Long Term Access, fully or partly, upon payment of relinquishment charges. The Petitioner has also undertaken under Clause 5.0

of the BPTA that any relinquishment of its rights and obligations under the BPTA would be subject to the payment of compensation in accordance with the Regulations issued by the Commission from time to time. Therefore, the request of the Petitioner for relinquishment of 542 MW sought by the Petitioner can be accepted only after the Petitioner communicating its consent for payment of relinquishment charges. The issue of stranded capacity was under adjudication in Petition No. 92/MP/2015.

Rejoinder by the Petitioner

6. The Petitioner in its rejoinder has reiterated its submissions made in the main petition. The Petitioner has mainly contended that it is not liable to pay the relinquishment charges for relinquishing 542 MW LTA capacity on account of the following:

- (a) Non-floating of long term bids by the distribution companies in Western Region and Southern Region is a force majeure event as per the BPTA relieving the Petitioner from its liabilities to pay the relinquishment charges.
- (b) The Respondent did not augment/construct the transmission corridor pertaining to 280 MW LTA capacity in Western Region.
- (c) The Respondent in view of its statutory responsibility under Section 38 of the Act should not have constructed the transmission corridor in Southern Region pertaining to 262 MW when there were no long term PPAs executed by the Petitioner.

- (d) There is no stranded capacity in the transmission system pertaining to 542 MW (280 MW in WR and 262 MW in SR).
- (e) The Respondent cannot compel the Petitioner to relinquish the MTOA to migrate to LTA before expiry of the said LTOA.

Submissions during the hearing

7. During the hearing of the petition, learned senior counsel for the Petitioner submitted as under:-

- (a) Once a contract has been entered into on account of provisions in the statute or regulations and the principles in the regulations have been incorporated in the contract, it cannot be said that the regulation will operate independent of the contract. Since the incident of relinquishment charge is on account of a contract executed in terms envisaged under Regulation 15 of the Connectivity Regulations, Regulation 18 would then be required to be applied in a manner envisaged by the parties in the contract/BPTA. Accordingly, Clauses 5 and 9 of the BPTA becomes relevant and would control the obligations of the parties.
- (b) The Commission in Petition No. 69/MP/2014 (Aryan MP Power Generation Pvt. Ltd. Vs. PGCIL) and in Petition No. 317/MP/2013 (Navbharat Power Pvt. Ltd. Vs. PGCIL) and other orders has interpreted Clause 9 of the BPTA to cover a temporary phase when the project developer is unable to utilize the transmission system or when the licensee is unable to make its transmission system available due to any force majeure event and has held that the said provision cannot be used for making an exit from BPTA. Force Majeure

cannot be of “temporary nature” for the reason that the definition of force majeure includes war, rebellion, mutiny, fire, flood, change in law etc. and some of these events creates a permanent disability to jeopardize the ability of the Petitioner to start operation again. Therefore, Clause 9 of the BPTA is without any limitations as to the time for which force majeure period can be claimed.

(c) Clauses 1 to 11 of the BPTA unambiguously provide that the obligation contained under the terms relating to payment of transmission charges (Clause 2) and relinquishment charges (Clause 5) shall stand discharged in the event of occurrence of force majeure situation (Clause 9). Therefore, Clause 9 is an omnibus clause that cuts right through the agreement and includes the failure to carry out the obligation to pay the transmission charges and relinquishment charges as envisaged in Clauses 3 and 5 of the BPTA. The functional basis of a power project is long term PPAs and if the same are not executed due to reasons not attributable to the project developer, the existence of force majeure events as provided in Clause 9 cannot be denied. Further, Clause 6 of the BPTA has no application to the present case as this is not a case of exit/abandonment of the project.

(d) The event narrated by the Petitioner i.e. non-availability of long term PPA is an event of force majeure within the meaning of Clause 9 of the BPTA and on occurrence of such force majeure event, the obligation to pay the relinquishment charges under Regulation 18(1) of the Connectivity Regulations stands extinguished. An analysis of the various provisions of the BPTA would show that the statutory right of CTU to collect transmission

charges was made in terms of the contract/BPTA. As per the minutes of the 37th and 40th Reports of the Parliamentary Standing Committee issued in March, 2018 and August, 2018 respectively, there was no possibility of signing of PPAs which resulted in the assets being stranded/stretched and several companies being declared NPAs. Lack of agreement for supply of power between generators and distribution licensees is an event of force majeure which is recognized by the Central Government.

8. Learned Counsel for CTU submitted as under:

a) The Commission in its order dated 8.3.2019 in Petition No. 92/MP/2015 has decided the issue of stranded capacity and payment of relinquishment charges. The Commission has held that Regulation 18 of the Connectivity Regulations was in conformity with the provisions of the Act and in advancement of the objects of the Act with regard to Open Access. Further, the Commission has held that the Relinquishment Charges were in the nature of the compensation which a long term customer was obliged to pay as transmission charges in accordance with the mechanism envisaged in the Regulation 18 of the Connectivity Regulation. Therefore, the issue as regards the liability of payment of relinquishment charges has been settled by the Commission which is binding on the petitioner being a party in the Petition No. 92/MP/2015.

b) In line with the direction of the Commission in order dated 8.3.2019 in Petition No. 92/MP/2015, CTU has computed the stranded capacity and relinquishment charges of the various generators including the Petitioner. The Petitioner is liable to pay Rs. 44.12 Crs. as Relinquishment Charges.

- c) The allegations made by the Petitioner as regards the responsibility of the CTU to execute the transmission corridors taking into account the actual long term PPAs entered by the Petitioner has been dealt with by the Commission in Para 94 of the Order dated 8.3.2019 in the Petition No. 92/MP/2015. Since, signing of the PPAs is not a pre-condition for implementation of transmission corridors, the same cannot be pleaded as a Force Majeure event relieving the Petitioner from paying the relinquishment/transmission Charges under the BPTA.
- d) The Commission in the Order dated 8.3.2019 in Petition No. 92/MP/2015 has held that since BPTA is in terms of the Connectivity Regulations, it is in the nature of a statutory contract. The relationship between the CTU and the LTA customer being statutory in nature has to be governed by the provisions of the Connectivity Regulations. Further, the liability for payment towards the relinquishment charges is to be determined based on Regulation 18 of the Connectivity Regulations. Since, the issue as regards the applicability of the Regulation 18 in the context of BPTA stands adjudicated, the submission of the Petitioner in this regard is liable to be rejected.
- e) Under Clause 5.0 of the BPTA, the obligation to pay the transmission charges under the BPTA is absolute and the Petitioner cannot transfer/relinquish its rights and obligations without the prior approval of the Commission. Since, the relinquishment is to be upon the payment of necessary compensation in accordance with the regulations, Regulation 18 of the Connectivity Regulation has been included as an operating

contractual provision under the express terms of Clause 5.0 of the BPTA. Therefore, the inter argument of the statute ousting the Regulation is of no consequence.

- f) While interpreting a contract what is of essence is the intention of the parties in the context which it appears and the nature of the rights and obligations agreed there under. As such the Force Majeure Clause under BPTA must be construed accordingly and cannot be given a wider area of applicability than what has been intended by the parties. The BPTA is a contract for use of transmission line of a transmission licensee by a DIC wherein the DIC agrees to bear the transmission charges as a consideration for use of the said transmission lines irrespective of the actual power flow. In other words, so long as a DIC is connected to the transmission lines of the licensee and retains the rights to access the system, it is liable to pay transmission charges to the licensee. It is in this context that Clause 9 of the Connectivity Regulations provides for an exclusion Clause in the nature of the force majeure event which temporarily absolves the parties from any liabilities arising from a breach of contract. This is evident from the last sentence of the Clause 9 which says that power flow should be started as soon as the force majeure event is over. Therefore, Clause 9 of the BPTA being temporary in nature and being restrictive in application cannot be relied upon by the Petitioner to contend that the entire BPTA including Clause 5.0 of the BPTA ceases to operate as between the parties. The liabilities under Clause 5 of the BPTA and Regulation 18 of the Connectivity Regulations must be distinguished from the liabilities under Clause 9 of the BPTA. Clause 9 of the BPTA only

provides for a departure of payment from the transmission charges and by no means can provide for departure from obligation under the Clause 5 of the BPTA.

g) As per the findings of the Commission in various cases and of the Appellate Tribunal in Appeal No. 54 of 2014, the absence of long term PPA cannot be construed as a force majeure event. The Petitioner is accordingly liable to pay the Relinquishment Charges.

