

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 21/MP/2017

**Coram:
Shri P.K. Pujari, Chairperson
Shri I. S. Jha, Member**

Date of Order: 4th February, 2021

In the matter of:

Petition for relinquishment of 1100 MW of Long-term Access agreed 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 of the subject transmission lines by Essar Power Jharkhand Limited (3x600 MW) Thermal Power Plant, ChandwaTeshil, District Latehar in the State of Jharkhand

And

In the matter of

Essar Power (Jharkhand) Limited
Lower Ground Floor
Hotel Conclave Boutique
A-20 Kailash Colony
New Delhi-110048

.....Petitioner

Vs

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

2. Central Electricity Authority
Sewa Bhawan
Rama Krishna Puram
New Delhi-110066

....Respondents

Parties present:

- 1) Shri Puneet S. Bindra, Advocate, Resolution Professional of EPJL
- 2) Ms. Simran Jeet, Advocate, Resolution Professional of EPJL
- 3) Shri Akash Singh, Advocate, Resolution Professional of EPJL
- 4) Ms. Suparna Srivastava, Advocate, PGCIL
- 5) Ms. Nehul Sharma, Advocate, PGCIL

6) Dr. V.N. Paranjape, PGCIL

7) Ms. Jyoti Prasad, PGCIL

ORDER

The Petitioner, Essar Power (Jharkhand) Limited (hereinafter called 'EPJL') has filed the present Petition under 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 ('the Connectivity Regulations') seeking relinquishment of the 1100 MW of Long-term Open Access (LTOA) granted to the Petitioner under the Bulk Power Transmission Agreement dated 24.2.2010.

Background of the Case

2. The Petitioner which is a generating company within the meaning of Section 2(28) of the Electricity Act, 2003 ('the Act') planned to set up 1800 MW (3 x 600 MW) thermal power plant in District Latehar in the State of Jharkhand (hereinafter referred to as 'the power project') in two phases, i.e. 2x600 MW in first phase and 1x600 MW in second phase. The Petitioner made an application dated 6.9.2007 to Power Grid Corporation of India Limited (PGCIL) in its capacity as Central Transmission Utility for grant of LTOA for 1100 MW for evacuation of electricity from Phase I of the project with point of injection as 400 kV sub-station of PGCIL at Ranchi or any suitable point recommended by PGCIL and with the tentative dates of commissioning of the units being October, 2011 (Unit-I) and March, 2012 (Unit-II) respectively. In the said application, the Petitioner indicated the Long Term Customer as Haryana Vidyut Prasaran Nigam Limited (300 MW), Rajasthan Rajya Vidyut Prasaran Nigam limited (200 MW), Maharashtra State Electricity Transmission Corporation Limited (200 MW), Government of Jharkhand (200 MW)

and Essar Steel Jharkhand Limited (200 MW). In the 3rd LTA Meeting and 9th Standing Committee Meeting of Eastern Region held on 8.11.2008, the transmission system for the power project of the Petitioner was discussed with the regional constituents as part of the High Capacity Power Transmission Corridor-II (HCPTC-II). The Petitioner vide its letter dated 7.7.2009 intimated PGCIL about the region-wise allocation of LTA as Northern Region: 600 MW, Western Region:200 MW and Eastern Region: 300 MW and revised schedule of commissioning of Unit I and Unit II as December 2011 and March 2012 respectively. The Petitioner was granted LTA for 1100 MW (Northern Region: 400 MW; Western Region: 400 MW and Eastern Region: 300 MW) by PGCIL vide its letter dated 3.9.2009. The Petitioner entered into a Bulk Power Transmission Agreement (BPTA) dated 24.2.2010 for evacuation of 1100 MW from its power project. As per the BPTA, the Petitioner was required to construct Essar TPS-Jharkhand Pooling Station 400 kV D/c line (quad moose) as its dedicated transmission line and PGCIL was required to construct the transmission systems in Northern, Western and Eastern Regions as per Annexure 3 to the BPTA. As required under the terms and conditions of the BPTA, the Petitioner furnished a bank guarantee of Rs 55.05 crore in favour of PGCIL whose validity was extended from time to time as advised by PGCIL.

3. The Petitioner vide letter dated 1.6.2012 informed PGCIL that in view of its decision to install one more unit of 600 MW under Phase II and its proposal to enter into a PPA with Noida Power Company Limited (NPCL) for supply of 240 MW, the allocations of LTA be revised as Northern Region: 240 MW, Eastern Region: 750 MW and Western Region: 110 MW. The Petitioner further informed about the expected completion dates of Unit-I, Unit-II and Unit-III of the power project as 30.9.2013, 31.12.2013 and 1.4.2014 respectively.



4. The Petitioner vide its letter dated 14.2.2014 informed PGCIL that the construction of its power project had been delayed due to several force majeure events as under:

- (a) Delay in transfer of service rights and surrender of mineral rights of Chakla Coal Block by Central Coalfields;
- (b) Delay due to water linkage and allocation;
- (c) Delay due to environmental clearance and FRA (Forest Rights Act) 2006 Certificate;
- (d) Cancellation of coal mines;
- (e) PPA of the Petitioner with NPCL declared frustrated by the Uttar Pradesh Electricity Regulatory Commission on account of the aforesaid events;
- (f) Delay due to Naxalite activities alongwith protests and bandhs;
- (g) Unilateral decision of State of Jharkhand to evacuate power (25% of generation capacity) through State Transmission Lines; and
- (h) Socio-political issues.

