

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 42/MP/2019

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 under Section 79(1)(f) of the Electricity Act, 2003 read with Regulations 8(5) and 8(6) of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010, read with Clause 4 of the Bulk Power Transmission Agreement dated 8.1.2010; read with Clause 12 of the Bulk Power Transmission Agreement entered into between PGCIL and various Electricity Boards for the Western Region dated 31.3.1999; Clause 14 of the Bulk Power Transmission Agreement entered into between PGCIL and various State Electricity Boards for the Eastern Region dated 16.9.2004; and Clause 13 of the Bulk Power Transmission Agreement entered into between PGCIL and Haryana Vidyut Prasaran Nigam Limited for the Northern Region dated 16.10.2003 challenging the levy of Transmission Charges on East Central Railway by PGCIL.

And

In the matter of

East Central Railway

Hajipur,

Bihar-844101

.....Petitioner

Vs

1. Power Grid Corporation of India Limited,
Through its Chairman and Managing,
Saudamini, Plot No.2, Sector-29,
Gurgaon (Haryana.)- 122001.

2. Bhartiya Rail Bijlee Company Limited
Through its Chief Executive Officer,
Nabinagar Thermal Power Project,
Post- Khaira, Aurangabad, Bihar-824303

3. Eastern Regional Power Committee,
Through its Member Secretary,
14, Golf Club Road,
Tollygunje, Kolkata-700033,

4. Eastern Regional Load Despatch Centre,
Through its Executive Director,
14, Golf Club Road,
Tollygunje, Kolkata-700033,

5. North Bihar Power Distribution Company Limited,
Through its Managing Director,
Vidyut Bhawan, Bailey Road,
Patna, Bihar-800001

6. South Bihar Power Distribution Company Limited,
Through its Managing Director,
Vidyut Bhawan, Bailey Road,
Patna, Bihar-800001

.....Respondents

Parties present:

Ms. Purna Priyadarshini, Advocate, Indian Railways
Ms. Suparna Srivastava, Advocate, PGCIL
Ms. Sanya Dua, Advocate, PGCIL
Ms. Anita Srivastava, PGCIL
Shri V. Srinivas, PGCIL
Ms. Swapna Sheshardi, Advocate, BRBCL
Shri Prashant Chaturvedi, BRBCL

ORDER

The present Petition has been filed by the Petitioner, East Central Railway under Regulations 8(5) and 8(6) of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 (hereinafter to be referred as "Sharing Regulations, 2010") read with Clause 4 of the Bulk Power Transmission Agreement (hereinafter to be referred as "BPTA") dated 8.1.2010, against the levy of Transmission Charges on the Petitioner by PGCIL and to set

aside the invoices raised by PGCIL on the Petitioner from August, 2017 onwards.

The Petitioner has made the following prayers:

(a) *Admit the instant Petition and set aside the invoices raised by PGCIL on the Petitioner from August, 2017 onwards;*

(b) *Direct PGCIL to revise its invoices from August, 2017 onwards to levy only transmission charges proportionate to the quantum of LTA capacity actually utilised by the Petitioner to draw electricity from the commissioned units of BRBCL's generating station and accordingly refund the excess transmission charges recovered;*

(c) *Without prejudice and in the alternative to prayer (b) hereinabove, direct PGCIL to raise its transmission charges invoices directly on BRBCL for the quantum of LTA capacity corresponding to the periods when Units II, III and IV of BRBCL's generating station were not commissioned, and accordingly set aside PGCIL's invoices raised on the Petitioner for such capacity, and direct PGCIL to refund the excess transmission charges recovered;*

(d) *Consequent to the grant of prayer (c) hereinabove, pass appropriate directions to the ERPC and the ERLDC to revise the Regional Transmission Accounts to reflect BRBCL's liability to pay transmission charges for periods when units of its generating station are not commissioned;*

(e) *Without prejudice and in the alternative, declare that the Petitioner is not liable to PGCIL for transmission charges in respect of periods when it was prevented from utilizing LTOA due to the Force Majeure events described in the instant Petition and accordingly direct PGCIL to revise its invoices from August, 2017 onwards to reflect only the quantum of LTOA which the Petitioner was capable of actually utilising;*

(f) *Award the Petitioner applicable interest on the excess transmission charges to be refunded; and*

(g) *Award the Petitioner the costs of the instant Petition.*

Submissions of the Petitioner

2. The Petitioner has submitted as under:

(a) The Ministry of Railways (hereinafter to be referred as "MoR") entered into a Memorandum of Understanding (MoU) dated 18.2.2002 with NTPC for the establishment and operation of power projects for use by Indian Railways at different drawl points. Subsequently, the MoR, acting on behalf of the President of India, and NTPC entered into a Joint Venture Agreement dated 6.11.2007 (hereinafter to be referred as "JV Agreement"). The JV Agreement envisaged

the establishment of BRBCL, which would be responsible for the construction and operation of a coal based thermal power plant (hereinafter referred to as the Project) at Nabinagar, Bihar with a total capacity of 1000 MW (4X250MW). The Ministry of Power, Government of India (MoP) vide its letter dated 30.6.2007 and 2.7.2010, allocated 90% of the power from generating station of BRBCL to Indian Railways and 10% to Bihar under home state quota.

(b) Subsequently, the Petitioner, entered into Bulk Power Purchase Agreement (hereinafter to be referred as "BPPA") dated 16.12.2010 with BRBCL to procure 90% of the power to be generated from the Project. Meanwhile, the Petitioner along with the erstwhile BSEB vide its applications dated 10.6.2008 and 14.5.2009 applied to CTU for grant of LTA for a total quantum of 1000 MW, which was granted by the CTU vide its intimation letter dated 24.7.2009. Out of the total quantum of 1000 MW transmission capacity, the Petitioner proposed to utilize 900 MW capacity as under:

S.NO.	State	Particulars
Eastern Region (355 MW)		
1.	Bihar	50 MW
2.	Jharkhand	75 MW
3.	West Bengal	95 MW
4.	Orissa (Odisha)	60 MW
5.	DVC	75 MW
Western Region (485 MW)		
6.	Chhattisgarh	95 MW
7.	Gujarat	75 MW
8.	Maharashtra	130 MW
9.	Madhya Pradesh	185 MW
Northern Region (50 MW)		
10.	Uttar Pradesh	60 MW
	Total	900 MW

(c) In accordance with Regulation 36(e) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff), Regulations, 2014 (hereinafter referred to as the "Tariff Regulations 2014"), which envisages that 9% of the power generated by a thermal power station shall be meant for auxiliary consumption. Accordingly, the Petitioner vide its letter dated 8.8.2017 to CTU, relinquished 9% out of the total quantum of 900 MW LTA granted to it i.e. 81 MW and PGCIL vide its letter dated 6.9.2017 accepted the Petitioner's request for the relinquishment of 81 MW of LTA.

(d) In order to utilise the LTA, following two conditions were necessarily required to be met for use of the allocated power but none of these conditions could be met on account of reasons beyond the control of the Petitioner:

- i. All four Units of the Project are commissioned in time so that the Petitioner is not required to off take power on a limited or piece meal; and
- ii. NOC for utilising State network in a timely manner

(e) There has been a delay in commissioning of generating stations of BRBCL, as below:

Sl. No	Units	SCOD as per CCEA	Actual COD	Remarks
1	Unit#1	22.10.2010	15.01.2017	The Petitioner has separately challenged the validity of BRBCL's claims that its Units were commissioned vide a Petition bearing Diary No. 485 of 2018.
2	Unit#2	22.04.2011	10.09.2017	
3	Unit#3	22.10.2011	Not yet commissioned	
4	Unit#4	22.04.2012		

(f) Pursuant to the Commission's directions vide its order dated 29.6.2017 in Petition No. 24/MP/2017, CTU operationalized the entire quantum of LTA with effect from 26.7.2017. As on date of the LTA was operationalization, only Unit-I of the Project was commissioned while Unit-II of the Project was commissioned only on 10.9.2017. Therefore, for the period between 26.7.2017 to 10.9.2017, the Petitioner could draw only 90% of the power generated from Unit-I. Further, from 10.9.2017 onwards, the Petitioner was unable to draw power from the remaining two un-commissioned units, i.e. 409.5 MW. Since, the CTU has operationalized the entire quantum of LTA capacity, the Petitioner is being charged transmission charges for the entire quantum of transmission capacity from the month of August, 2017 despite the fact that the Petitioner had not utilized the remaining quantum of transmission capacity, for no fault of its own as the remaining units of the Project are yet to be commissioned

(g) The Petitioner has not been able to utilize the full quantum of transmission capacity on account of two reasons, namely, the non-commissioning of 2 units of BRBCL's Project despite a delay of more than 6 years and the unforeseeable and uncontrollable delay and withholding of NOCs by the STUs. Therefore, from 26.7.2017 to 10.9.2017, only 204.75 MW power was available for the Petitioner and from 10.9.2017 till date, only 409.5 MW is

available for the Petitioner as it is further constrained by declaration of low DC by BRBCL. However, PGCIL has been raising invoices and recovering transmission charges for the entire quantum of LTA capacity from the Petitioner. While for the month of August 2017, an invoice has been raised for transmission charges for 879 MW, September 2017 onwards invoices for transmission charges for 819 MW LTA capacities have been raised on the Petitioner. The Petitioner has been constrained to pay the transmission charges in accordance with these invoices.