9. Learned Counsel for TANGEDCO submitted that as per Regulation 8(5) of the Sharing Regulations, the generators are liable to pay the transmission charges irrespective of force majeure clause.

10. Learned Senior Counsel for the Petitioner has submitted as under:

(a) Relinquishment Charges have been made as part of the contractual obligations under Clause 5 and therefore, the same is amenable to the Clause 9 of the BPTA. While the relinquishment charges can be computed in terms of the protocol provided under Regulation 18, levy of the same is subject to the terms and subject of the BPTA. Further, the BPTA does not contain any exception or non obstante clause specifying that the relinquishment charges will be levied as per the Connectivity Regulations. In the absence of such stipulations, CTU cannot argue that the compensation for relinquishment is a statutory charge which is payable de-hors the provisions of the BPTA.

(b) The argument by PGCIL that PPA is not at all relevant while considering the LTA application is fundamentally flawed. Regulation 12 of the

Connectivity Regulations provides that an agreement for sale/purchase of power is a consideration at the time of applying for LTA. Clause 22.7 of the Detailed Procedure under the Connectivity Regulation casts an obligation on an LTA customer to confirm the exact details of the PPA executed 3 years prior to the intended date of operationalization of the LTA. Clause 7.1 of the BCD Procedure provides that an LTA cannot be operational in the event firm long term PPA is not available. Regulation 15-B of the Connectivity Regulations provides that LTA can only be availed by having a contract of above one year. In view of the above provisions, the Commission is precluded from taking a view that non-availability of long term PPAs as a result of non-initiation of a long term power purchase processes by the distribution licensees will have no impact on the BPTAs.

- (c) Ministry of Power issued the guidelines for procurement of power under Design, Build, Finance, Own and Operate (DBFOO) basis on 8.1.2013. As per DBFOO, coal cost is a pass through in certain scenarios which relate to the source of coal. For example, if the bids are called for scenarios relating to domestic coal linkage or from domestic coal mines, then power plants based on imported coal cannot participate in such bids. The said stipulation is a departure from the earlier Case 1 bidding regime where coal source was at the discretion of the bidders. This factor has materially affected the Petitioner from entering into long term PPA. The aforesaid reason cannot be ignored by the Commission and in the event of relinquishment of BPTA/LTA on account of the said force majeure reasons, no relinquishment charges can be levied.

(d) The BPTA is not an underlying contract for underwriting the costs of PGCIL. Where a generator is not able to evacuate power on account of reasons which are beyond its control, the said generator cannot be made liable to underwrite the cost of PGCIL on account of non-usage of the transmission system. As per Section 38(2)(b) of the Act, CTU is required to effectively coordinate the construction of transmission systems with various entities including the generators. It follows therefrom that when the generators have raised their concerns pertaining to non-evacuation of power on account of reasons beyond their control, CTU cannot just proceed with the transmission corridors only on the basis of BPTAs being signed with the generators. As per Para 5.3.2 of the National Electricity Policy, CTU is required to undertake network expansion after identifying requirements in consultation with the stakeholders and taking up the execution after the due regulatory approval. When PGCIL develops transmission corridors without execution of contracts/BPTA with the beneficiaries, the risks in developing the transmission network cannot be entirely attributable to the LTA customers. CTU has to take the risk of developing transmission infrastructure in the event of occurrence of any unforeseeable or uncontrollable event.

(e) CTU's interpretation of clause 9 of the BPTA is only applicable to the extent of "transmission of electricity in a transmission system", and not for the purpose of injection or withdrawal of power is completely erroneous. After injection of power by the generator from its generating station, it has no role qua such generation of power. If the force majeure clause is

interpreted as per the argument of CTU, then it will be applicable for the benefit of CTU, and for no other entity. Any issues qua the flow of power in the transmission system can only be attributable to CTU and in such an event, any benefit of force majeure will always be availed by CTU. The above interpretation will render clause 9 as otiose as only CTU can invoke the said clause since the generator does not have any role after injection of power in the transmission system from its power plant.

- e) TANGEDCO's reliance on Regulation 8(5) of the Sharing Regulations with regard to the liability of generators to pay the transmission charges irrespective of the force majeure clause is misplaced. Regulation 13(1)(l) of the Sharing Regulations provides that "force majeure clause" shall be inserted in the TSA which means that in case of an event beyond the control of a generator, the said clause will be applicable and the generators are not bound to pay the transmission charges on account of force majeure events. Since the liability to collect the transmission charges has been subjected to TSA which is a statutory contract, the Sharing Regulations will have to be implemented as per the provisions of the TSA. Accordingly, the Regulation 8(5) of the Sharing Regulations cannot be independently invoked. In the event of occurrence of force majeure, the liability to pay transmission charges by the generator is discharged.

Analysis and Decision

11. We have considered the submissions of the Petitioner and Respondents and perused all relevant documents on record and the regulations of the Commission

and the orders issued by the Commission having bearing on the adjudication of disputes raised in the petition. The following issues arise for our consideration:

(a) Issue No. 1: Whether Clause 9 of the BPTA dealing with force majeure is an omnibus provision cutting across all provisions of the BPTA including clause 3 and 5 and in the event force majeure is proved, relieves an affected party from its liability to pay the transmission charges or relinquishment charges as the case may be, or is a standalone provision applicable for disruption in injection/supply of power of temporary nature?

(b) Issue No.2: Whether the case of the Petitioner is covered under clause 9 of the BPTA?

(c) Issue No.3: Whether CTU could not have operationalized the LTA of the Petitioner since one of elements mentioned in amended Annexure-3 of the PPA has not been commissioned?

(d) Issue No.4: What shall be the date of relinquishment?

(e) Issue No.5: What are the reliefs admissible to the Petitioner in terms of its prayers in the Petition?

These issues have been dealt with ad seriatim in the succeeding paragraphs of this order.

Issue No. 1: Whether Clause 9 of the BPTA dealing with force majeure is an omnibus provision cutting across all provisions of the BPTA including clause 3 and 5 and in the event force majeure is proved, relieves an affected party from its liability to pay the transmission charges or relinquishment charges as the case may be, or is a standalone provision applicable for disruption in injection/supply of power of temporary nature?

12. The Petitioner has set up a 1200 MW (2x600) power project at village Tuticorin in the State of Tamil Nadu. It applied for and was granted LTA of 1100 MW to target region by CTU and as required under the Connectivity Regulations, it entered into a BPTA with CTU on 24.2.2010 which envisaged 820 LTA for Southern Region and 280 MW LTA to Western Region. The Petitioner could tie up 558 MW with TANGEDCO on long term basis and in the absence of operationalization of LTA, the Petitioner sought and was granted MTOA for 558 MW from 1.7.2015 to

30.6.2018. CTU in the 21st Meeting of Southern Region constituents on connectivity and long term access held on 19.11.2016 decided to operationalize the LTA of 1100 MW since all the transmission systems planned under common transmission system have been commissioned except Salem (New)-Madhugiri 765 kV S/C transmission line and as per the study conducted by CTU, the commissioned elements are capable of evacuating the entire 1100 MW of power (820 MW to Southern Region and 280 MW to Western Region) from the generation project of the Petitioner. The Petitioner vide its letter dated 28.11.2016 sought to relinquish 542 MW (280 MW to Western Region and 242 MW to Southern Region) with effect from 19.11.2016 without any relinquishment charges on the ground that it has been affected by force majeure under Clause 9 of the BPTA on account of absence of long term procurement bids by the distribution companies. CTU rejected the claim of the Petitioner that non-availability of long term procurement bids is covered under Clause 9 of the BPTA. The Petitioner in the present petition has sought a declaration that the LTA of 542 MW under BPTA dated 24.2.2010 stands relinquished with effect from 19.11.2016 without any liability to pay the relinquishment charges since the relinquishment is on account of force majeure reasons.