5. The Petitioner in the said letter requested for extension of the timelines as stipulated in the BPTA with no liabilities on either side till the end of 2016. In the 1st-Standing Committee Meeting for Power System Planning of Eastern Region held on 2.5.2014, the Petitioner intimated that all projects activities have been stopped due to de-allocation of coal blocks by Ministry of Coal and 1st unit of the power project was expected to be commissioned by end 2016 subject to regulatory clearance for the coal blocks. PGCIL informed the Petitioner that the transmission system was already under implementation and, therefore, the Petitioner would be liable to pay the transmission charges as and when the transmission system got commissioned.

The Petitioner vide its letter dated 24.6.2014 requested for further extension of the contractual timelines under the BPTA till 9.7.2017 in view of the above mentioned force majeure events and for synchronization of the construction of 2 no. of bays by PGCIL to the said timeline. PGCIL vide its letter dated 8.7.2014 rejected the events claimed by the Petitioner as being covered under force majeure events in terms of the BPTA and advised the Petitioner that it would be liable to pay the transmission charges. Consequent to the de-allocation of coal blocks by the Hon'ble Supreme Court in Manohar Lal Sharma v. The Principal Secretary & Ors. [2014 (9) SCC 516], the Petitioner vide its letter dated 17.10.2014 requested PGCIL to extend the date of commencement of LTA till December 2017 subject to availability of coal block or alternative coal from Ministry of Coal in lieu of de-allocated coal blocks. The Petitioner vide its letter dated 20.1.2016 sought relinquishment of 350 MW out of 1100 MW LTA, waiver of relinquishment charges and replacement of BG for 1100 MW with a BG for 750 MW on account of non-materialization of PPA for 240 MW with Noida Power Company Limited in Northern Region and for 110 MW in the Western Region. PGCIL vide its letter dated 29.2.2016 informed the Petitioner that the Petitioner would be liable to pay the relinquishment charges in terms of Regulation 18 of the Connectivity Regulations for the capacity relinquished by the Petitioner. PGCIL further intimated that its construction BG associated with the LTA quantum of 1100 MW could be replaced with the BG for 750 MW only after receipt of the formal request for relinquishment, revision in grant for the LTA and the Petitioner's acceptance to pay the applicable relinquishment charges.

6. The Petitioner filed Petition No. 100/MP/2016 and Petition No. 101/MP/2016 before the Commission for determination of relinquishment charges, if any, payable by the Petitioner for relinquishing 350 MW out of the total LTA quantum of 1100 MW.

During the hearing of these petitions (along with IA No. 56/2016), the Petitioner sought to withdraw the petitions with liberty to file a fresh consolidated petition which was allowed by the Commission vide order dated 22.12.2016. The Petitioner vide its letter dated 13.1.2017 informed PGCIL to relinquish 1100 MW LTA on account of various force majeure events which was rejected by PGCIL vide its letter dated 19.1.2017. The Petitioner vide its letter dated 30.1.2017 urged PGCIL to accept the relinquishment of LTA of 1100 MW due to force majeure reasons without its liability to pay the relinquishment charges. Thereafter, the Petitioner filed the present petition seeking the following reliefs:-

“(a) Declare the LTOA of 1100 MW relinquished without any liability for payment of relinquishment charges under Regulation 18 of the Connectivity Regulations;

(b) Direct Power Grid to return the Bank Guarantee given for LTOA of 1100 MW; and

(c) Declare that the events set out in paras 14 to 48 of the petition constitute force majeure events as defined under the Bulk Power Transmission Agreement.”

7. Subsequent to filing of the present petition, the Petitioner vide its letter dated 10.4.2017 approached PGCIL for relinquishment of 1100 MW of LTA along with unconditional undertaking to bear the relinquishment charges as may be determined by the Commission in Petition No. 92/MP/2015. PGCIL vide its letter dated 12.4.2017 permitted the Petitioner to relinquish the LTA with effect from that date subject to directions of the Commission in Petition No.92/MP/2015 and the instant petition.

8. The Commission issued the order dated 8.3.2019 in Petition No.92/MP/2015 holding that 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. Respondent No.1 was directed to calculate the stranded capacity and the relinquishment charges payable by the relinquishing long term

customers. Respondent No.1 has computed the relinquishment charges of various generators including the Petitioner according to which the Petitioner has a liability to pay Rs.55.05 crore as relinquishment charges.

Submissions of the Petitioner

9. The Petitioner has submitted that the change in the scheduled commissioning of the project has resulted in relinquishment of LTOA for 1100 MW due to the following force majeure events:

(A) Delay due to coal allocation, mining site hurdles and other associated issues:

Although the designated captive coal blocks at Chakla and Ashok Karkata were allotted to the Petitioner by the Ministry of Coal on 20.2.2007 and 6.11.2007 respectively, the operation of such mines were delayed due to delay in transfer of surveys rights and surrender of mineral rights of Chakla coal block by Central Coalfields Limited (CCL). Though, the request for transfer of such rights was made on 1.5.2007, there has been a delay of 17 months in the transfer of service rights and 28 months in the surrender of mineral rights by CCL. During land survey phase of Chakla coal block, it was found that a third party had prospecting license for clay in an area which overlapped with the designated coal block mine area, which affected the initial coal site development activities.