(h) As per LTA intimation dated 24.7.2009, it was agreed that PGCIL under Common Strengthening System shall build the following transmission assets in order to facilitate the Petitioner's open access:

A. Dedicated transmission system: Nabinagar - Sasaram 400 KV D/C (twin lapwing conductor)

B. Transmission System strengthening: Common strengthening system associated with Tilaiya Ultra Mega Power Project Barh-II Thermal Power Station and the Project:

- (i) Balia-Lucknow 765 kV S/C (2nd)
- (ii) Meerut- Moga 765 kV S/C.

(i) However, in the 11th Connectivity & LTA meeting dated 13.6.2016 for the Eastern Region, it was decided that the two transmission elements for transmission system strengthening were not required to be constructed anymore, on account of the delay/ deferment of the Tilaiyya UMPP and Barh-II TPS generating stations. It was also decided to issue revised LTA intimation with the revised transmission system and generation schedule.

(j) CTU, vide its revised LTA intimation dated 15.7.2016 to the beneficiaries, including the Petitioner stated that the existing and planned transmission system shall be sufficient for the evacuation of power from the Project. However, the necessary amendment to the BPTA was carried out only on 26.10.2018 i.e. after lapse of more than 2 years. Therefore, up to 26.10.2018, the BPTA in its unamended form was valid and in operation, which includes the period commencing from the date of operationalization of LTA, i.e. from 26.7.2017 up to 26.10.2018. Therefore, the contractual obligations laid

down in the original BPTA were binding on the parties until the execution of the Supplementary Agreement. Since the BPTA in its original form was valid until 26.10.2018, the construction of the two transmission elements for the common strengthening system was a condition precedent to the operationalization of LTA and levy of transmission charges, until the execution of the Supplementary Agreement.

(k) PGCIL has not incurred any additional cost in arranging the transmission capacity for evacuation of power from the Project for the benefit of the Petitioner. The Petitioner was granted LTA on the existing capacity of the transmission network, which was already in existence. Therefore, PGCIL was already recovering the transmission charges for the said transmission network from the PoC pool in terms of the Sharing Regulations, 2010. In the absence of PGCIL having fulfilled its contractual obligations under the BPTA, it is not entitled to levy the transmission charges for the entire capacity of LTA granted until such contractual obligations continued to be valid, i.e. 26.10.2018. For the period commencing from the operationalization of the LTA, i.e. 26.7.2017, to the execution of the Supplementary Agreement, i.e. till 26.10.2018, PGCIL has a right to recover the transmission charges limited to the LTA capacity actually utilized by the Petitioner.

(l) During a special meeting convened by ERPC on 11.7.2017, which was attended by the representatives of all the stakeholders, including the CTU and the Petitioner, the Petitioner requested the CTU to operationalize the capacity of LTA in accordance with the commissioning schedule of the Project. Such a request was made for the effective utilization of the existing network's transmission capacity. However, despite being aware of the delay in construction of the Project and the Petitioner's requests for optimum utilization of the transmission capacity, the CTU operationalized the LTA for the entire quantum of 900 MW for the Petitioner with effect from 26.7.2017.

(m) Had the CTU operationalized the LTA in a phased manner according to the commissioning schedule for the Project, the Petitioner wouldn't have been saddled with the liability of transmission charges for the capacity which hasn't been utilized yet due to the delay in commissioning of the Project. It is on

account of the imprudence of PGCIL that out of the total quantum of 819 MW LTA capacity operationalized for the Petitioner, around 414 MW is lying idle and unutilized for no fault of the Petitioner. Such capacity can be utilized for Medium Term Open Access and Short Term Open Access. The Petitioner cannot be held liable for something that is a result of the imprudence on part of the CTU.

(n) At present, PGCIL is already recovering the cost of the existing transmission system from its existing users. The transmission element in respect of which PGCIL is levying transmission charges was not built at the Petitioner's behest. While 414 MW out of the total blocked capacity of the existing network is lying unused, for which the Petitioner is paying transmission charges, PGCIL would also be recovering transmission charges by giving out such capacity for MTOA and STOA. Therefore, no loss is caused to PGCIL at all to justify such excess recovery from the Petitioner. Therefore, PGCIL ought to recover transmission charges limited and proportionate to the quantum of transmission capacity actually being utilized by the Petitioner. Accordingly, PGCIL's invoices from August 2017 onwards ought to be set aside and revised. The excess charges recovered by PGCIL ought to be refunded to the Petitioner with applicable interest.

(o) BRBCL, out of four units of 250 MW each has only managed to commission Units I and II till date. Accordingly, out of the total quantum of 1000 MW capacity of the Project, only 500 MW is being generated. While the Petitioner is off-taking power proportionate to its allocated quantum of 90% from the purportedly commissioned units subject to declaration of DC, it is being levied with transmission charges for the entire quantum of 819 MW by the CTU. It is submitted that any liability on part of the Petitioner, as a Designated ISTS Customer with respect to the payment of transmission charges arises only under the Sharing Regulations, 2010. Regulations 8(5) and 8(6), which were inserted vide the Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) (Third Amendment) Regulations, 2015 provide that in the event there is a delay in the commissioning of a generating station or a unit thereof, the transmission

charges proportionate to such uncommission capacity shall be borne exclusively by the generator.

(p) The SOR (Statement of Reasons) of Clause (5) of Regulation 8 of Sharing Regulations, 2010 makes it clear that the liability of transmission charges, in the event of delay in commissioning of the generating station or a unit thereof, cannot be passed on to the users/ beneficiaries.

(q) As per Clause 4 of the BPTA, executed between the Petitioner and PGCIL, the Petitioner is not liable for any claims for loss or damage arising out of its failure to comply with the BPTA because of any Force Majeure event. Any event or dispute arising prior to the operationalization of the LTA shall be governed by the BPTA as the TSA would not be in force at the time. As on the date of operationalization of LTA, i.e. 26.7.2017, only Unit-I of the Project had been commissioned. While Unit-II of the Project was commissioned on 10.9.2017. Therefore, the Petitioner was capable of drawing only 204.75 MW power from the Project from 26.7.2017 to 10.9.2017. Further, from 10.9.2017 onwards, the Petitioner is only capable of drawing 409.5 MW from the Project. In view of the delay in commissioning of the Units of the Project, the Petitioner is incapable of utilizing the entire quantum of the LTA capacity. Therefore, in view of the above, the non-commissioning/ delay in commissioning of Unit-II and the non-commissioning of Units III and IV was unforeseeable and squarely beyond the control of the Petitioner. Therefore, the same constitutes an on-going Force Majeure event in terms of the Force Majeure Clause under the BPTA.

(r) There has been delay in issue/ non-issuance of NOCs by STUs across different States and the details are as under:

S.No	State	Date of Application to STU (Quantum of LTA)	Reminders	Current Status
1	Kerala (KSEB)	18.4.2017- (50MW)	2.5.2017, 15.5.2017	KSEB raised the issue of their system constraints with adopting two phase metering system for the first time during the meeting dated

				11.7.2017. Southern Railway attempted to assuage the concerns of KSEB regarding two phase metering vide its communication dated 25.7.2018, It was also pointed out that the two phase metering and the constraints because of the same, if any, are not relevant as far as issuance of NOC for availing open access is concerned. Not yet granted.
2	West Bengal (WBSETCL)	19.9.2016 – (95 MW) 1.11.2017 – (170 MW)	23.8.2016, 21.10.2016, 28.11.2016	WBSETCL vide NOC dated 21.8.2017 granted a conditional NOC to Eastern Railway (ER) for LTA of 95 MW power.
3	Bihar (BSPTCL)	2.7.2013– (50 MW)		BSPTCL's NOC dated 18.5.2018 that the Petitioner was granted LTA for 50 MW power.
4	Odisha (OPTCL)	20.09.2016- (50MW) 20.04.2017- (60 MW)		The non-issuance of NOC by OPTCL is an on-going Force Majeure event in terms of the Force Majeure Clause under the BPTA, which has uncontrollably prevented Indian Railways from utilising the LTA capacity to the extent of 60 MW for the entire period commencing from the operationalisation of LTA i.e. 26.7.2017 onwards.
5	Chhattisgarh (CSPDCL)	9.1.2017- (95MW)		NOC has been put on hold until past dues, which are purportedly pending against Indian Railways, are settled, an NOC for grant of LTA cannot be issued. Further, the matter is under arbitration in CSERC.