13. The Petitioner has submitted that CTU accorded long term access in terms of the Connectivity Regulations. The Petitioner and CTU entered into BPTA as required under Regulation 15 of the Connectivity Regulations for payment of transmission charges (Clause 2 of the BPTA). Clause 5 of the BPTA recognized the ability to relinquish or transfer obligations specified in the BPTA subject to approval of CTU and the Commission and further subject to payment of compensation. In terms of Clause 9 of the BPTA, the parties have agreed to limit their liability for loss or

damage arising out of failure to carry out the terms of the agreement if such loss or damage is on account of force majeure. Further, force majeure has been defined in broad terms to include change in law or any other cause beyond the control of the defaulting party. Therefore, the statutory right of CTU to collect the transmission charges was made in terms of the contract/BPTA. The Petitioner has submitted that the agreed terms of the BPTA, being Clauses 1 to 11 are unambiguous which provide that the obligations contained under the terms relating to payment of transmission charges (Clause 2) and relinquishment charges (Clause 5) shall stand discharged in the event of occurrence of force majeure situation (Clause 9). The Petitioner has submitted that Clause 9 is an omnibus clause that cut right through the agreement since it provides that “no party is liable to any claim for any loss or damages whatsoever arising out of the failure to carry out the terms of this Agreement”. The Petitioner has submitted that use of the phrase “this agreement” includes the failure to pay the transmission charges and relinquishment charges as envisaged in Clauses 3 and 5 of the agreement. The parties entering into contract are fully aware of the nature of the contract including the contingencies (i.e. Clause 9 of the BPTA) and it would not be proper if any other interpretation or meaning is given to the same which is contrary to the original intention of the parties i.e. inspite of occurrence of force majeure events under clause 9, the contractual obligations under Regulation 5 to pay the relinquishment charges continues to be alive.

14. The Petitioner has further submitted that a question which needs to be considered is whether the Petitioner would be liable for payment of relinquishment charges in terms of Regulation 18 of Connectivity Regulations read with the order dated 8.3.2019 in Petition No. 92/MP/2015 irrespective of whether the Petitioner has demonstrated existence of force majeure events. The Petitioner has submitted that

once a contract has been entered into on account of provisions in a statute/regulations and the principles in the regulations have been incorporated in the contract, it cannot be said that the regulation will operate independent of the contract. The Petitioner has submitted that the incident of relinquishment charge is on account of the contract executed in terms envisaged under Regulation 15 and hence Regulation 18 would require to be applied in a manner envisaged by the parties in the BPTA. It is in this context that Clauses 5 and 9 become relevant and would control the obligations of the parties, irrespective of whether such obligation has reference to determination made under the regulations.

15. CTU has submitted that the issue regarding liability of payment of relinquishment charges and method of determination of stranded capacity has been settled by the Commission in order dated 8.3.2019 in Petition No.92/MP/2015 and is binding on the Petitioners who were also parties in the said proceedings (subject to order in the appeals). The Petitioners cannot now be heard to contend that they are not liable to make payment of the compensation in the manner provided under Regulation 18 of the Connectivity Regulations. CTU has submitted that the Petitioner in terms of Clause 2.0 of the BPTA has undertaken to share and pay to the CTU the transmission charges in accordance with the Regulations/Tariff orders of the Commission. Further, Clause 6 of the BPTA have bound the generators to pay the transmission charges when they are abandoning the project or making an exit. CTU has emphasized that it is in pursuance of the said provision that the Petitioner has furnished to the CTU the bank guarantee corresponding to the LTAs granted to them which can be encashed by the CTU in case of any adverse progress of the generating unit assessed in the Coordination Meeting. CTU has further submitted that Clause 5.0 of the BPTA prevents the Petitioner to relinquish or transfer its rights

and obligations specified in the BPTA without the prior approval of the Commission and CTU and subject to payment of compensation in accordance with the regulations of the Commission issued from time to time. Therefore, Regulation 18 has been included as an operating contractual provision under the express terms of Clause 5.0 of the BPTA and therefore, the entire argument of the contract ousting the regulation is of no consequence. CTU has submitted that the contention of the Petitioner that the right to claim relinquishment charges based upon exit/surrender/relinquishment of LTA is subject to provisions of BPTA which has become frustrated on account of force majeure event, already stands adjudicated in order dated 8.3.2019 in Petition No.92/MP/2015 wherein the Commission has held that BPTAs or LTA Agreements are in accordance with the Connectivity Regulations and they are in the nature of statutory contract and are to be governed by the provisions of Connectivity Regulations. CTU has submitted that the interpretation supplied by the Petitioner to Clause 9 of the BPTA so as to broaden its applicability to situations which were never intended to be covered, is absolutely erroneous and has occurred on account of the unwarranted comparison by the Petitioner of the force majeure clause in the BPTA with the force majeure clause in the Power Purchase Agreement between the generating companies and distribution licensees. CTU has submitted that the force majeure clause in the BPTA must be interpreted on the principle of interpretation of contract i.e. the intention of the parties, the context in which they appear and the nature of rights and obligations agreed thereunder and cannot be given a wider area of applicability than what has been intended by the parties. CTU has submitted that the BPTA is a contract for use of transmission lines of a transmission licensee by a DIC wherein the DIC agrees to bear the transmission charges as a consideration for use of the said transmission

lines irrespective of the actual power flow, meaning thereby that so long as a DIC is connected to the transmission lines of the licensee and retains the right to access the system, it is liable to pay the transmission charges to the licensee. It is in this context that Clause 9 provides for an exclusion clause in the nature of force majeure which temporarily absolves the parties from any liability arising out of the breach of contract if the same has occurred on account of force majeure which prevents the use of the transmission lines and suspends the power flow. That is why the clause says that power flow is to be started as soon as force majeure event is over. CTU has submitted that clause 9 of the BPTA being temporary in nature and restrictive in its application cannot be relied upon by the Petitioner to contend that once it becomes applicable, the entire BPTA including clause 5.0 ceases to operate between the parties. CTU has emphasized that the applicability of Clause 9 cannot be extended to matters which are beyond the eventualities affecting “transmission/drawal of power”. CTU has submitted that the attempt of the Petitioner to misinterpret the provisions of Clauses 9 and 5 of the BPTA read with Regulation 18 of the Connectivity Regulations so as to evade its liability of payment of relinquishment charges at the time of relinquishment of the LTA, is also negated by the clear language of Clause 9 of the BPTA.

16. We have considered the submissions of the Petitioner and CTU. The main contention of the Petitioner is that once the BPTA has been signed as required under Regulation 15 of the Connectivity Regulations, the rights and liabilities of the parties to the BPTA shall be governed by the provisions of the BPTA and not in accordance with the provisions of the Connectivity Regulations. To be specific, the Petitioner’s contention is that the relinquishment charges determined under Regulation 18 of the Connectivity Regulations cannot be levied if the Petitioner is excused for

performance on account of force majeure in terms of Clause 9 of the BPTA. Therefore, the question for consideration is whether the relinquishment charges are statutory or contractual in nature. The Commission has dealt with the issue in its order dated 8.3.2019 in Petition No.92/MP/2015. Relevant observations and findings of the Commission in the said order are extracted as under:

“97. We have considered the submissions of the parties. Long Term Access rights have been granted to the LTA customers under provisions of Regulation 12 of the Connectivity Regulations and such access rights carry with itself the corresponding commitment under Regulation 26 to pay the transmission charges for the transmission systems included in the LTA grants. Further, in terms of the Connectivity Regulations, the LTA customers have signed the Bulk Power Transmission Agreements or Long Term Access Agreement making unconditional commitment to pay the transmission charges throughout the term of the LTA. Regulation 18 deals with the relinquishment of long term access rights by the LTA customers. Regulation 18 provides for an exit provision for the long term customers to relinquish the LTA rights subject to payment of transmission charges for a maximum period of 12 years with a notice period of one year or payment of transmission charges in lieu thereof. Since BPTA or LTA Agreements are in terms of the Connectivity Regulations, they are in the nature of statutory contract. Therefore, the relationship between the CTU and the LTA customers are basically statutory in nature and has to be governed by the provisions of the Connectivity Regulations. As a corollary, the relinquishment of access rights of the LTA customers has to be strictly construed in terms of the provisions of the Connectivity Regulations.