(B) Delay due to water linkage and allocation:

On 24.8.2006, the Petitioner had applied to Water Resources Department (WRD), Govt. of Jharkhand for allocation of 80 cusec of water for its power plant. Subsequently, on 15.9.2006, the Petitioner submitted the techno-economic feasibility report to WRD and requested it to expedite the water allocation process. The WRD informed the Petitioner on 20.2.2007 that only 100 MCM was available from Damodar basin. The Petitioner received water linkage on 22.2.2008 for a quantity of 22 MCM only from Amanat river. Further on 24.5.2010, the Petitioner received additional water linkage of 50 MCM. With the execution of water agreement on 20.3.2012, the Petitioner was assured availability of 72 MCM of water for its project. However, despite assurance,

issue arose with regard to drawl of water as construction of weir was to be taken up in conformity with the WRD, who approved the DPR for construction on 16.7.2013. The Petitioner decided to modify the generation project design and install air cooled condenser in place of conventional cooling system, which resulted in unanticipated delay in project development timelines apart from the associated cost overrun.

(C) Delay due to Environment Clearance and Forest Right Act, 2006 Certificate:

(i) The approved TOR was issued by the Ministry of Environment & Forests (MOEF) to the Petitioner vide letter dated 1.8.2007. Accordingly, the Petitioner undertook activities such as Environmental Impact Assessment (EIA) and study of generation projects as per TOR. By letter dated 1.8.2008, the Petitioner submitted EIA study report along with other supporting documents to MOEF on 1.8.2008. However, MOEF did not grant EC for all three units of the power plant due to insufficient water availability, non-availability of sufficient quantity of coal for all three units and changes in regulations for grant of EC by linking it with various clearances of the linked mines. MOEF vide notification dated 1.11.2010 and 19.4.2012 linked the EC of the project with the EC of captive coal mines allocated to the Petitioner. Such change in policy framework resulted in conditional grant of EC limited to the extent of Unit-I of the project. The delay in grant of EC resulted in affecting the implementation schedule of the project by more than 2.5 years. After inordinate delay, the Petitioner received EC for Units-II & III in November, 2013.

(ii) Despite the fact that application for issuance of Forest Right Act (FRA), 2006 certificate was made on 3.8.2011, the certificate was granted on 26.12.2013. The delayed FRA 2006 certificate and Stage-I forest clearance from MOEF has not only delayed the progress of the project but also affected the financing of the project development.

(D) Substantial effect on generation project due to cancellation of coal mines:

(i) The Petitioner informed PGCIL on 13.6.2014 regarding notice of cancellation of designated coal blocks of Chakla and Ashok karkata from the Ministry of Coal. Subsequently, on 24.9.2014, the Hon'ble Supreme Court cancelled the allocation of designated coal blocks. The cancellation of coal block is not attributed to the Petitioner. Till such time, Stage-I forest clearance was not issued by MOEF despite 40% progress of the project. The Petitioner vide letter dated 17.10.2014 requested PGCIL to look at its case sympathetically as the cancellation was not attributable to the Petitioner. Subsequently, in February 2012, the Petitioner applied for tapering coal linkage, which has not been approved till date.

(ii) On account of cancellation of coal blocks and delayed progress of the project due to reasons not attributable to the Petitioner, UPERC has declared the said PPA frustrated. Thus, the LTOA of 240 MW for Northern Region was relinquished by the Petitioner vide letter dated 20.1.2016. Therefore, the Petitioner's obligation under BPTA for payment of transmission charges stands frustrated and the Petitioner cannot be held liable to the extent of 240 MW LTOA to the Northern Region.

(E) Naxalite activities along with protests and Bandhs:

The Project is situated in a sensitive zone, where the naxalite movement and naxalite led bandh, protests and other activities had affected the progress of the project. The implementation of the project has been affected adversely due to local unrest and constant naxalite/extremist group activities. The Petitioner had taken up the issue with the appropriate authority and local police, but such efforts could not materialize. The naxalite disruptions faced by the Petitioner are similar to those of PGCIL Ranchi-Chandwa-Gaya line and, therefore, common dispensation in relation to such issue may be made by the Commission.

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

(a) The Petitioner was constrained to relinquish LTA of 350 MW on 20.1.2016 due to occurrence of force majeure events which made it impossible for the Petitioner to achieve the commissioning schedule of the project.

(b) The availability of coal block was an important basis for execution of PPA with NPCL. Since the conditions for successful execution of the PPA materially changed by virtue of the judgment of the Hon'ble Supreme Court in Manohar Lal Sharma vs Principal Secretary & ors [2014 (9) SCC516], the performance of the PPA became impossible by the Petitioner and the PPA stood frustrated since there was no committed fuel source available to the Petitioner for the project. The PPA did not require the Petitioner to look at alternate sources for supply of coal.

(c) The Petitioner had informed PGCIL regarding the target beneficiary (NPCL) in the Northern region for evacuation of 240 MW of power from the project. However, upon the PPA being frustrated on account of order of UPERC, the evacuation to target beneficiary was no more required. After frustration of PPA to the target beneficiary namely, NPCL, the Petitioner has no option but to relinquish the associated LTOA for 240 MW.