(s) BRBCL had filed Petition No 24/MP/2017 before this Commission seeking directions to ERLDC for acceptance of Declared Capacity being issued by BRBCL for the Project. Notably, the CTU was a party to these proceedings. The Commission, vide its order dated 29.6.2017 in the said Petition, observed as follows:

“26. The main hurdle for scheduling of power from the first unit of BRBCL is the non-availability of consent from the States where the drawal points of the Railways are situated.

.....”

In light of the above, this Commission directed as follows:

“27. In the light of our decision in para 26 above, we direct ERPC to convene a meeting of CTU, ERLDC, Indian Railways, BRBCL and Constituent States and sort out the outstanding issues in connection with scheduling of power from Nabinagar TPP and report to the Commission by 17.7.2017.”

(t) A bare perusal of the above order makes it clear that the Force Majeure events, which were uncontrollably preventing the Petitioner from utilizing the LTA capacity, were prevalent much prior to the operationalization of the LTA and were within the notice of the CTU. In compliance with the directions in the Commission's order dated 29.6.2017, a special meeting was convened by ERPC on 11.7.2017, which was attended by the representatives of all the stakeholders, including the CTU and the Petitioner. The MoM for the said ERPC meeting records that the Petitioner once again requested various STUs for issuance of NOC/ permission. In response to the said request, various STUs reiterated their respective issues for delay in the grant of the requisite NOCs/ permissions.

(u) The non-issuance of NOCs/ permissions for utilisation of the full LTA capacity was unforeseeably and uncontrollably going to prevent the Petitioner from utilising the LTA capacity. Further, it is also clear that these Force Majeure events were in operation prior to the operationalisation of the LTA, which was well within the knowledge and notice of the CTU.

(v) CTU was always aware of the delay in non-issuance of NOCs by the STUs. There was also a statutory duty on part of PGCIL in its capacity as CTU to co-ordinate the grant of NOCs by the STUs for the effective operationalization of the LTA. The LTA had to be operationalized up to the points of drawl of the Petitioner within each State. It is clear that the CTU operationalized the LTA for the entire capacity despite knowing that the Petitioner is not capable of utilizing that LTA on account of the non-commissioning of the various Units of the Project and delay in grant/ non-issuance of NOCs by the STUs. The operationalization of LTA cannot be held to be effectively complete when the Petitioner has not been granted NOCs by the STUs. Further, the CTU has also been recovering transmission charges from the Petitioner for the entire capacity. Such a recovery could only have been made if the operationalization of the LTA was complete from end-to-end. Therefore, the invoices raised by the CTU ought to be quashed and consequent directions ought to be issued to CTU to refund any additional

amounts it has recovered after deducting the transmission charges corresponding to the actual capacity of LTA being utilized by the Petitioner.

(w) The Commission vide its RoP of hearing dated 6.3.2019 admitted the Petition and issued notices to the Respondents. PGCIL and BRBCL have filed their replies vide affidavits dated 22.4.2019 and 22.3.2019 respectively. The Petitioner has also filed the rejoinders to the replies filed by PGCIL vide affidavit dated 10.7.2019.

Submissions of PGCIL

3. The Respondent No. 1, PGCIL, has filed its reply vide affidavit dated 22.04.2019 and submitted as under:

(a) The Power generated from the BRBCL's project was primarily for consumption by the Indian Railways and for which BRBCL has entered into an BPPA dated 16.12.2010 with the Petitioner wherein it has been recorded in clause 2.2.1 that 90% of the power generated from the project has been allocated by the Government of India to Railways. The balance 10% power generated from the project was initially kept as the unallocated quota and has subsequently been allocated to Bihar. BRBCL vide application dated 14.5.2009, on behalf of the Petitioner, applied for grant of LTA quantum of 910 MW (i.e. 1000 MW less auxiliary power consumption @9%) wherein the beneficiaries of the project were stated to be the Indian Railways (900 MW), Bihar State Electricity Board (53 MW) and Jharkhand State Electricity Board (47 MW).

(b) BRBCL vide letter dated 29.5.2009, on behalf of the Petitioner modified its earlier LTA request and informed PGCIL that the LTA was required for 1000 MW with the drawee utilities being Indian Railway (910 MW) and Bihar State Electricity Board (90 MW). It was further informed that the Indian Railways would confirm the above details separately and also an LTA application for 90 MW would be submitted by Bihar State Electricity Board (BSEB) separately. However, the grant of LTA for the entire quantum of 1000 MW was requested to be processed and BRBCL undertook that in the event that BSEB did not submit a separate application, it would bear all obligations of

BSEB for the open access granted for 90 MW. Accordingly, PGCIL vide intimation letter dated 24.7.2009 granted LTA for 1000 MW as under:

1.	Drawee utilities	(in MW)
a	Indian Railways – Eastern Region	355 MW
	Bihar	50
	Jharkhand	75
	West Bengal	95
	Odisha	60
	Damodar Valley Corporation	75
b	Indian Railways – Western Region	485
	Chhattisgarh	95
	Gujarat	75
	Maharashtra	130
	Madhya Pradesh	185
c	Indian Railways – Northern Region	60
	Uttar Pradesh	60
d	Bihar State Electricity Board	100
2.	Transmission system requirement	
	Dedicated part	Nabinagar-Sasaram 400 kV D/c line
	Common transmission system associated with Tilaiyya Ultra Mega Power Project, Barh-II Thermal Power Station and Nabinagar Thermal Power Station.	(1) Balia-Lucknow 765 kV S/c (2 nd circuit) (2) Meerut-Moga 765 kV s/c
3.	Date of commencement of open access	After commissioning of transmission system elements mentioned above.

(c) The transmission system requirement for grant of open access to the project of Respondent No.2 had been evolved considering the generation projects proposed to be set up in the similar timeframe viz. Tilaiyya Ultra Mega Power Project and Barh-II Thermal Power Station. In the 11th Meeting of Eastern Region constituents for connectivity and LTA applications held on 13.6.2016, the LTA granted for the project of Respondent No.2 was reviewed. The Minutes of the said Meeting show that the common strengthening system associated with Tilaiyya Ultra Mega Power Project, Barh-II Thermal Power Project and Nabinagar Thermal Power Project could not be taken up for implementation due to

delay in materialization of Tilaiyya Ultra Mega Power Project and Barh-II Thermal Power Project. The relevant extracts of the said Meeting are reproduced hereinbelow for ready reference of this Commission:

“2. Revision in LTA granted for Nabinagar-I TPS

CTU representative informed that LTA to Nabinagar-I TPS (4x250 MW) was granted with following associated transmission system:

Immediate Evacuation System

- Nabinagar - Sasaram 400kV D/c (Twin Lapwing conductor)

Common Strengthening System associated with Tilaiyya UMPP, Barh-II TPS and Nabinagar-I TPS

- Balia - Lucknow 765kV S/c (2nd)
- Meerut - Moga 765kV S/c

The above mentioned Common Strengthening System could not be taken up for implementation due to delay in materialization of Tilaiyya UMPP & Barh TPS. Subsequently, Meerut - Moga 765kV S/c line has been taken up for implementation as strengthening scheme in Northern region.

With the deferment of the above mentioned generation projects, it has been seen that the evacuation of power from Nabinagar - I (4x250 MW) can be accomplished with Nabinagar-Sasaram 400kV D/c (Twin Lapwing conductor) in conjunction with the existing and planned transmission system. Therefore, the Common System Strengthening earlier associated with Nabinagar-I (4x250 MW) may be removed from its LTA requirement. Constituents agreed for revision of the transmission system requirement.

NTPC updated the schedule of generation project as:

- Unit-1: Sept 2016; Unit-2: Mar 2017; Unit-3: June 2017; Unit-4: Dec 2017.

Accordingly, it was decided to issue revised LTA intimation with the revised transmission system and generation schedule.”