98. Regulation 18 which deals with the relinquishment of long term access rights by LTA customers is extracted 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 atleast 12 years

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

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

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

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

Provided further that in case a customer submits an application for relinquishment of long-term access rights at anytime 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."

99. Regulation 18 provides for relinquishment of access rights fully or partly before expiry of the full term of long term access by making payment of compensation for the stranded capacity. The regulation has fixed a period of maximum of 12 years for the purpose of compensation for access rights even though the tenure of the LTA is 25 years. Further, the compensation has been fixed at an amount of 66% of the transmission charges (net present value) for the stranded transmission capacity for a period falling short of 12 years. In other words, the long term customers relinquishing the access rights are exempted from paying 34% of the transmission charges (net present value) for a period falling short of 12 years. Thus on account of the exit of a long term customer through relinquishment, the entire transmission charges from 13th year to 25th year and 34% of the transmission charges from 1st year to 12th year for the relinquished capacity has to be borne by other long term customers and medium term customers. This aspect becomes clear from Regulation 18(3) which provides that the compensation received on account of relinquishment shall be applied for reducing the transmission charges of other long term and medium term customers which are required to bear the additional transmission charges which would have been borne by the relinquishing long term customers but for the relinquishment of long term access rights. 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 CTU 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....."

In the light of the above findings of the Commission, the issue whether the relinquishment charges shall be governed by the Connectivity Regulations or the provisions of the BPTA stands settled. Since appeals have been filed against the said order, it is needless to say that the above findings are subject to the decision of the Appellate Tribunal. As the matter stands today, the issue is settled and cannot be reopened in the present proceedings.

17. Another argument of the Petitioner is that Clause 9 of the BPTA is an omnibus clause that cut right through the agreement and the use of the words “this agreement” includes the failure to carry out the obligation to pay the transmission charges and relinquishment charges, as envisaged in Clauses 3 and 5 of the BPTA. The Petitioner has submitted that the Commission has taken a view qua Clause 9 in Aryan Coal and other related matters that the said clause provides temporary amnesty and appeals are presently pending against these orders. Despite being aware that the Commission has become functus officio qua the interpretation of Clause 9 of the BPTA, the Petitioner has urged the Commission to take an independent view on account of the submissions made in the petition. Therefore, without any prejudice to our findings in our earlier order, we are examining the submissions of the Petitioner.

18. The relevant provisions of the BPTA dated 24.2.2010 are quoted hereunder:

“1.0 In accordance with Central Electricity Regulatory Commission Regulations, 2009 and Electricity Act 2003 (including their amendment, if any) and in accordance with the term mentioned above, POWERGRID agrees to provide such open access required by these Long Term Transmission Customers from the date and in the manner mentioned in the Annexure 1, Annexure 2, Annexure 3 and Annexure 4 of this agreement for a period of 25 years from the schedule date of open access of individual long-term open access customers (as specified in Annexure I).

2.0 (a) Long term transmission customer shall share and pay the transmission charges in accordance with the regulation/tariff order issued by Central Electricity

Regulatory Commission from time to time of POWERGRID transmission system of concerned applicable Region i.e. Northern Region, Western Region, Southern Region including charges for inter-regional links/ULDC/NLDC charges and any additions thereof. These charges would be applicable corresponding to the capacity of power contracted from the said generation project through open access from the, scheduled date of commissioning of generating projects as indicated at Annexure-I irrespective of their actual date of commissioning.

(b) Long term transmission customer shall share and pay the transmission charges of the transmission system detailed in Annexure-3 in accordance with the sharing mechanism detailed in Annexure-4. In case, in future, any other long-term transmission customer(s) is/are granted open access through the transmission system detailed at Annexure-3 (subject to technical feasibility), he/they would also share the applicable transmission charges.

(c) Each Long transmission customer (including its successor/assignee) shall pay the applicable transmission charges from the date of commissioning of the respective transmission system which would not be prior to the scheduled commissioning date of generating units as indicated by the respective developer as per Annexure-I. The commissioning of transmission system would be postponed only if the same is agreed mutually by concerned parties.

(d) In addition to opening of LC for 105% of estimated average monthly billing for charges mentioned at 2(a) and 2(b) above, Long-Term Transmission customer would provide security in the form of irrevocable Bank Guarantee (BO), in favor of POWER GRID, equivalent to two months estimated average monthly billing, three months prior to the scheduled date of commissioning of generating units as indicated at Annexure-I. Initially the security mechanism shall be valid for a minimum period of three (3) years and shall be renewed from time to time till the expiry of the open access.

3.0 POWERGRID agrees to provide Long Term Access required by Long term transmission customer as per the details mentioned above and in accordance with the Regulations under the Central Electricity Regulatory Commission (Open Access in Interstate Transmission) Regulations 2009 and conditions specified by the CERC from time to time.

However, during the tenure of this agreement if any of the covenants and conditions recited in this agreement including agreements at Annexure- A, Band C found inconsistent with the provisions of the Electricity Act 2003 and/or applicable notifications/rules/regulations issued either by CERC or by GOI as per the provisions of the Electricity Act, then notwithstanding anything contained in the agreement referred to above, the said rules and regulations shall prevail.

5.0 The Long term transmission customer shall not relinquish or transfer its rights and obligations specified in the Bulk Power Transmission Agreement, without prior approval of POWERGRID and CERC and subject to payment of compensation in accordance with the CERC Regulations issued from time to time.

6.0 (a) In case any of the developers fail to construct the generating station or 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

nationalised 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 units) mentioned at Annexure-I (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 I), The bank guarantee would be encashed by POWER GRID in case of adverse progress of individual generating units assessed during coordination meeting as per para 7 below. However, the validity should be extended by the concerned Long Term transmission customer(s) as per the requirement to be indicated during co-ordination meeting.

(c) The POWERGRID shall build transmission system included at Annexure-3 keeping view of various commissioning schedules, however, till the completion of identified transmission elements the transfer of power will be based on the availability of system on short term basis.

(d) In the event of delay in commissioning of concerned transmission system from its schedule, as indicated at Annexure-4 POWERGRID shall pay proportionate transmission charges to concerned Long Term Access Customer(s) proportionate to its commissioned capacity (which otherwise would have been paid by the concerned Long Term Access Customer (s) to POWERGRID) provided generation is ready and POWERGRID fails to make alternate arrangement for dispatch of power.

9.0 The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other cause," beyond the control of the defaulting party. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice of 30 days to the other party to this effect. Transmission/drawal of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.

10. In the event of finalisation of beneficiaries by the developers the applicable transmission charges and other charges covered under this agreement would be payable by the concerned beneficiary. These charges would be effective only from the date of signing of agreement by concerned beneficiary with POWERGRID for the validity period of open access."