(d) The State of Jharkhand unilaterally decided to evacuate power (25% of generation capacity) through the State transmission lines and, therefore, any possibility to utilize the existing LTOA could not have occasioned.

(e) Uncertainty in the schedule of commissioning of the power project eventually led to the Petitioner seeking relinquishment.

(f) Both the Respondents PGCIL and CEA were aware about the considerable delay in the commissioning of the project and have also acknowledged in the 17th Standing Committee Meeting on Power Systems that the delay is beyond the reasonable control of the Petitioner.

(g) In Chapter III of the NLDC Report on Operational Feedback on Transmission Constraint- October 2016, POSOCO / NLDC had discussed the transmission line constraint in Eastern region. The subject transmission line is being utilized to avert loading issues and violation of N-1 security criterion. NLDC has also observed that as power was being imported from WR at Ranchi 400 kV and part of power generated by DSTPS was landing in Raghunathpur, 400 kV Raghunathpur- Maithon S/C was getting overloaded.

(h) The BPTA provides that unless the entire transmission scheme as provided under Annexure-II & III are not completed, the transmission scheme cannot have said to have achieved end to end connectivity. Unless there is possibility of actual transmission of electricity, the parties cannot avail the service rendered by the respondent under the BPTA.

(i) Under Clause 9.0 of the BPTA, the parties are absolved of the responsibilities under the BPTA, in case they are being affected by force majeure conditions. The Petitioner has brought to the notice of PGCIL from time to time, the existence of each and every force majeure events and to that extent the rejection of the force majeure claim of the Petitioner by PGCIL, is not tenable in law.

(j) On analysis of the progress of work by PGCIL during the relevant period, it can be seen that there was sufficient opportunity for PGCIL to either delay the construction of the strengthening system and divert men and material as has been done by them in several other cases.

(k) In order to claim any relinquishment charges, PGCIL is required to demonstrate the existence of the standard capacity and the extent of loss caused thereby. Admittedly, there is no stranded capacity caused due to the relinquishment of LTA by the Petitioner and, therefore, the question of payment of charges under Regulation 18 does not arise. It is an admitted fact by both PGCIL and CEA that there would not be any stranded capacity upon relinquishment of the LTOA of Petitioner for 1100 MW and accordingly the Petitioner shall not be liable to pay any relinquishment charges.

Submissions of the Respondent 1 (PGCIL)

11. The Respondent (PGCIL), vide affidavit dated 27.3.2018, has submitted the following:

(i) The Petitioner applied to Respondent No.1 (PGCIL) vide application dated 6.9.2007 for long term open access (LTOA) of 1100 MW into the Inter-State Transmission System (ISTS) with expected commencement date of October 2011. The Petitioner entered into an MoU with the Government of Jharkhand for supply of 25% power generated from the project to the Government of Jharkhand or its nominated agency. In the meeting held on 26.5.2009 regarding LTOA for evacuation of power from IPPs in Jharkhand, the region-wise allocation of 1100 MW was recorded as NR-400MW, WR-400MW, ER-300MW and the commissioning schedule was recorded as Unit-1: December 2011 and Unit-2 : March 2012 which was revised vide letter dated 7.7.2009 as NR-600MW, WR-200MW and ER-300MW. The Petitioner also intimated its readiness to sign the Bulk Power Transmission Agreement (BPTA).

(ii) Evacuation from the Petitioner's project being under HCPTC-II as discussed in the 3rd LTA meeting and 9th Standing Committee Meeting of Eastern Region held on 8.11.2008 at Bhubaneswar and PGCIL office, Gurgaon on 26.5.2009, the Petitioner was granted 1100 MW LTA vide intimation dated 3.9.2009 to sign the necessary BPTA for sharing of transmission charges and 400 MW each was allocated for transfer to the Northern Region and Western Region and 300 MW in the Eastern Region. The Petitioner alongwith other power projects proposed in the State of Jharkhand, signed a BPTA with PGCIL on 24.2.2010 for availing open access under the LTA granted to it and also for paying transmission charges for use of the transmission system for 25 years.

(iii) After approval of Standing Committee on Power System Planning and Regional Power Committee of ER, NR and WR, regulatory approval was granted by Commission vide its order dated 31.5.2010 in Petition No. 233/2009 for implementation of HCPTCs. the HCPTC-II was divided into three parts - Part-A1, Part-A2 and Part-B while granting investment approval on 22.10.2011,

27.12.2011 and 8.2.2012 respectively, with commissioning schedule as 25 months, 32 months and 32 months from investment approval respectively. The Corridor was scheduled for completion progressively from November 2013 till October 2014. Admittedly, the units of Petitioner's power project were expected to be commissioned by September/December 2013 at the time of investment approval of the transmission system, i.e. 2011-12, which was a fairly close match between generation and transmission. In August 2013, the Petitioner made a request for shifting of the date of commissioning of its power project from September/December 2013 to March 2015 i.e. shifting by 15-18 months, under same LTA.