(d) Thus, looking into the progress of the generating station, the transmission system requirement for the project of Respondent No.2 was reviewed and the transmission elements comprised in the common strengthening system viz. Balia-Lucknow 765 kV S/c (2nd circuit) and Meerut-Moga 765 kV S/c were removed from the transmission system. Accordingly, in terms of the above decision taken in the meeting, revised information for LTA for the project of Respondent No.2 was sent by Respondent No.1 vide letter dated 15.7.2016 as under:

(d-ii)	Transmission system requirement (System Strengthening)	Existing and Planned Transmission System
--------	--	--

Thus, entire power from the project of Respondent No.2 was now to be transmitted through the existing and planned system of Respondent No.1.

(e) Pursuant to the aforesaid Meeting, Respondent No.1 issued a revised LTA intimation dated 15.7.2016 to Respondent No.2 and its beneficiaries, informing as under:

“In this regard, it may be mentioned that In view of deferment of Tilaiyya UMPP & Barh TPS, the Common Strengthening System, earlier associated with Nabinagar - I (4x250 MW) was reviewed and decided to be deleted from the LTA requirement of Nabinagar TPS-I in the above referred LTA meeting. Accordingly, the following clause of the earlier Intimation has been revised as per following:

(d-ii)	Transmission system requirement (System Strengthening)	Existing and Planned Transmission System
--------	--	--

Further, it is requested that necessary amendment to agreement(s) may be signed by BRBCL/ECR/BSPHCL to this effect. It may also be mentioned that all other terms & conditions shall remain unchanged and revision in the clause as per this letter shall form an integral part of above referred Intimation dated 24.07.2009.”

(f) In this manner, the Petitioner, Respondent No.2 and the erstwhile BSEB became aware that power evacuation from the generation project was to take place by use of the existing transmission system of Respondent No.1, without any requirement for system strengthening. Further, on formal signing of the Supplementary Agreement based on the above LTA revised intimation which was never disputed, neither Respondent No.2 nor any of its beneficiaries could subsequently be heard to contend that till the formality of amending the BPTA took place, Respondent No.1 continued to be “contractually” bound to undertake the transmission system strengthening as per the original LTA grant as incorporated in the BPTA and any operationalization of LTA could take place only thereafter.

(g) Pursuant to the above revised LTA, a Supplementary Agreement to the BPTA was signed on 26.10.2018 incorporating the revision as regards the transmission system requirement for power evacuation from the project of Respondent No.2. The LTA quantum was revised to 919

MW (w.e.f. 24.8.2017) on account of relinquishment of 81 MW by East Central Railways, subject to payment of relinquishment charges by Railways, along with redistribution of power vide letter dated 25.10.2018. In the said Supplementary Agreement, the revision in system strengthening vide letter dated 15.7.2016, was specifically recorded as under:

“1.

(a) *The requirement of strengthening of transmission system indicated at para ‘3. (d-II)’ of LTOA intimation letter no. C/ENG/SEF/TA/L/E/09/002 dated 24.07.2009 has been revised by CTU vide letter ref no. C/CTUPlg/LTA/E/2016/Nabinagar-1 dated 15.07.2016 (placed as Attachment-II to this supplementary Agreement) as indicated below:*

(d -ii)	Transmission system requirement (System Strengthening)	Existing and Planned Transmission System
------------	--	---

.....

(f) *LTC shall share and pay all the applicable transmission charges of total transmission system from the date of Commencement of Long Term Access in accordance with the sharing mechanism, as decided/ notified/ determined/ adopted by Central Electricity Regulatory Commission from time to time.”*

(h) Having acknowledged in the Supplementary Agreement that the LTA granted had been revised vide letter dated 15.7.2016 with the “Existing and Planned Transmission System” and having accordingly agreed to share and pay all applicable transmission charges from the date of commencement of LTA in accordance with the sharing mechanism notified by this Commission, the Petitioner cannot later hide behind a technicality of modification in BPTA so as to evade its statutory liability to pay transmission charges to Respondent No.1.

(i) During special meeting dated 25.1.2017, convened by the Eastern Region Power Committee (ERPC), pertaining to issues relating to scheduling of power from certain projects, BRBCL informed that unit-1 of its project had been commissioned in March, 2016 and was declared commercially operational on 15.1.2017. It was also informed that the Declared Capacity (DC) for the unit was being sent to the Eastern Regional Load Despatch Centre regularly.

BRBCL also submitted that LTA may be operationalized upto 250 MW only as only one unit (250 MW) was commissioned. However, PGCIL informed that operationalization of LTA depends on the transmission availability and was not linked with the COD of a generating station.

(j) A number of regulatory issues were required to be resolved before scheduling of power under the LTA could take place, regardless of whether it was actually operationalized or not. BRBCL has undertaken the necessary steps for resolving such regulatory issues much before the commissioning of its unit-1 so that by the time the commissioning took place, the scheduling also could have taken place. The issue of NOC by STUs was known at that time to both the Petitioner and BRBCL and as such, the same cannot be pleaded as a “force majeure event” at any subsequent stage. The requirement of NOC from the STU while availing open access was a regulatory requirement under 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 (hereinafter referred to as the 2009 Connectivity Regulations) notified by this Commission and the Petitioner was necessarily required to comply with the same. In any case, the statutory notice of 30 days claiming force majeure has also not been given by the Petitioner.

(k) The plea of force majeure cannot be admissible in case of non-compliance of a regulatory requirement and even otherwise, force majeure is a matter of contract and cannot be invoked as a plea under the laws of equity. The Appellate Tribunal for Electricity (APTEL) in Appeal No.54/2014: (Himachal Sorang Power Ltd. versus. Central Electricity Regulatory Commission & Anr) has held that the force majeure situations contemplated under the BPTA relate to the “flow of power” from the transmission system and have no nexus with the issues faced by the generators/beneficiaries with third parties. Therefore, the settled legal position is that the non-grant of NOCs by the STUs/SLDCs cannot be permitted as a force majeure event as has been wrongly pleaded by the Petitioner.

(l) Subsequently, BRBCL filed a Petition No.24/MP/2017 alongwith an I.A. No.20/2017], seeking direction to ERLDC/ERPC to accept the DC as given by

BRBCL generating station and further direction to ERLDC/ERPC to reflect the DC of Nabinagar Thermal Power Plant in REA (Regional Energy Accounts) without linking the same to operationalisation of LTA. Taking due cognizance of the hurdle in the form of non-availability of consents from the STUs, the Commission directed PGCIL to operationalize the LTA for power evacuation from the project of BRBCL and to raise the bills for transmission charges as per the LTA. Thus, the categorical finding was that all requirements for operationalization of the LTA had been met. In compliance PGCIL operationalized the entire LTA for 1000 MW (Railways-900 MW and Bihar-100 MW) w.e.f. 26.7.2017 and accordingly the Commission disposed-off Petition No.24/MP/2017 vide its Order dated 18.9.2018. The Petitioner thus became liable to pay transmission charges for the operationalized LTA of 900 MW in accordance with the applicable Regulations of this Commission. Therefore, the Petitioner cannot be permitted to raise the pleas of system strengthening or non-availability of NOCs/force majeure so as to re-agitate the issues which have already been considered and adjudicated by this Commission. The challenge made in the present Petition to the transmission charges bills raised by PGCIL cannot therefore be admissible on these pleas.

(m) For the purpose of evacuation of power generated from the Nabinagar generating station of BRBCL, the 400kV Nabinagar–Sasaram D/C line is a dedicated transmission line (connectivity line) built under ISTS for providing connectivity to the ISTS and the evacuation has been envisaged through the existing transmission system and no separate Associated Transmission System (ATS) has been planned. Further, the Commission vide Order dated 3.8.2017 passed in Petition No.10/MP/2017 has directed that the generator-Respondent No.2 would be liable to pay the applicable transmission charges for the said dedicated transmission line from 21.3.2016 (COD of the line) till the date of commercial operation of Unit-1 of Nabinagar TPP. In line with the directions of the Commission, Respondent No.2 has paid the transmission charges for Nabinagar-Sasaram line till the COD of its 1st unit and the tariff of the line has subsequently been included in the POC.

Submissions of BRBCL

4. The Respondent No. 2, BRBCL, has filed its reply vide affidavit dated 22.3.2019 and submitted as under:

(a) BPPA entered into between ECR and BRBCL clearly provides that the sale of power is at the bus bar and thereafter, it is the responsibility of ECR to take the power by making arrangements for evacuation of the same. The risk of the electricity passes from BRBCL to ECR at the Bus Bar and thereafter, it is the responsibility of ECR to deal with the electricity.