19. Perusal of the above provisions makes the scheme envisaged in the BPTA clear. As per Clause 1, CTU has agreed to grant long term access to the Petitioner in accordance with the Act and Connectivity Regulations from the date and in the manner mentioned in Annexure 1 to 4 of the BPTA for a period of 25 years from the scheduled date indicated in Annexure 1. According to Clause 2, the Petitioner is



under obligation to pay the transmission charges in accordance with the regulations and tariff order of the Commission issued from time to time. The applicable charges are payable by the Petitioner from the date of commissioning of the transmission system which should not be prior to the scheduled date of commissioning of the generating station irrespective of actual date of commissioning of the generating station. Further Clause 2 (d) provides for opening of LC and BG as security. As per Clause 3, CTU has agreed to provide the long term access as per the BPTA in accordance with the regulations and conditions as specified by the Commission from time to time. During the tenure of the agreement, if any of the covenants and conditions recited in the agreement are found inconsistent with the provisions of the Act or applicable notification, rules/regulations issued by the Commission or by GOI as per the provisions of the Act, then the said rules and regulations shall prevail. Therefore, the parties to the BPTA have expressly agreed that the provisions of the applicable notification/rules/regulations issued by GOI or the Commission shall prevail over any covenant or conditions of the BPTA. Clause 5 enjoins upon the Petitioner not to relinquish or transfer its rights and obligations under the BPTA without prior approval of CTU and the Commission and subject to compensation determined in accordance with the regulations of the Commission issued from time to time. This means that the BPTA incorporates the relinquishment charges determined under Regulation 18 of the Connectivity Regulation as compensation for relinquishment in terms of Clause 5 of the BPTA. Clause 6 deals with four eventualities attributable to the Petitioner i.e. failure to construct the generating station, failure to construct the dedicated transmission system, exit from the project or abandonment of the project, on occurrence of which CTU has the right to collect the transmission charges and/or damages in accordance with the

regulation/notification issued by the Commission from time to time. For compensating the damages, the Petitioner is required to give a bank guarantee @Rs.5 lakh/MW which could be encashed on account of adverse progress of the individual generating units assessed during the coordination meeting as per Clause 7. Clause 9 enjoins upon both parties to ensure due compliance of the terms of the agreement. However, a party is discharged from its liability for claim for any loss or damages if it fails to carry out the terms of the agreement to the extent such failure is due to force majeure events. There is also provision for notice by the party claiming force majeure to the other party. The Clause further enjoins on the parties to resume transmission/drawal of power as soon as practicable by the parties concerned after the eventuality ceased to exist or come to an end.

20. The parties have argued at length with regard to applicability of force majeure clause in case of relinquishment of LTA and liability of parties to pay the relinquishment charges. It is a settled principle that while interpreting the contract, the intention of the parties, the context in which they appear and the nature of rights and obligations agreed thereunder are relevant considerations which should be kept in view. Therefore, Clause 9 of the BPTA has to be interpreted with due consideration of the above principle of construction. Different elements of Clause 9 are as under:

- (a) The parties shall ensure due compliance with the terms of the agreement.
- (b) No party shall be liable for any claim of damages or loss arising out of failure to carry out the terms of the agreement.

(c) The party shall be relieved of the liability to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other cause beyond the control of the defaulting party.

(d) The defaulting party shall satisfy the other party of the existence of such an event and give a written notice of 30 days.

(e) Transmission/drawal of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.

It is evident from the above that the intention of the parties is to ensure due compliance of the terms of the BPTA. BPTA is a contract for use of the transmission lines of a transmission licensee by a long term customer wherein the transmission licensee agrees to provide open access to its transmission lines and the long term customer agrees to pay the transmission charges as a consideration of use of the said transmission lines. In other words, so long as the long term customer is connected to the transmission lines of the licensee and retains the right to access to the system, it is liable to pay the transmission charges irrespective of actual power flow. Clause 9 provides for an exclusion in the form of force majeure which absolves a party from its liability to any loss or damages arising out of its failure to carry out the terms of the BPTA if it has occurred on account of force majeure which prevents the use of the transmission lines by the long term customer and suspends the power flow. The clause does not visualize the failure to be of permanent nature, It says that as soon as the event ceases to exist, the transmission/drawal of power shall be started as soon as practicable, meaning thereby that the clause is envisaged to be

applicable for a temporary period. Therefore, Clause 9 of the BPTA covers situation of temporary in nature and has a restrictive application. The scope of the said clause cannot be given wider application to cover the cases under Clause 5 wherein the long term customer has an option to relinquish the LTA on payment of compensation in accordance with the regulations issued from time to time. We are of the view that Clause 9 of the BPTA cannot be considered as an omnibus provision to cover under its sweep clause 5 which deals with relinquishment of the LTA. Therefore, the Petitioner cannot escape its liability to pay the relinquishment charges under Clause 5 of the BPTA and Regulation 18 of the Connectivity Regulations by resorting to Clause 9 of BPTA.

21. The Commission in its order dated 31.10.2017 in Petition No.69/MP/2014 (Aryan MP Power Generation Pvt. Limited Vs. Powergrid Corporation of India Ltd) has dealt with clause 9 of the BPTA in the context of clause of the BPTA as under:

“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.”

Further in order dated 12.4.2017 in Petition No.317/MP/2013 (Navbharat Power Private Limited Vs. Power Grid Corporation of India Ltd & Another), the Commission has treated clause 9 of the BPTA as providing temporary amnesty and not for seeking an exit from the LTA. Relevant portion of the order is extracted as under:

“19. The Petitioner has abandoned the project for the purely commercial reasons and the Petitioner cannot be said to be affected by reasons beyond its control. The Petitioner has relied upon the findings of the Hon’ble Appellate Tribunal for Electricity dated 4.2.2014 in Appeal No. 123 of 2012. In the said case, the Appellate Tribunal held that the approval under the Bombay Tenancy and Agricultural Land (Vidarbha Region and Kutch Area) Act,1958 and for water source under the Environment Protection Act,1986 and CRZ Regulations are statutory/ legal approvals under the PPA and accordingly, it fall under *force majeure* events and the period of delay is required to be suspended or excused and to that extent the period of Commercial Operation Date, Date of construction default and Scheduled Commercial Operation Date were to be extended under the LTA Agreement. In the present case, the Petitioner has abandoned the project on account of delay in obtaining clearances and is seeking to wriggle out of the LTA Agreement. From the analysis of Clause 9 of the LTA Agreement, it clearly emerges that the said clause is for providing temporary amnesty to the parties affected by force majeure in order to make their agreement work. The provision of Clause 9 of the LTA Agreement does not permit a defaulting party to abandon the LTA which is evident form the last sentence of the said clause which states that drawal/transmission of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.”

22. In the light of the analysis on the issue and our findings in the orders as quoted above, we hold that Clause 9 of the BPTA gives a temporary amnesty from the compensation for loss or damages to the party affected by force majeure and cannot be used for evading relinquishment charges on account of relinquishment of LTA. Both Clause 5 of the BPTA and Regulation 18 of the Connectivity Regulations require that in case of relinquishment of LTA, the Petitioner is required to pay the relinquishment charges. Since CTU has determined the liability of the Petitioner for relinquishment charges pursuant to the order of the Commission dated 8.3.2019 in Petition No.92/MP/2015, the Petitioner is liable to pay the relinquishment charges.

Issue No.2: Whether the case of the Petitioner is covered under force majeure in terms of clause 9 of the BPTA?

23. The Petitioner has submitted that pursuant to the execution of the BPTA, it made best efforts to enter into PPA but could only succeed upto 558 MW. Since the long term power procurement in the region is substantially disproportionate to the commissioned IPPS, the situation is beyond the control of the Petitioner. The Petitioner has submitted that its inability to enter into long term PPA is an event of force majeure rendering the LTA impossible to perform and therefore, the Petitioner be allowed to relinquish the LTA of 542 MW without any liability for relinquishment charges.

24. CTU has submitted that nowhere in the BPTA, there is any reference to the PPA to be executed by the LTA Customers. Since LTA was granted to the Petitioner without executing the PPAs, non-execution of PPA cannot be interpreted as a force majeure event.