(iv) The Petitioner subsequently decided to install one more unit of 600 MW under Phase-II of its project maintaining the same LTA quantum of 1100 MW, through a revised allocation requested vide letter dated 1.6.2012. Accordingly, the Petitioner requested PGCIL to change the planned capacity and the region-wise allocation in the BPTA. Further, based on the then progress of its power project, the Petitioner informed the expected unit-wise completion date as under:

Unit-1	:	30.9.2013
Unit-2	:	31.12.2013
Unit-3	:	1.4.2014

(v) The Petitioner requested PGCIL to extend the contractual timelines under the LTA including execution of the Transmission Service Agreement (TSA) till the end of December, 2016 vide its letter dated 14.2.2014 and reiterated the said request with the CEA vide its letter dated 20.2.2014.

(vi) By letter dated 13.6.2014, the Petitioner informed PGCIL that the identified source of fuel for its power project was in the likelihood of being de-allocated by the Ministry of Coal. PGCIL vide letter dated 8.7.2014, clarified that the Petitioner's liability to pay transmission charges under the LTA was not conditional upon any events/issues surrounding the project implementation. By letter dated 17.10.2014, the Petitioner informed about cancellation of the coal block allocated to the Petitioner vide Order dated 24.9.2014 by the Hon'ble Supreme Court. As a result, the Petitioner requested PGCIL for extension of

LTA date to end December 2017 subject to availability of coal block or alternative from Ministry of Coal.

(vii) PGCIL vide letter dated 22.2.2016 replied that there could be no relinquishment of LTA or any part thereof without payment of relinquishment charges as per the applicable Regulations and directions of the Commission. The Petitioner approached the Commission by filing Petition Nos.100/MP/2016 and 101/MP/2016 with respect to determination of relinquishment charges, if any, payable by it for relinquishing a part of LTA of 350 MW out of the total 1100 MW which was allowed to be withdrawn by the Petitioner vide Order dated 22.12.2016 passed by the Commission with liberty to file a fresh Petition for determination of relinquishment charges payable for relinquishing the entire LTA quantum of 1100 MW. PGCIL vide letter dated 19.01.2017 rejected the Petitioner's request for relinquishment as not being in accordance with the provisions of the Connectivity Regulations and the contractual commitments made with PGCIL.

(viii) Pursuant to the filing of the instant Petition, the Petitioner vide letter dated 10.4.2017 sought to relinquish entire 1100 MW LTA alongwith an unconditional undertaking to bear the relinquishment charges, as may be determined by the Commission in Petition No. 92/MP/2015. Accordingly, PGCIL permitted the relinquishment w.e.f. 12.4.2017 subject to directions of the Commission in the instant Petition as well as in Petition No. 92/MP/2015.

(ix) The Commission has considered the relinquishment of LTA on account of occurrence of alleged force majeure events and return of bank guarantee in Order dated 12.7.2016 in Petition No. 315/MP/2013 (PEL Power Ltd. Vs. Power Grid Corporation of India Ltd) and Order dated 12.4.2017 in Petition No.317/MP/2013 (Navbharat Power Private Ltd. Vs. Power Grid Corporation of India Ltd. &anr).

12. The Petitioner had filed I.A. No. 9/2017 vide affidavit dated 3.2.2017 for restraining PGCIL from invoking and encashing the Bank Guarantee submitted by the Petitioner to PGCIL under the agreements. However, the Commission,after

noting the submissions of learned counsel for PGCIL that no coercive measure would be taken during the pendency of the petition, disposed of the said IA vide ROP of the hearing dated 16.2.2017.

Affidavit by the Resolution Professional on behalf of the Petitioner

13. National Company Law Tribunal (NCLT) admitted a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 filed by the lender of the Petitioner, namely, ICICI Bank Limited and consequently, the Petitioner has been undergoing corporate insolvency resolution since April 2018. The Resolution Professional, (appointed by NCLT) through its affidavit dated 1.7.2019 filed on behalf of the Petitioner has placed on record the judgment dated 21.12.2018 of APTEL in “*GMR Kamalanga Energy Ltd. and Anr. Vs Central Electricity Regulatory Commission and Ors.*” [Appeal No. 193 of 2017] and has submitted that in the light of the said judgment holding cancellation of coal block as an event of force majeure and change in law, de-allocation of the coal blocks allocated to the Petitioner would amount to change in law and consequently force majeure under Clause 9 of the BPTA and accordingly, the Petitioner is not liable to pay any relinquishment charges.

Submissions during the hearing

14. 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 LTA Agreement/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 create a permanent disability to jeopardize the ability of the Petitioner to start operations 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 events narrated by the Petitioner i.e. cancelation of coal block, termination of PPA and non-availability of long term PPA are events 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/stressed 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.

15. Learned Counsel for PGCIL/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 directions of the Commission in order dated 8.3.2019 in Petition No. 92/MP/2015, PGCIL/CTU has computed the stranded capacity and relinquishment charges of various generators including the Petitioner. The Petitioner is liable to pay Rs. 50.05crores as relinquishment charges.

c) The allegations made by the Petitioner as regards the responsibility of the PGCIL/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 paragraph 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 PGCIL/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 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 and the nature of the rights and obligations agreed thereunder. 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 (Designated ISTS Customer) 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. Even cancellation of coal block cannot be considered as force majeure in terms of Clause 9 of the BPTA. The Petitioner is accordingly liable to pay the Relinquishment Charges.