(b) The issue of obtaining open access being faced by the Petitioner has nothing to do with BRBCL and cannot by any stretch of imagination be a force majeure qua BRBCL. This force majeure, if any has to be qua PGCIL and cannot in any manner add any liability on BRBCL.

(c) The Commission in its order dated 6.11.2018 in Petition No. 261/MP/2017 has held that the COD of the generating station has nothing to do with operationalization of LTA and the same has also been reiterated by the Commission in its orders dated 30.6.2016 and 6.7.2017 respectively in Petition Nos. 10/SM/2014 and 103/MP/2017.

(d) Regulation 8 (5) of the Sharing Regulations, 2010 has no application in the present case as the Commission in its order dated 6.11.2018 in Petition No. 261/MP/2017 has already held that the liability of the generator in the case of delay is confined to 'transmission charges' of the dedicated elements and has nothing to do with the LTA Charges/ POC Charges. Therefore, the transmission charges beyond the LTA capacity being utilized by the Petitioner cannot be levied on BRBCL.

(e) The contract between BRBCL and the Petitioner is a BPPA which is for supply and purchase of power. The sale of power is at the bus bars of the generating station at Nabinagar and beyond the bus bars, it is the sole responsibility of ECR to carry the power by entering into appropriate agreements including for long-term access with any interstate transmission licensees of its choice including the CTU, which was raised by BRBCL and

accepted by the Commission in Petition No. 24/MP/2017 vide Orders dated 29.06.2017 and 18.09.2018.

(f) BRBCL is not concerned with the issues being faced by the Petitioner either in Kerala or West Bengal or Bihar or DVC control area or Chhattisgarh. Further, BRBCL is also not concerned with the efforts made by the Petitioner in obtaining the open access or mitigating the so-called force majeure event in obtaining the open access being cited by the Petitioner.

(g) The Petitioner cannot be exempted from performing its obligations under the BPPA including payment of invoices due to the alleged force majeure events under Article 7 of the BPPA. The Petitioner is liable to pay the entire invoices being raised by BRBCL which have been pending for a long and has called upon the Petitioner to clear all such pending invoices. Article 7 of the PPA which is being cited by the Petitioner to claim such a relief does not get invoked in the present case and does not provide any relief qua billing to ECR.

Rejoinder of the Petitioner

5. The Petitioner has filed rejoinder vide affidavit dated 10.07.2019 to the reply filed by PGCIL and submitted as under:

(a) The Petitioner has acted in compliance with Clause 3 (transmission/wheeling of electricity) of the Bulk Power Purchase Agreement (BPPA) by entering into necessary agreements for transmission, and the same is not a matter of dispute. The said clause does not envisage a situation of delayed commissioning of the various Units of the NTPS Project. The Petitioner's liability towards transmission charges under the POC mechanism towards POC charges is limited to the LTA capacity actually being utilized by it for off taking its share of power in accordance with the commissioning of the Units and not for the entire quantum and the said stand is supported by the provisions of the Sharing Regulations, 2010 and its interpretation as given by this Commission.

(b) PGCIL itself has stated that it was on the request of BRBCL that the Nabinagar- Sasaram 400 kV D/c line was commissioned w.e.f. 1.7.2012 and that it was agreed that the BRBCL would be liable to pay transmission charges

for the same till the commissioning of the NTPS Project by way of the Tariff Order dated 21.6.2013 passed by this Commission in Petition No.83/TT/2012. Accordingly, PGCIL recovered transmission charges from BRBCL for the dedicated transmission system, and should not have billed the Petitioner for PoC charges for the existing transmission system, in respect of which it was already recovering its charges from the PoC pool from the other entities in the region.

(c) The Petitioner was not a part of the said 11th Connectivity and LTA meeting held on 13.6.2016 and had no role to play in the said decision and, as such, the decision for non – construction of the Common Strengthening System taken without the knowledge or consent of the Petitioner. Pursuant thereto, the CTU issued a revised LTA intimation to the Petitioner on 15.7.2016 stating that the existing and planned transmission system shall be sufficient for the purpose of evacuation of power from the NTPS Project. The said intimation mentioned the necessity of amendment of the BPTA and it was only on 26.10.2018 i.e., after a lapse of two years that necessary amendments were carried out vide a Supplementary Agreement to the BPTA.

(d) The unamended BPTA was valid and in operation upto 26.10.2018 and the contractual obligations as stipulated in the original BPTA were binding on the parties until the execution of the Supplementary Agreement. It is a settled principle of contract law that a contract cannot be novated unilaterally by a party, and the old contract continues to be in force until the new contract is executed. In addition, a party in breach of its contractual obligations cannot take advantage of its own wrong. Accordingly, PGCIL is entitled to POC charges for the capacity actually utilized by the Petitioner to draw power from the Project until the execution of the Supplementary Agreement. PGCIL cannot levy POC charges for the capacity that is idle on the Petitioner, more so, when PGCIL itself did not fulfil its own contractual obligation.

(e) The Petitioner was granted LTA on the capacity of the transmission network, which was already in existence. Therefore, PGCIL was already recovering the transmission charges for the said transmission network from the Point of Connection pool in terms of the Sharing Regulations, 2010. As such,

no loss is caused to PGCIL and it ought to charge the Petitioner only to the extent of the actual quantum of transmission capacity being utilized by the Petitioner.

(f) The Petitioner has made all efforts to obtain NOCs from STUs in a timely manner, including sending them repeated reminders for the same. However, despite its best efforts, the State entities/ STUs have either issued the NOCs with a considerable delay or are yet to do it. Accordingly, it is submitted that the said events, being in the nature of “causes beyond the control of the Petitioner”, are covered under the Force Majeure Clause under the BPTA.

(g) As per Regulations 8(5) and 8(6) of the Sharing Regulations, 2010 and Statement of Reasons, in the event of delay in commissioning of generating stations or its units thereof, transmission charges for the said period cannot be imposed on the beneficiaries. Necessary clarifications may be issued by this Commission in respect of Regulations 8(5) and 8(6) of the Sharing Regulations, 2010 so as to clarify its applicability to cases where there is no Associated Transmission System, but the non-utilization/ under-utilization of the LTA capacity is not due to any fault/ lapse on the part of the beneficiaries but on account of delay in commissioning of the generating station.

Analysis and Decision

6. After considering the submissions of Petitioner and Respondents and perusing the documents on record following issues arise for our consideration:

Issue No.1: Whether the Supplementary Agreement signed in 2018 has a bearing on liability of the Petitioner?

Issue No.2: What shall be the liability of the Petitioner towards payment of charges for Long term Access granted to it?

The issues are dealt with in subsequent paragraphs:

Issue No.1: Whether the Supplementary Agreement signed on 26.10.2018 has a bearing on liability of the Petitioner?

7. Petitioner has submitted that, as per LTA intimation dated 24.7.2009, it was agreed that PGCIL under Common Strengthening System shall build the following transmission assets in order to facilitate the Petitioner's open access:

- A. Dedicated transmission system: Nabinagar - Sasaram 400 KV D/C (twin lapwing conductor)
- B. Transmission System strengthening: Common strengthening system associated with Tilaiyya Ultra Mega Power Project Barh-II Thermal Power Station and the Project:
 - (iii) Balia-Lucknow 765 kV S/C (2nd)
 - (iv) Meerut- Moga 765 kV S/C.

However, in the 11th Connectivity & LTA meeting dated 24.6.2016 for the Eastern Region, it was decided that the two transmission elements for transmission system strengthening were not required to be constructed anymore, on account of the delay/ deferment of the Tilaiyya UMPP and Barh-II TPS generating stations. It was also decided to issue revised LTA intimation with the revised transmission system and generation schedule.

8. Petitioner has further stated that CTU vide its revised LTA intimation dated 15.7.2016 to the beneficiaries, including the Petitioner, stated that the existing and planned transmission system shall be sufficient for the evacuation of power from the Project. However, necessary amendment to the BPTA was carried out only on 26.10.2018 i.e. after lapse of more than 2 years. Therefore, up to 26.10.2018, the BPTA existed in its unamended form and was valid and in operation. The LTA in respect of the Petitioner was operationalized by the CTU on 26.7.2017. Thus, the period when unamended BPTA was in existence includes the period commencing from the date of operationalization of LTA, i.e. from 26.7.2017 up to 26.10.2018. The contractual obligations laid down in the original BPTA were binding on the parties

until execution of the Supplementary Agreement. Since the BPTA in its original form was valid until 26.10.2018, the construction of the two transmission elements for the common strengthening system was a condition precedent to the operationalization of LTA and levy of transmission charges, and CTU should not have operationalized the LTA before signing of the Supplementary Agreement.