25. The Petitioner has submitted that PPA became a material requirement while granting as well as operationalizing the LTA. Therefore, absence of PPA resulted in frustration of the LTA. The Petitioner has quoted the following provisions of the Regulations, Procedures and orders of the Commission in support of its contention:

(a) Regulation 12 of the Connectivity Regulations requires the applicant for long term access to indicate the entity to whom power is to be supplied or procured and the quantum of power to be supplied or procured and therefore, the agreement for sale/purchase of power is a consideration at the time of applying for LTA.

(b) Para 22.7 of the Detailed Procedure issued under the Connectivity Regulations requires the LTA Customer to confirm to CTU with the exact details of the PPA executed by the said customer, three years prior to the intended operationalization of the LTA.

(c) Clause 7.1 of the BCD Procedure provides that LTA cannot be operationalized in the event a firm long term PPA is not available.

(d) The Commission in order dated 2.12.2013 in Petition No.244/MP/2012 relying on Clause 7.1 of the BCD Procedure has held that execution of long term PPA is a necessary condition for availing long term access.

(e) The Commission after recognizing the impossibility of availing LTA on account of lack of long term PPA inserted Regulation 15B through 6th amendment of the Connectivity Regulations and provided that LTA can be availed by having a contract of above one year.

(f) Even under Shakti Scheme, it was mandated that coal could be provided only for those generating companies who have long term or medium term PPA.

(g) Ministry of Power issued the guidelines for procurement of power under Design, Build, Finance, Own and Operate (DBFOO) basis on 8.1.2013. As per DBFOO, coal cost is a pass through in certain scenarios which relate to the source of coal. For example, if the bids are called for scenarios relating to domestic coal linkage or from domestic coal mines, then power plants based on imported coal cannot participate in such bids. This factor has materially affected the Petitioner from entering into long term PPA.

(h) The 37th and 40th Parliamentary Standing Committee Reports recognized the issue of lack of long term PPAs with distribution licensees being uncontrollable.

The Petitioner has submitted that non-availability of long term PPA has close link with the utilisation of the LTA and therefore, lack of long term PPA is a force majeure condition which is beyond the control of the Petitioner.

26. We have considered the submissions of the Petitioner and Respondent CTU. The subject transmission system based on which LTA was granted to the Petitioner were executed on the basis of the regulatory approval granted by the Commission vide its orders dated 26.3.2010 and 31.5.2010 in Petition No.233/2009. The Petitioner was a party to the said petition. The issue of signing of the PPA was considered at the time of according regulatory approval. Relevant para of the order dated 26.3.2010 is extracted as under:

“17. As regards the requirement for signing of PPAs with the beneficiaries, we observe that the IPPs have not been able to come forward to sign the PPAs, primarily because the States have not yet gone ahead with the bidding process for evacuation of power. However, linking the signing of the PPAs with regulatory approval will hamper the progress of the transmission projects. The Tariff Policy issued vide Govt. of India in para 7.1.4 does not make it mandatory for network expansion by the CTU/STU. The said para reads as under:

“In view of the approach laid down by the NEP, prior agreement with the beneficiaries would not be a pre-condition for network expansion. CTU/STU should undertake network expansion after identifying the requirements inconsonance with the National Electricity Plan and in consultation with stakeholders, and taking up the execution after due regulatory approvals.”

In view of the above mandate of the Tariff Policy, we are of the view that the CTU should carry out consultation with the stake holders and satisfy itself about the bonafide nature of generation projects which are likely to materialize during the next three years and submit the detailed report about such projects, including the physical progress made wherever feasible and approach the Commission by first week of April, 2010.”



Therefore, the Petitioner is aware that the regulatory approval was granted to the Petitioner on the basis of the LTA and without linking it to PPAs. It was left to the Project Developer for tie-up with the beneficiaries for PPA. When availability of PPA was not a condition precedent either for applying for LTA or for regulatory approval, therefore, it cannot be pleaded at this stage that PPA is a necessary pre-condition of the LTA and hence its absence of PPA cannot be considered as force majeure frustrating the operation of the LTA. The Petitioner has in fact entered into long term PPA for 558 MW and the Petitioner's failure to enter into PPA for the balance capacity cannot be considered as force majeure.

27. As regards the reasons adduced by the Petitioner (as summarised in para 25 of this order) to prove that the existence of long term PPA is a necessary condition for availing the LTA and absence of long term PPA has led to frustration of the LTA, we are of the view that these provisions in the Connectivity Regulations and Detailed Procedure have been specified to cater to different requirements and cannot be pleaded as the basis for grant of LTA in the absence of which LTA stands frustrated. Regulation 12 requires an applicant for long term access to indicate the entity from which power is to be procured or supplied and the quantum of power to be supplied. But the first proviso provides that where the source or quantum has not been fixed up, then the applicant has to indicate the quantum of power alongwith the name of the region where the electricity to be interchanged. Thus, PPA is not an essential condition for applying for LTA. Para 22.7 of the Detailed Procedure requires the LTA Customer to give details of the PPA three years prior to operationalization of LTA, the purpose being that the last mile connectivity could be planned and implemented. As regards Clause 7.1 of the BCD Procedure, scheduling can be done against the LTA quantum when there is long term, medium term and short term PPA. This

provision is regarding scheduling and from the said provision, inference cannot be drawn that in the absence of long term PPA, LTA would be frustrated. In fact, Regulations allow for scheduling of medium term and short term power against the LTA quantum and offset is allowed. Regulation 15B of the Connectivity Regulations facilitates operationalization of LTA with PPA of the duration of more than one year. In other words, if the LTA Customer is able to make a medium term PPA of more than one year, it can schedule its power under MTOA. This provision does not support the case of the Petitioner that in the absence of long term PPA, LTA stands frustrated. The requirement for participating in Shakti Scheme or procurement under DBFOO or the observation of the Parliamentary Standing Committee cannot absolve the Petitioner from its liability towards LTA under the BPTA. In our view, the Petitioner had applied for and was granted LTA in the absence of long term Power Purchase Agreements and the Petitioner has taken the business risk by entering into BPTA in the absence of long term PPA. Failure of the Petitioner to enter into long term or medium term PPA for 552 MW cannot be considered as the reasons beyond the control of the Petitioner and hence, is not covered under Clause 9 of the BPTA.

Issue No.3: Whether CTU could not have operationalized the LTA of 1100 MW of the Petitioner since one of the elements mentioned in amended Annexure 3 of the PPA has not been operationalized?

28. The Petitioner has submitted that the CTU vide its letter dated 17.11.2016 informed the Petitioner about proposed operationalisation of the LTA which is wholly erroneous in view of the fact that the obligations undertaken by the CTU under BPTA dated 24.2.2010 to complete various sub-stations and transmission lines towards system strengthening for evacuation of power from the power plant of the Petitioner has only been partially commissioned and hence, LTA cannot be operationalized unless and until the system envisaged under the BPTA is commissioned completely.

The Petitioner has further submitted that reliance by CTU on para 129 of the order dated 16.2.2015 in Petition No. 92/MP/2014 with regard to part operationalisation of LTA is misplaced since the said part-operationalisation can happen only in cases where the delay in completion of the transmission assets is for the reasons beyond the control of CTU.