16. Learned Senior Counsel for the Petitioner 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 of the Connectivity Regulations, 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 (Billing, Collection and Disbursement) Procedure provides that an LTA cannot be operational in the event firm long term PPA is not available. Regulation 15B 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, PGCIL/CTU is required to effectively coordinate the construction of transmission system 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, PGCIL/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. PGCIL/CTU has to take the risk of developing transmission infrastructure in the event of occurrence of any unforeseeable or uncontrollable event.

e) PGCIL/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 such argument, it will be only benefit PGCIL/CTU, and for no other entity. Any issues qua the flow of power in the transmission system can only be attributable to PGCIL/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 PGCIL/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.

f) Reliance on Regulation 8(5) of the 2010 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 2010 Sharing Regulations will have to be implemented as per the provisions of the TSA. Accordingly, Regulation 8(5) of the 2010 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

17. 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. To briefly recapitulate the facts of the case, the Petitioner planned to set up an 1800 MW (3x600) power project at Chandwa Teshil, District Latehar in the State of Jharkhand. The Petitioner applied for LTA for 1100 MW with point of injection as 400 kV sub-station of PGCIL at Ranchi or any suitable point recommended by PGCIL for transmission of power from two units of its generating station. The Petitioner vide its letter dated 7.7.2009 intimated PGCIL about the region-wise allocation of LTA as Northern Region: 600 MW, Western Region: 200 MW and Eastern Region: 300 MW and revised schedule of commissioning of Unit I and Unit II as December 2011 and March 2012 respectively. The Petitioner was granted LTA for 1100 MW (400 MW in Western Region, 400 MW in Northern Region and 300 MW in Eastern Region). The Petitioner entered into a BPTA with CTU on 24.2.2010 for 1100 MW and submitted a bank guarantee of Rs.55.05 crore. The Petitioner vide its letter dated 1.6.2012 sought the revision of allocation of LTA to different regions on account of its decision to add another unit of 600 MW and intimated about the revised SCOD of the units as 30.9.2013, 31.12.2013 and 1.4.2014 respectively. However, no document has been placed on record to show that the LTA allocations as requested by the Petitioner vide its letter dated 1.6.2012 was either agreed to by PGCIL or the BPTA was amended to give effect to the proposed revised allocation of LTA.

18. The Petitioner vide its letter dated 14.2.2014 intimated PGCIL about delay in implementation of the power project due to various events such as delay in environmental clearance, cancellation of coal mines, PPA with NPCL being declared as frustrated by UPERC and decision of State of Jharkhand to evacuate its share of power through State transmission lines etc. and sought extension of time till end 2016. In the 1st Standing Committee Meeting for Transmission System Planning of Eastern Region held on 2.5.2014, PGCIL clarified that transmission system was already under implementation and the Petitioner would be liable to pay the transmission charges as and when the transmission system got commissioned. Thereafter, the Petitioner vide its letter dated 20.1.2014 requested for extension of the timelines till 9.7.2017. Even after the de-allocation of coal blocks, the Petitioner sought extension of LTA till December 2017 subject to availability of the coal block or alternative coal from Ministry of Coal. The Petitioner vide its letter dated 20.1.2016 sought relinquishment of 350 MW, waiver of relinquishment charges and replacement of BG for 750 MW on account of non-materialisation of PPA for 240 MW with Noida Power Company Limited in Northern Region and for 110 MW in the Western Region. PGCIL vide its letter dated 29.2.2016 clarified to the Petitioner that it would be liable to pay the relinquishment charges for the LTA capacity relinquished. The Petitioner vide its letter dated 13.1.2017 informed PGCIL to relinquish 1100 MW of LTA on account of force majeure without any liability to pay the relinquishment charges which was rejected by PGCIL. The Petitioner vide its letter dated 10.4.2017 sought to relinquish its LTA of 1100 MW with an unconditional undertaking to bear the relinquishment charges as may be determined by the Commission in Petition No.92/MP/2015. However, the Petitioner in the petition has submitted that it is not liable to pay the relinquishment charges as its case is covered

under Clause 9 of the BPTA on account of its project being affected by various force majeure events and Clause 9 of the BPTA excludes operation of other provisions of the BPTA.

19. In the above factual matrix and after considering the submissions of the Petitioner and PGCIL, 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 force majeure in terms of clause 9 of the BPTA?

(c) Issue No.3: What should be the date of relinquishment of LTA under the BPTA dated 24.2.2010?

(d) Issue No.4: What are the reliefs admissible to the Petitioner in terms of its prayers in the Petition?

20. 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?

21. Learned Senior Counsel for the Petitioner 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.

22. PGCIL/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 contend that they are not liable to make payment of the compensation in the manner provided under Regulation 18 of the Connectivity Regulations. PGCIL/CTU has submitted that the Petitioner in terms of Clause 2.0 of the BPTA has undertaken to share and pay to the PGCIL/CTU the transmission charges in accordance with the Regulations/tariff orders of the Commission. Further, Clause 6 of the BPTA has bound the generators to pay the transmission charges when they are abandoning the project or making an exit. PGCIL/CTU has emphasized that it is in pursuance of the said provision that the Petitioner has furnished the bank guarantee corresponding to the LTA granted which can be encashed by the PGCIL/CTU in case of any adverse progress of the generating unit assessed in the Coordination Meeting. PGCIL/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 PGCIL/CTU and subject to payment of compensation in accordance with the regulations of the Commission issued from time to time. Regulation 18 of the Connectivity Regulations 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. PGCIL/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 the Connectivity Regulations. PGCIL/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. PGCIL/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. PGCIL/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. PGCIL/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. PGCIL/CTU has emphasized that the applicability of Clause 9 cannot be extended to matters which are beyond the eventualities affecting “transmission/drawal of power”. PGCIL/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.