9. PGCIL has submitted that in the 11th Meeting of Eastern Region constituents for connectivity and LTA applications held on 13.6.2016, the LTA granted for the project of BRBCL was reviewed and it was recorded that with deferment of the Tilaiyya UMPP and Barh TPS, evacuation of power from Nabinagar - I (4x250 MW) can be accomplished with Nabinagar-Sasaram 400kV D/c (Twin Lapwing conductor) in conjunction with the existing and planned transmission system. Therefore, it was suggested that the Common System Strengthening scheme earlier associated with Nabinagar-I TPP (4x250 MW) may be removed from its LTA requirement and the constituents agreed for revision of the transmission system requirement. Accordingly, PGCIL issued a revised LTA intimation dated 15.7.2016 to Respondent No.2 and its beneficiaries. Thus, the Petitioner, BRBCL (Respondent No. 2) and the erstwhile BSEB were aware that power evacuation from the generation project of BRBCL was to take place by use of the existing transmission system of PGCIL without any requirement for system strengthening. Further, the Supplementary Agreement was signed on 28.10.2018 where it is specifically recorded that the requirement of strengthening of transmission system indicated at para '3. (d-II)' of LTA intimation letter no. C/ENG/SEF/TA/L/E/09/002 dated 24.07.2009 has been revised by CTU vide letter ref no. C/CTUPlg/ LTA/E/2016/Nabinagar-1 dated

15.07.2016. Having acknowledged in the Supplementary Agreement that the LTA granted had been revised vide letter dated 15.7.2016 with the “Existing and Planned Transmission System” and having accordingly agreed to share and pay all applicable transmission charges from the date of commencement of LTA in accordance with the sharing mechanism notified by this Commission, the Petitioner cannot hide behind technicality of modification in BPTA so as to evade its statutory liability to pay transmission charges to Respondent No.1. Further, on formal signing of the Supplementary Agreement based on the revised LTA intimation which was never disputed, neither Respondent No.2 nor any of its beneficiaries can subsequently contend that till the formality of amending the BPTA took place, Respondent No.1 continued to be contractually bound to undertake the transmission system strengthening as per the original LTA grant.

10. The Petitioner has submitted that it was not a part of the said 11th Connectivity and LTA meeting held on 13.6.2016 and had no role to play in the said decision and, as such, the decision for non – construction of the Common Strengthening System was taken without the knowledge or consent of the Petitioner.

11. We have considered the submissions of the Petitioner and the Respondents. We have perused Supplementary Agreement dated 26.10.2018 which provides as follows:

“C. AND WHEREAS the requirement of strengthening of transmission system indicated at para ‘3. (d-II)’ of LTOA intimation letter no. C/ENG/SEF/TA/L/E/09/002 dated 24.07.2009 has been revised by CTU vide letter ref no. C/CTUPIg/LTA/E/2016/Nabinagar-1 dated 15.07.2016 (placed as Attachment-II to this supplementary Agreement) as indicated below:

(d-ii)	Transmission system requirement (System Strengthening)	Existing and Planned Transmission System
--------	--	--

CTU letter ref no. C/CTUPIg/ LTA/E/2016/Nabinagar-1 dated 15.07.2016 (Attachment-II) shall be an integral part of earlier Long term Open Access (LTOA) intimation ref no. C/ENG/SEF/TA/L/E/09/002 dated 24.07.2009 (Attachment –I)for grant of 1000 MW LTOA. Except above all other terms and conditions shall remain same.

.....
1.

(a) The requirement of strengthening of transmission system indicated at para ‘3. (d-II)’ of LTOA intimation letter no. C/ENG/SEF/TA/L/E/09/002 dated 24.07.2009 has been revised by CTU vide letter ref no. C/CTUPIg/ LTA/E/2016/Nabinagar-1 dated 15.07.2016 (placed as Attachment-II to this supplementary Agreement) as indicated below:

(d-ii)	Transmission system requirement (System Strengthening)	Existing and Planned Transmission System
--------	--	--

.....

(f) LTC shall share and pay all the applicable transmission charges of total transmission system from the date of Commencement of Long Term Access in accordance with the sharing mechanism, as decided/ notified/determined/adopted by Central Electricity Regulatory Commission from time to time.”

12. We note from the Supplementary Agreement that the Petitioner has acknowledged that LTA intimation stood revised vide letter dated 15.7.2016. The revised LTA intimation letter dated 15.7.2016 or the Supplementary Agreement dated 26.10.2018 have not been disputed by petitioner. In our view, the Petitioner not being part of the meeting of 13.6.2016 is not material since it was issued a revised LTA intimation letter based on the decisions in that meeting. The Petitioner has not disputed the revised LTA intimation. Subsequently, the Petitioner and the CTU signed the Supplementary Agreement based on the same revised LTA intimation letter dated 15.7.2016. We do not find force in the argument of the Petitioner that decision has been taken in meeting dated 13.6.2016 of LTA constituents without its knowledge.

13. We also note that the issue of LTA operationalization was submitted in pleadings of Petition No. 24/MP/2017 where CTU has brought out the issue of revision of LTA based on 11th meeting of Eastern region Constituents held on

13.6.2016. The Petitioner was a Respondent in the said Petition No. 24/MP/2017 but never raised the issue of revision in LTA. The Commission has recorded as follows vide Order dated 29.6.2017 in Petition No. 24/MP/2017 with regards to operationalization of LTA:

“26. The main hurdle for scheduling of power from the first unit of BRBCL is the non-availability of consent from the States where the drawal points of the Railways are situated. It is the responsibility of CTU to operationalize the LTA. According to CTU, the evacuation link from BRBCL, namely, Nabinagar-Sasaram 400 kV D/c Line was commissioned on 1.7.2012. No system strengthening has been carried out by CTU for scheduling of power from Nabinagar TPP and the existing and planned transmission system would be used. There is a BPPA between BRBCL and Indian Railways and PPA between BRBCL and Bihar. Therefore, all requirements of operationalization of LTA have been met. Accordingly, we direct the CTU to operationalize the LTA for evacuation of power from Nabinagar Thermal Power Plant and raise the bills for transmission charges in accordance with the LTA. Since Indian Railways has intimated the percentage of allocation between different drawal points, ERPC/ERLDC should accept the DC by BRBCL. For drawal of power, it is the responsibility of Indian Railways to facilitate scheduling of power by the respective SLDCs where the State network is used for drawal of power from Nabinagar TPP.”

14. The above Order has not been challenged by the Petitioner. Further we observe that Supplementary Agreement includes revised allocation of power as sought by the Petitioner and was revised by CTU vide letter dated 28.10.2018. Such revised allocation has been made effective from 28.10.2018 as per the Supplementary Agreement.

15. In our opinion, the Petitioner was aware that its original LTA grant was getting revised on account of decision in the meeting dated 13.6.2016 of Eastern Region LTA constituents. A plain reading of the Supplementary Agreement dated 26.10.2018 makes it amply clear that it followed from the revised LTA intimation dated 15.7.2016. Though the formal agreement was not entered into, there was amply clarity as regards the scope of transmission lines on which LTA was to be operationalized for the Petitioner. We, therefore, reject the contention of the Petitioner that the parties were bound by original BPTA and that LTA could have not

been operationalized prior to signing of Supplementary Agreement dated 26.10.2018.

Issue No.2: What shall be the liability of the Petitioner towards payment of charges for Long term Access granted to it?

16. The Petitioner has mainly submitted that in case of delay in commissioning of the generating station or a unit thereof, it is the liability of the generator to pay transmission charges, until the commissioning of the said generating station or unit thereof. As per Regulation 8(5) of the Sharing Regulations, 2010, the beneficiaries are liable to pay POC charges after operationalization of the LTA and the same has been observed by this Commission in its order dated 6.11.2018 in Petition No. 261/MP/2017.

17. The Petitioner has submitted that delay in commissioning of generating stations of the Project by BRBCL and delay/ withholding of the NOC/ permissions to utilize the STU network by various STUs across different States, prevented the Petitioner from utilizing its long term access. As per the timelines envisaged in the CCEA approval, the 1st unit of the Project was to be commissioned by 22.10.2010 and the subsequent three units thereafter at intervals of 6 months each. However, Units I and II of the Project were commissioned only on 15.1.2017 and 10.9.2017 respectively after a delay of more than 6 years, while Units III and IV of the Project are yet to be commissioned. As on the date of operationalization of LTA, i.e. 26.7.2017, only Unit-I of the Project had been commissioned and the Petitioner was capable of drawing only 204.75 MW power from the Project from 26.7.2017 to 10.9.2017. Thereafter, when Unit-II of the Project was commissioned on 10.9.2017, the Petitioner could draw only 409.5 MW from the Project, in contrast to the total LTA for 819 MW.