29. CTU, on the other hand, has submitted that the Petitioner had vide its e-mail dated 27.9.2016 requested CTU to operationalize the entire quantum of 1100 MW granted under the LTA. CTU has further submitted that the immediate evacuation system of the Petitioner's power project included six assets out of which five assets were commissioned and one asset was stuck in RoW issue as on 17.11.2016 when the agenda was circulated. CTU has submitted that study was carried out for dispatch level of SR allocation plus WR allocation and considering Tuticorin pooling station- Dharnapuri (Salem-New) 765 kV D/C line initially charged at 400 kV, CTU analysed the adequacy of the transmission system for transfer of power to the target regions and found that line loading in the base case as well as contingency conditions were generally in order. Accordingly, CTU proposed to operationalize the LTA of 1100 MW of the Petitioner subject to fulfillment of necessary regulatory requirements and included the same in the agenda for the meeting of Southern Region Constituents on Connectivity and Long term access scheduled for 19.11.2016. The Petitioner during the meeting raised the issue of its relinquishment of 552 MW on account of non-finalization of firm beneficiaries. CTU has submitted that since lack of firm beneficiaries could not be a ground for force majeure conditions and after considering the request of the Petitioner to operationalize the entire quantum of LTA, CTU decided in the 21st meeting of Southern Region Constituents held on 19.11.2016 to operationalize the Petitioner's LTA of 1100 MW

with target beneficiaries as SR-820 MW and WR-225 MW. CTU has submitted that the Petitioner vide its letter dated 28.11.2016 reiterated its intention to relinquish 542 MW with effect from 19.11.2016 without any relinquishment charges on the ground that the Petitioner was affected by force majeure under Clause 9.0 of the BPTA since there was no long term power procurement in Southern Region and Western Region. The Petitioner also requested for return of BG corresponding to 542 MW due to relinquishment. CTU has submitted that since any relinquishment of LTA was necessarily to be on payment of relinquishment charges as per the BPTA, the Petitioner's request for conditional relinquishment as well as proportionate reduction of BG was not accepted.

30. We have considered the submissions of the Petitioner and CTU. In our order dated 16.2.2015 in Petition No.92/MP/2014 it has been clarified about the part operationalization of LTA as under:

“129.....In our view, grant of part LTA shall not be permitted and the applicants shall be granted LTA for the full capacity after the required system augmentation. However, part operationalization of LTA after the scheduled date of operationalization shall be permitted only when for reasons beyond control, some of the required transmission systems considered for full LTA are not available by the scheduled date. In case of generating station with multiple units, LTA shall be operationalized if the transmission systems are available for evacuation of entire contracted power from a particular unit.”

TANGEDCO has submitted during the hearing that as per Regulation 8(5) of the Sharing Regulations, the Petitioner is liable to pay the transmission charges for the LTA capacity operationalized. The Petitioner has submitted that Regulation 8(5) of the Sharing Regulations cannot be independently invoked since the liability to collect the transmission charges has been subjected to TSA which is a statutory contract under Sharing Regulations and the Petitioner cannot be held liable for payment of transmission charges on account of force majeure provision in the TSA.

We do not think that there is any merit in the objection of the Petitioner since we have held that the Petitioner is not affected by force majeure. Therefore, the liability for payment of transmission charges can accrue in terms of Regulation 8(5) of the Sharing Regulations. The relevant proviso under Regulation 8(5) of the Sharing Regulations is extracted as under:

“Provided that where operationalization of LTA is contingent upon several transmission lines or elements, and only some of the transmission lines and elements have been declared commercial, the generator shall pay the transmission charges for the LTA operationalized corresponding to the transmission system commissioned.”

Since the Petitioner had requested vide its e-mail dated 27.9.2016 to operationalize the entire quantum of 1100 MW granted under the LTA and on the basis of the study CTU came to the conclusion that even after non-commissioning of one asset out of the six assets as per Annexure 3 of the BPTA, there is adequate capacity to evacuate the entire 1100 MW from the generation project of the Petitioner, we are of the view that CTU has correctly operationalized the LTA of 1100 MW in terms of our order dated 16.2.2015 in Petition No.92/MP/2014 and Regulation 8(5) of the Sharing Regulations.

31. It is however pertinent to mention that the Commission in order dated 8.3.2019 in Petition No.92/MP/2015 has held that relinquishment of long term access is a statutorily permissible option which entails payment of compensation for the stranded capacity on account of such relinquishment. Para 99 of the said order is extracted as under:

“99.....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.”

Thus the Commission held that relinquishment of long term access rights is a statutorily permissible option and 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. Therefore, the Petitioner has a statutory right to relinquish 542 MW of its capacity subject to payment of compensation for the stranded capacity. Further, in para 138 of the said order, the Commission decided the effective date of relinquishment as under:

“138. Regulation 18(1)(a) and 18(1)(b) provide that the long term customer intending to relinquish long term access rights shall have to make an application to CTU one year prior to the date it desires to relinquish the LTA. If the notice period is less than one year, then it has to pay the transmission charges (net present value) for the period falling short of one year. Therefore, the cases of LTA relinquishment prior to date of start of LTA or after date of start of LTA shall be considered in accordance with Regulation 18 of the Connectivity Regulations. In certain cases(through Orders in respective petitions), the Commission has directed the CTU to accept the LTA relinquishment subject to the payment of relinquishment charges to be determined in the instant petition. In such cases, notice period shall be considered from the date the application was made to CTU for relinquishment of access rights and if no application was made, then from the date from which the Commission directed the CTU to accept the relinquishment.”

32. CTU in its written submission has stated that in accordance with the directions in order dated 8.3.2019 in Petition No.92/MP/2015, CTU has computed the stranded capacity and relinquishment charges of various generators including the Petitioner who have relinquished the LTA. According to CTU, the Petitioner is liable to pay

Rs.44.12 crore as relinquishment charges to CTU. Therefore, the relinquishment of 542 MW of LTA by the Petitioner has been settled in terms of the Commission's order dated 8.3.2019 in Petition No.92/MP/2015.

Issue No.4: What shall be the date of relinquishment?

33. The Petitioner has prayed that LTA of 542 MW under BPTA dated 24.02.2010 stands relinquished with effect from 19.11.2016.

34. The Petitioner has stated that PGCIL vide letter dated 17.11.2016 called for 21st Standing Committee meeting on 19.11.2016 for operationalization of 1100 MW LTA of Petitioner at Hyderabad along with Southern Region LTA constituents. In the said 21st Standing Committee meeting held on 19.11.2016, the Petitioner communicated its intent to relinquish LTA of 542 MW (280 MW in WR and 242 MW in SR), without any relinquishment charges, on account of the reason that there has been no sufficient long-term procurement bids in the said target regions, which happens to be a Force Majeure event within the meaning of Article 9.0 of the BPTA.

35. The Petitioner vide its letter dated 28.11.2016, while reiterating to PGCIL that it has tied up with TANGEDCO for 558 MW on long term basis and the same is being scheduled through Medium term open access till June 2018, the Petitioner also relinquished of 542 MW (280 MW towards WR and 242 MW towards SR) out of the total 1100 MW with effect from 19.11.2016 without any relinquishment charges.

The relevant excerpts from the letter dated 28.11.2016 is reproduced below:

"It has been communicated during the Standing committee meeting that we have tied up for 558MW with TANGEDCO on long term basis and same is being scheduled on MTOA till June 2018. Also, we have communicated our intent to relinquish LTA of 542 MW (280 MW towards WR and 242 MW towards SR), without any relinquishment charges and also discussed during the 21st Standing Committee meeting held on 19.11.2016, on account of the reason that there has been no long-term procurement bids in the target region, which happens to be a force majeure event within the

meaning of Article 9.0 of the BPTA. As you are aware the large quantum of thermal generation in the country is stranded due to non-availability of long term bids. In near future also, no long term bids are expected in our target regions, hence it will not be feasible for us to continue paying the LTA charges without any firm tie up. Further due to various force majeure events, we had to incur heavy cost overrun for the construction of our power plant. In the light of the above facts and Circumstances, we may seek your indulgence and necessary action on the following:

a. Kindly accept our request of relinquishment of 542 MW (280 MW towards WR and 242 MW towards SR) out of the total 1100 MW with effect from 19.11.2016 (during the 21st meeting of SR constituents, we have communicated our intention to relinquish), without any relinquishment charges on account of the occurrence of Force Majeure events, which are beyond our control and contemplation, and accordingly, to carry out the necessary changes in the BPTA and Transmission Service Agreement (TSA) dated 07.10.2013 executed with PGCIL;

b. allow us to continue scheduling of 558 MW power to TANGEDCO under MTOA which is approved till June 2018 or the date on which PGCIL shall operationalize the LTA qua us after achieving all milestones under the BPTA (assets to be developed/ commissioned by PGCIL as listed under Annexure 3 to BPTA), whichever is earlier. It may be noted that in such an event there is no requirement of relinquishment of MTOA since the evacuation of power under MTOA shall merge convert into evacuation of power through LTA;

c. Return of Bank Guarantee corresponding to 542 MW due to relinquishment."