23. We have considered the submissions of the Petitioner and PGCIL/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.

24. 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.....”

25. 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, 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.

26. Another argument taken on behalf 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.

27. The relevant provisions of the BPTA dated 24.2.2010 between the Petitioner and PGCIL/CTU 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/Eastern 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 tile 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 schedule 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 (BG), in favor of POWERGRID, 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.

(e) to (h).....

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 not withstanding 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 POWERGRID 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."

28. Perusal of the above provisions makes the scheme envisaged in the BPTA clear. As per Clause 1, PGCIL/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 PGCIL/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/drawl of power as soon as practicable by the parties concerned after the eventuality ceased to exist or come to an end.

29. 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.

30. 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.

31. 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.”

32. Further in order dated 14.7.2017 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.”

33. 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 dated 24.2.2010 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?

34. The various events of force majeure mentioned by the Petitioner are delay in transfer of service rights and surrender of mineral rights of Chakla Coal Block by Central Coalfields Limited; delay due to water linkage and allocation; delay due to environmental clearance and FRA 2006 Certificate; cancellation of coal blocks allotted to the Petitioner; PPA with NCPL being declared as frustrated by UPERC; delay due to Naxalite activities; and unilateral decision of State of Jharkhand to evacuate 25% of generation capacity through State transmission lines. The Petitioner has submitted that these events are beyond the control of the Petitioner and in terms of Clause 9 of the BPTA, the Petitioner is relieved from discharging its obligations under BPTA. Since the Petitioner is before NCLT, the Resolution Professional appointed by NCLT vide its affidavit dated 1.7.2019, by relying upon the judgment dated 21.12.2018 of APTEL in Appeal No. 193 of 2017 titled "*GMR Kamalanga Energy Ltd. and Anr. Vs Central Electricity Regulatory Commission and Ors.*" has contended that in the light of the said judgement holding cancellation of coal block as an event of force majeure and change in law, de-allocation of the coal blocks allocated to the Petitioner would amount to change in law and consequently force majeure under Clause 9 of the BPTA and accordingly, the Petitioner is not liable to pay any relinquishment charges. Apart from the above, the Petitioner has submitted that Ranchi-Chandwa-Gaya transmission line is a system strengthening line and cannot be said to be stranded on account of the generating station of the Petitioner. The Petitioner has further submitted that all the transmission assets within the scope of PGCIL have not been commissioned and therefore, LTA of the Petitioner cannot be operationalized pending commissioning of all transmission

assets and the Petitioner cannot be saddled with either the transmission charges or relinquishment charges.

35. PGCIL/CTU has submitted that the regulatory approval for HCPTC-II was accorded by the Commission in its order dated 31.5.2010 in Petition No.233/2009 after considering the progress of three generation developers including the Petitioner. PGCIL/CTU has further submitted that the investment approvals for three parts of HCPTC-II were accorded on 22.10.2011, 27.12.2011 and 3.2.2012 respectively with commissioning schedule as 25 months, 32 months and 32 months from investment approval respectively which means that HCPTC-II was scheduled to be commissioned progressively from November 2013 till October 2014 matching with the revised commissioning of the units of the generating station by September/December, 2013. PGCIL/CTU has further submitted that it was only in August 2013 that the Petitioner made a request for shifting of the date of commissioning of the generation project from September/December 2013 to March 2015 i.e. shifting by 15-18 months which is akin to its readiness to utilize the LTA from March 2015 onwards. PGCIL/CTU has submitted that the Petitioner vide its letter dated 14.2.2014 sought extension of the contractual timelines to December 2016 on account of the issues relating to clearances and funding. In the 17th Standing Committee Meeting for Power System Planning for Eastern Region held on 2.5.2014, CTU had clarified to the Petitioner that Jharkhand pooling sub-station (Chandwa) was already under construction and generation developers including the Petitioner are required to ensure that their dedicated transmission lines alongwith associated line bays at Jharkhand pooling station are commissioned matching with the commissioning schedule of Jharkhand Pooling station. CTU further clarified in the said meeting that the generation developers including the Petitioner were liable

to pay the transmission charges as and when the transmission system gets commissioned. According to CTU, the Petitioner vide its letters dated 13.6.2014, 24.6.2014 and 17.10.2014 sought extension of the LTA date to December 2017 on account of various events including cancellation of coal blocks which the Petitioner claimed to be in the nature of force majeure. PGCIL/CTU has submitted that the Petitioner vide its letter dated 20.1.2016 sought relinquishment of 350 MW out of 1100 MW LTA together with waiver of transmission charges for the relinquished quantum and replacement of bank guarantee of 1100 MW with that of 750 MW on account of frustration of the PPA with NPCL. The Petitioner vide its letter dated 10.4.2017 relinquished 1100 MW of LTA alongwith an unconditional undertaking to bear the relinquishment charges as determined by the Commission. However, the Petitioner in the petition has claimed the protection of force majeure in terms of Clause 9 of the BPTA. PGCIL/CTU has submitted that the BPTA contemplates only such events of force majeure which disrupt the ongoing transmission/drawl of power to the subject transmission system and issues relating to the implementation of the generation project are not contemplated within the force majeure conditions under the BPTA. Hence the Petitioner's relinquishment of the LTA has no nexus with the occurrence of the events adversely affecting the generating station of the Petitioner. PGCIL/CTU has submitted that the reasons mentioned by the Petitioner are normal activities involved in establishing a thermal generating station and do not qualify as force majeure.