18. The Petitioner has also submitted that there have been uncontrollable and unforeseeable delays in grant of permissions/ NOCs by various STUs despite timely applications made by the Petitioner and it has submitted the details in this regard.

19. As regards delay/ non-grant of NOCs by STUs to the Petitioner, PGCIL has submitted that obtaining NOC from STUs to avail open access is a regulatory requirement under the 2009 Connectivity Regulations and the same was within the knowledge of the Petitioner as well as BRBCL. Therefore, it cannot be pleaded as a force majeure event.

20. PGCIL has also submitted that as long as PGCIL, by its acts of omission or commission has not contributed to the Petitioner being unable to utilize its LTA, the Petitioner cannot claim force-majeure under the BPTA and it will be liable to pay transmission charges as agreed under the provisions of BPTA. Further, APTEL in its judgment dated 30.4.2015 in Himachal Sorang Power Ltd. Vs. CERC & Anr., has also held that the force majeure situations contemplated under the BPTA relate to the “flow of power” from the transmission system and have no nexus with the issues faced by the generators/ beneficiaries with third parties. Thus, the non-grant of NOCs by the STUs/ SLDCs cannot be permitted as a force majeure event and the same has been wrongly pleaded by the Petitioner.

21. PGCIL has also submitted that this Commission in its Order dated 6.11.2018 in Petition No.261/MP/2017 has observed that the operationalization of LTA is not linked with the commercial operation date (COD) of the generating units/ station and that the LTA is required to be operationalized from the date of commissioning of the transmission system irrespective of the COD of the generating station. PGCIL has further stated that the findings of the Commission in its Order dated 6.11.2018 in

Petition No.261/MP/2017 are in the context where an Associated Transmission System (ATS) is required to be built for the evacuation of power from a particular generating station. However, in the present situation, power evacuation from the generating station is to take place by use of the dedicated line (Nabinagar-Sasaram) and existing transmission system only. In case the direction of this Commission in its Order dated 6.11.2018 passed in Petition No.261/MP/2017 is implemented in the present case where there is no ATS except connectivity line built under ISTS for its dedicated use i.e. 400 kV D/c Nabinagar–Sasaram transmission line, no transmission charges other than that for dedicated line may be levied on BRBCL despite its delay in commissioning of generation units besides blocking the transmission corridor for the LTA during the period of generation delay.

22. BRBCL has submitted that the issue of obtaining open access being faced by the Petitioner has nothing to do with BRBCL and cannot be a force majeure event qua BRBCL. BRBCL has also submitted that the delay in the commissioning and commercial operation of the generating units of BRBCL are for reasons beyond its control and is subject matter to be considered by this Commission in Petition No. 23/GT/2017. The liability of the generator in case of delay is confined to transmission charges of the dedicated elements and has nothing to do with the LTA Charges/ POC Charges. As regards delay in obtaining NOC from STUs, BRBCL has submitted that this is the responsibility assumed by Petitioner under the BPPA.

23. We have considered the submission of the parties. The Petitioner has entered into BPTA dated 8.1.2010 and LTA agreement with PGCIL for evacuation of power from the Project of BRBCL. The Petitioner has also agreed under BPPA entered into with BRBCL to bear the charges for utilisation of transmission system(s) owned by

PGCIL/ other transmission licensee for wheeling of the electricity beyond bus-bar of the generating station of BRBCL. As per the BPPA, the primary responsibility towards the payment of transmission charges for the usage of transmission system rests with the Petitioner.

24. It is observed that as per LTA intimation dated 24.7.2009, it was agreed that PGCIL under Common Strengthening System shall build the following transmission assets in order to facilitate the Petitioner's open access:

- A. Dedicated transmission system: Nabinagar - Sasaram 400 KV D/C (twin lapwing conductor)
- B. Transmission System strengthening: Common strengthening system associated with Tilaiyya Ultra Mega Power Project, Barh-II Thermal Power Station and the Project:
 - (i) Balia-Lucknow 765 kV S/C (2nd)
 - (ii) Meerut-Moga 765 kV S/C.

25. However, in the 11th Connectivity & LTA meeting for the Eastern Region held on 13.6.2016, it was decided that two transmission elements for transmission system strengthening were not required to be constructed anymore, on account of the delay/deferment of the Tilaiyya UMPP and Barh-II TPS generating stations. It was also decided to issue revised LTA intimation with the revised transmission system and generation schedule. This revised LTA intimation was issued to the Petitioner vide letter dated 15.7.2016. Based on decision in the 11th Connectivity & LTA meeting for the Eastern Region held on 13.6.2016 and subsequent revised intimation dated 15.7.2016, the necessary amendment to the BPTA was carried out on 26.10.2018. In light of the discussions in the 11th Connectivity & LTA meeting for the Eastern Region held on 13.6.2016, revised LTA intimation and Supplementary BPTA between the Petitioner and PGCIL, the only transmission asset which was required

to be built by PGCIL for LTA operationalization of the Petitioner was the dedicated transmission line of Nabinagar - Sasaram 400 KV D/C. PGCIL/ CTU operationalized the LTA for the entire quantum of 900 MW for the Petitioner with effect from 26.7.2017. 400 kV D/C Nabinagar-Sasaram Transmission Line and 400 kV sub-station at Nabinagar and extension of 400 kV sub-station at Sasaram have been executed by PGCIL and the transmission system was put under commercial operation on 1.7.2012.

26. We observe that even after COD of BRBCL Units, the Petitioner was not able to schedule power from generating units of BRBCL due to non-availability of consent from the States where the drawal points of the Railways are situated. BRBCL had filed Petition No. 24/MP/2017 seeking direction to Eastern Regional Load Despatch Centre (ERLDC)/ Eastern Regional Power Committee (ERPC) to accept the Declared Capacity (DC) as given by Nabinagar Thermal Power Project (NTPP) and to reflect the DC of NTPP in Regional Energy Account. Subsequently, the Petitioner filed I.A No. 20/17 in Petition No. 24/MP/2017. In this case, CTU had not operationalized the LTA due to non-availability of consent at all drawl points and consequently the beneficiaries such as Bihar where the requirement of consent was not there, was also not able to schedule the power from BRBCL. The Commission vide its order dated 29.6.2017 disposed of the aforesaid I.A. and directed the CTU to operationalize the LTA for evacuation of power from Nabinagar Thermal Power Plant and to raise the bills for transmission charges in accordance with the LTA. The relevant portion of the said order is produced as under:

“26. The main hurdle for scheduling of power from the first unit of BRBCL is the non-availability of consent from the States where the drawal points of the Railways are situated. It is the responsibility of CTU to operationalize the LTA. According to CTU, the evacuation link from BRBCL, namely, Nabinagar-Sasaram 400 kV D/c Line was commissioned on 1.7.2012. No system strengthening has been carried out by CTU for

scheduling of power from Nabinagar TPP and the existing and planned transmission system would be used. There is a BPPA between BRBCL and Indian Railways and PPA between BRBCL and Bihar. Therefore, all requirements of operationalization LTA have been met. Accordingly, we direct the CTU to operationalize the LTA for evacuation of power from Nabinagar Thermal Power Plant and raise the bills for transmission charges in accordance with the LTA. Since Indian Railways has intimated the percentage of allocation between different drawal points, ERPC/ERLDC should accept the DC by BRBCL. For drawal of power, it is the responsibility of Indian Railways to facilitate scheduling of power by the respective SLDCs where the State network is used for drawal of power from Nabinagar TPP.”

27. Pursuant to the issuance of the order dated 29.6.2017 in I.A No.20/2017 in Petition No. 24/MP/2017, PGCIL operationalized the entire quantum of LTA on 26.7.2017 and is raising the bill for the same upon the Petitioner.

28. Regulation 8(5) and 8(6) of the Sharing Regulations, 2010, provides as under:

“8. Determination of specific transmission charges applicable for a Designated ISTS Customer

(5) Where the Approved Withdrawal or Approved Injection in case of a DIC is not materializing either partly or fully for any reason whatsoever, the concerned DIC shall be obliged to pay the transmission charges allocated under these regulations:

Provided that in case the commissioning of a generating station or unit thereof is delayed, the generator shall be liable to pay Withdrawal Charges corresponding to its Long term Access from the date the Long Term Access granted by CTU becomes effective. The Withdrawal Charges shall be at the average withdrawal rate of the target region:

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

Provided also that where the construction of dedicated transmission line has been taken up by the CTU or the transmission licensee, the transmission charges for such dedicated transmission line shall be payable by the generator as provided in the Regulation 8 (8) of the Connectivity Regulations:

Provided also that during the period when a generating station draws start up power or injects infirm power before commencement of LTA, withdrawal or injection charges corresponding to the actual injection or withdrawal shall be payable by the generating station and such amount shall be adjusted in the next quarter, from the ISTS transmission charges to be recovered through PoC mechanism from all DICs:

Provided also that CTU shall maintain a separate account for the above amount received in a quarter and deduct the same from the transmission charges of ISTS considered in PoC calculation for the next application period.