36. The Petitioner has submitted that PGCIL till date has not responded to the request of the Petitioner for relinquishment of 542 MW out of 1100 MW under BPTA dated 24.02.2010. However, PGCIL vide letter dated 02.12.2016 called upon the Petitioner to open a Letter of Credit (LC) for Rs. 63,63,54,155/- in its favour towards payment security mechanism for the LTA being availed by the said Petitioner.

37. The respondent, PGCIL vide affidavit dated 2.2.2017 has submitted that the Petitioner vide its affidavit dated 28.11.2016 reiterated its intention to relinquish LTA of 542 MW (280 MW towards WR and 242 MW towards SR), without any relinquishment charges for the reason that there had been no long-term procurement bids in the target region which the Petitioner contended was a force majeure event within the meaning of Article 9.0 of the BPTA. The Petitioner further alleged that the Respondent has decided to operationalize the LTA of 1100 MW without achieving



the milestones enumerated under the BPTA. As such, the Petitioner requested the Respondent to accept the relinquishment of 542 MW out of the total 1100 MW w.e.f 19.11.2016 without any relinquishment charges on account of occurrence of Force Majeure event and accordingly, carry out the necessary changes in the BPTA. The Petitioner also requested for return of the bank guarantee corresponding to 542 MW due to relinquishment. It is submitted and as has been set out hereinabove, any relinquishment of LTA was necessarily to be on payment of relinquishment charges as set out in the BPTA and therefore, the Petitioner's request for conditional relinquishment (as also for proportionate reduction in amount of construction phase bank guarantee) could not be accepted.

38. We have considered the submissions of Petitioner and Respondents. We observe that CTU on its website has uploaded date of relinquishment and charges payable towards relinquishment for all entities as per our directions vide Order dated 8.3.2019 in Petition No. 92/MP/2015. We observe that as per the uploaded document by CTU on its website, for Petitioner, CTU has considered the date of relinquishment as 1.3.2018 and quantum of relinquishment as 542 MW. We observe that CTU has not provided any justification of considering date of relinquishment as 1.3.2018 in its submissions in the instant Petition.

39. We have perused minutes of meeting of 21st meeting of Southern region Constituents regarding Long term Access and Connectivity Applications held on 19.11.2016 which has been referred to by Petitioner as 21st Standing Committee meeting. The minutes of meeting of said meeting provides as follows:

“4.3 Representative of CEPL stated that currently no case – I bids are being invited by the States, therefore, they are not in position to tie-up firm long term beneficiaries. This is leading to force majeure situation in term of BTPA signed earlier with

POWERGRID. Therefore, they would like to relinquish 542 MW with target (WR-280 MW and SR - 262 MW).

CTU stated this stance now being taken by CEPL is entirely opposite to the one taken by CEPL just two months before wherein vide communication dated 27-09-2016 CEPL had requested to operationalize the entire quantum of LTA. Non-finalization of firm beneficiaries cannot be a ground for force majeure conditions in terms of BPTA. CTU further explained the operationalization of LTA for the entire quantum was proposed in line with the CERC Regulations.

Accordingly, after detailed deliberations on various provisions of CERC regulations, it was decided to operationalize LTA of CEPL for 1100 MW with target beneficiaries as SR-820 MW & WR-280 MW and Ind-Barath for 500 MW with target beneficiaries as SR275 MW & WR-225 MW. CTU further informed that presently 558 MW of MTOA from CEPL to Tamil Nadu is under operation, which CEPL have to relinquish in terms of regulations. It was also informed that balance LTA of Ind-Barath for 400MW to NR shall be discussed and operationalized as and when capacity to NR gets available. Members agreed for the same.”

We observe as per above minutes that Petitioner had shown its intent to relinquish 542 MW in the above said meeting.

40. We have perused letter dated 28.11.2016 of the Petitioner which provides as follows:

“Kindly accept our request of relinquishment of 542 MW (280 MW towards WR and 242 MW towards SR) out of the total 1100 MW with effect from 19.11.2016 (during the 21st meeting of SR constituents, we have communicated our intention to relinquish), without any relinquishment charges on account of the occurrence of Force Majeure events, which are beyond our control and contemplation, and accordingly, to carry out the necessary changes in the BPTA and Transmission Service Agreement (TSA) dated 07.10.2013 executed with PGCIL;

41. CERC vide Order dated 8.3.2019 in Petition No. 92/MP/2015 directed as follows with respect to the date of relinquishment:

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

42. We observe that date of relinquishment cannot be taken as 19.11.2016, where Petitioner expressed its intention to relinquish in a meeting. We observe that Petitioner vide letter dated 28.11.2016 made an application for relinquishment of 542

MW. Hence, 28.11.2016 shall be considered as date of relinquishment in terms of our Order in Petition No. 92/MP/2015.

Issue No.5: What are the reliefs admissible to the Petitioner in terms of the prayers in the petition?

43. The first prayer of the Petitioner is for a declaration that LTA of 542 MW under BPTA dated 24.2.2010 stands relinquished with effect from 19.11.2016 without any relinquishment charges. In terms of our order dated 8.3.2019 in Petition No.92/MP/2015, the Petitioner has a statutorily permissible right to relinquish its LTA subject to payment of compensation determined under Regulation 18 of the Connectivity Regulations. The date of relinquishment shall be considered as 28.11.2016. CTU is directed to calculate relinquishment charges accordingly in terms of our Order dated 8.3.2019 in Petition No. 92/MP/2015.

44. The second prayer of the Petitioner is for a declaration that it is not liable to pay the relinquishment charges as it has relinquished 542 MW on account of force majeure reasons. We have held in this order that the case of the Petitioner is not covered under Clause 9 of the BPTA and also Clause 9 has no application to Clause 5 of the BPTA regarding relinquishment of access rights and consequently, the Petitioner is liable to pay the relinquishment charges for the stranded capacity on account of relinquishment of 542 MW.

45. The third prayer of the Petitioner is for a direction to CTU to defer operationalizing 558 MW of LTA until commissioning of all assets as per Annexure 3 of the BPTA. We have held that since adequate capacity was available for evacuation of 1100 MW from the generation project of the Petitioner even though one asset out of six assets mentioned in Annexure 3 of the BPTA was not



commissioned. Hence, operationalization of 1100 MW was in order. After reducing 542 MW which was statutorily permissible for the Petitioner to relinquish on payment of relinquishment charges for the relinquished capacity, operationalization of 558 MW by CTU was in order and does not require interference.

46. In fourth prayer, the Petitioner has sought a reduction of BG amount corresponding to 542 MW relinquished. We observe that Petitioner has to make payment of relinquishment charges as calculated by CTU in terms of this Order and Order dated 8.3.2019 in Petition No. 92/MP/2015. Hence we direct that BG shall be kept alive by the petitioner till it makes payment of relinquishment charges as calculated by CTU. In case the Petitioner does not make payment of relinquishment charges to CTU in accordance with timeline provided in order dated 8.3.2019 in Petition No. 92/MP/2015, CTU shall encash the BG and adjust the same against relinquishment charges. CTU shall return the balance amount of encashed BG, if any, after adjusting against relinquishment charges.

47. In the fifth prayer, the Petitioner has sought for quashing the letters dated 2.12.2016 and 7.12.2016 issued by CTU for opening LC. We direct that the Petitioner shall be liable to open the LCs for 558 MW in terms of the provisions of the BPTA.

48. Petition No.246/MP/2016 is disposed of in terms of the above.

sd/-
(I.S. Jha)
Member

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

sd/-
(P.K. Pujari)
Chairperson