(6) For Long Term Transmission Customers availing power supply from inter-State generating stations, the charges attributable to such generation for long term supply shall be calculated directly at drawal nodes as per methodology given in the Annexure-I. Such mechanism shall be effective only after commercial operation of the generator. Till then it shall be the responsibility of the generator to pay transmission charges.”

29. According to the third proviso under Clause 8(5) of the Sharing Regulations, 2010, where CTU or any transmission licensee executes the dedicated transmission line, the generator shall be liable for payment of the transmission charges of the said transmission line till the COD of the generating station or unit thereof.

30. Further, Regulation 8(6) of the Sharing Regulations, 2010, provides that for Long Term Transmission Customers availing power supply from inter-State generating stations, the charges attributable to such generation for long term supply shall be calculated directly at drawal nodes and such mechanism shall be effective only after COD of the generating station/ units and it shall be the responsibility of the generator to pay transmission charges till COD of its generating station.

31. In terms of provisions of Regulation 8(6) of the Sharing Regulations, 2010, the generator (BRBCL in the instant case) has the liability to bear transmission charges till COD of its generating station/ units. The commissioning schedule and the actual COD of units of BRBCL are as under:

S. No	Units	SCOD as per CCEA	Actual COD
1.	Unit I	22.10.2010	15.1.2017
2.	Unit II	22.4.2011	10.9.2017
3	Unit III	22.10.2011	26.2.2019
4.	Unit IV	22.4.2012	Not yet Commissioned

32. In the case for Kudgi STPP of NTPC, the Commission vide Order dated 6.11.2018 in Petition No. 261/MP/2017 has directed as follows:

“39..

(vi) In the light of the above, as per Regulation 8(6) of the Sharing Regulations, the petitioner is liable to pay the transmission charges till COD of its delayed units. Hence, we direct that the annual transmission charges of the associated transmission system (i.e Kudgi-Narendra, Narendra-Madhugiri and Madhugiri Bidadi and associated bays) as determined or adopted by the Commission shall be considered in PoC mechanism corresponding only to the unit declared under commercial operation i.e Unit-I (as per records available in this petition) and the balance transmission charges shall be recovered from NTPC till the remaining units are declared under commercial operation. On COD of Unit-II & Unit-III, proportionate transmission charges corresponding to Unit-II & Unit-III, shall be considered in PoC from their respective CODs.”

33. However, we observe that the associated transmission system in the instant case is Nabinagar-Sasaram line which is a dedicated line for BRBCL, Nabinagar. The liability of transmission charges towards dedicated transmission line is covered in Regulation 8(8) of CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations 2009. The relevant portion of Clause (8) of Regulation 8 of the said Regulations is extracted as under:

“The dedicated transmission line from generating station of the applicant generating Company or any other entity on behalf of generating company to the pooling station of the transmission licensee (including deemed transmission licensee) shall be developed, owned and operated by the applicant generating Company or any other entity on behalf of generating company. The specifications for dedicated transmission lines may be indicated by CTU while granting Connectivity or Long term Access or Medium term Open Access:

Provided that CTU shall plan the system such that maximum length of dedicated transmission line does not exceed 100 km from switchyard of the applicant till the nearest pooling substation of transmission licensee:

Provided further that dedicated transmission line may exceed 100 km, if such an Applicant, so chooses:

Provided also that in case any connectivity grantee is not utilizing the bay allocated to it at ISTS substation, CTU may cancel its Connectivity as per provisions of these regulations and detailed procedure and allocate the bay to other Applicant. In such an event, the original grantee shall either dismantle its bay or enter into an Agreement with a new grantee as indicated by CTU for utilization of the bay within a period of 2 months of cancellation of Connectivity.

Provided that where the dedicated transmission lines have already been constructed/are under construction by CTU under coordinated transmission planning, the following shall apply:

(a) The transmission charges for such dedicated transmission lines shall be payable by the concerned generating company to the transmission licensee (including deemed transmission licensee) from the date of COD of the dedicated line till operationalisation of LTA of the generating station of the generating company:

(b) After operationalisation of the LTA, the dedicated transmission line shall be included in the POC pool and payment of transmission charges for the said dedicated transmission line shall be governed as per the CERC (Sharing of inter-state transmission charges and losses) Regulations, 2010 as amended from time to time.”

As per above, transmission charges for dedicated transmission lines which have been constructed by CTU under coordinated transmission planning shall be payable by the concerned generating company from the date of COD of the dedicated line till operationalisation of LTA of the generating station of the generating company.

34. In the instant case the date of operationalization of LTA is 26.7.2017, whereas CoD of the first unit of BRBCL generating station is on 15.1.2017. Therefore, in terms of Regulation 8(8) of CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations 2009 and Regulation 8(5) and 8(6) of Sharing Regulations 2010, in the instant case BRBCL shall be liable to pay transmission charges for the dedicated line till date of start of its LTA on 26.7.2017. Post 26.7.2017, the annual transmission charges of the transmission line (Nabinagar - Sasaram 400 KV D/C) as determined by the Commission shall be considered in PoC mechanism corresponding only to the unit declared under commercial operation and the proportionate transmission charges for the said dedicated line corresponding to units not declared commercial,

shall be recovered from BRBCL till the remaining units are declared under commercial operation.

35. It is worth pointing out that the Commission has already included the transmission charges in respect of units of BRBCL vide Order in No.L-1/44/2010-CERC dated 10.10.2019 while revising POC rates for 9 Quarters for the period July 2017- September 2019. The relevant portion of the Order dated 10.10.2019 for the quarter July-September 2017 is quoted below:

“6. In view of the above, the Implementing Agency vide its letter dated 29.08.2019 has submitted the revised slab rates for PoC Charges towards LTA/MTOA, Reliability Support Charge Rate, HVDC Charge Rate for the Application Period July, 2017 to Sep, 2017 in compliance with Regulation 17 of the 2010 Sharing Regulations, considering the following changes incorporated in the calculations with respect to the original POC Order dated 23.8.2017:-

a) The methodology of sharing of transmission charges for associated transmission system (ATS) of Kudgi generating station (i.e. Kudgi-Narendra, Narendra Madhugiri and Madhugiri Bidadi and associated bays) as per Order dated 06.11.2018 in Petition no. 261/MP/2017, has been considered. For this Quarter LTA of 797.5 MW from Kudgi generating station has been considered for SR beneficiaries and 1/3rd of transmission charges for Kudgi ATS has been considered under PoC. 2/3rd of transmission charges for Kudgi ATS have been allocated to NTPC Kudgi.

b) The sharing mechanism as directed vide Order dated 6.11.2018 in Petition No. 261/MP/2017 has been for BRBCL Generating Station also. For this Quarter LTA of 250 MW from BRBCL has been considered for beneficiaries and 1/4th of transmission charges for ATS of BRBCL i.e. Nabinagar- Sasaram line along with associated bays has been considered under PoC. 3/4th of transmission charges for Nabinagar- Sasaram line have been allocated to BRBCL.”

Similar view has been taken in other 8 quarters (October 2017 – September 2019). In the aforesaid order, the Commission also directed RPC to revise the Regional Transmission Accounts (RTAs) as per above.

36. The Petitioner has submitted that vide its letter dated 8.8.2017 to CTU, it relinquished 9% out of the total quantum of 900 MW LTA granted to it i.e. 81 MW and PGCIL vide its letter dated 6.9.2017 accepted the Petitioner's request for the relinquishment of 81 MW of LTA. The Petitioner shall be liable to pay LTA charges

(for quantum for which LTA persists) in terms of the Sharing Regulations, 2010, corresponding to the unit of BRBCL which has declared COD.

37. As regards delays due to non-grant/ delayed grant of NOC by STUs, we are not inclined to consider the prayer of petitioner since it was the responsibility of Petitioner to arrange such consent.

38. Petition No. 42/MP/2019 is disposed of in terms of above.

Sd/-

(I. S. Jha)
Member

Sd/-

(Dr. M. K. Iyer)
Member

Sd/-

(P. K. Pujari)
Chairperson