36. We have considered the submissions of the Petitioner and Respondent PGCIL/CTU. The Petitioner has broadly based its case on the three sets of events affecting its generating stations, namely, delay in getting various approval for the project, frustration of PPA and absence of new PPA, and cancellation of coal block

and has claimed relief under clause 9 of the BPTA. Clause 9 of the BPTA refers to the 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.” Accordingly, we have examined hereinafter whether the events relied upon by the Petitioner are covered under force majeure in terms of Clause 9 of the BPTA, without prejudice to our finding that provisions of clause 9 only provides temporary amnesty and cannot invoked to get out of the LTA without the liability for relinquishment charges.

37. The Petitioner relinquished 350 MW in the first instance on account of cancellation of its PPA with NPCL (240 MW) and non-materialisation of PPA in Western Region (110 MW). 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 paragraph 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 in consonance 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.”

38. 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, it cannot be pleaded at this stage that PPA is a necessary pre-condition for continuation of the LTA and hence absence of PPA is an event of force majeure frustrating the operation of the LTA. Further, Non-materialisation of PPA or frustration of existing PPA is clearly within the domain of commercial decision of the Petitioner and, therefore, cannot be covered under force majeure in terms of clause 9 of the BPTA. Therefore, frustration of the PPA of the Petitioner with NPCL cannot be considered as an event of force majeure in terms of the provisions of the BPTA.

39. The Petitioner has also submitted that the events like delay in coal allocation, mining site hurdles, delay in water linkage and allocation, delay in environmental clearance have affected the execution of the generating station which are events beyond the control of the Petitioner and are covered under force majeure in terms of clause 9 of the BPTA. In our view, these are operational and commercial risks involved for implementation of the generation project. Moreover, the Petitioner has been seeking postponement of the date of the LTA from time to time which impliedly showed that the Petitioner would utilize the transmission system built by CTU on the strength of its commitment under the BPTA. In our view, these events cannot be considered as force majeure events in terms of clause 9 of the BPTA.

40. The Petitioner submitted that cancellation of coal block by Hon'ble Supreme Court is an event of force majeure and relieves the Petitioner from its obligations

under the BPTA. The Petitioner has relied upon the judgment dated 21.12.2018 of APTEL in Appeal No. 193 of 2017 (*GMR Kamalanga Energy Ltd. and Anr. Vs Central Electricity Regulatory Commission and Ors.*) in support of its contention. The relevant paragraphs of the judgment of APTEL in Appeal No.193 of 2017 are extracted as under:

“68. Meanwhile, on 25-8-2014 by virtue of judgment of the Hon’ble Apex Court in the case of Manohar Lal Sharma vs. The Principal Secretary & Ors, entire allocation of coal block made by Screening Committee from 14-7-1993 onwards in 36 meetings and allocations made through the Govt. dispensation route were held to be illegal. As a consequence, de-allocation order came to be passed on 24-9-2014 which cancelled allocation of 204 coal blocks including Rampia etc. with immediate effect. Therefore, Captive Coal Block came to be cancelled. Prior to this, the delay between October 2013 till date of judgment, it was on account of Go-No-Go policy of MOEF which was beyond the control of Appellant. Additional 40% or 20% of the base price was payable by the purchasers as “add on price” for coals after the normative date of production. On account of reasons mentioned above between the scheduled date of coal block and the judgment in Manohar Lal Sharma, it was a case of force majeure and from the date of judgment, it was on account of change in law (due to NCDP of 2013).

69. According to the Appellants, if Captive Coal Block had not been cancelled and if development of coal block was not delayed because of Go-No-Go policy, GKEL would not have to pay add on premium. For the reasons stated above, since the delay in development of Captive Coal Block and subsequent cancellation of the Block by virtue of judgment of Hon’ble Apex Court, the consequential financial impact on account thereof in respect of add on premium is also covered as change in law.

70. Apparently, add on premium was not part of LOA and tapering linkage policy. Therefore, we are of the opinion, Appellant GKEL is entitled for compensation for increase in cost due to continued use of tapering linkage coal on account of delay in development of coal block as well as eventual cancellation of blocks by judgment.”

41. The above findings of APTEL have been rendered in the context of the provisions of change in law in the PPA (between GMR Kamalanga and its procurers) and NCDP 2013. On perusal of the PPA in GMR Kamalanga case and the BPTA in the present case, it is noticed that while there are elaborate provisions regarding change in law in the PPA, corresponding provisions regarding change in law do not exist in the BPTA. In fact, the words used in the BPTA are “change of law” which has been mentioned in Clause 9 of the BPTA as one form of force majeure without any

explanation as to what would constitute “change of law”. Moreover, the provisions of the PPA in GMR Kamalanga case are not in para materia with the provisions of the BPTA in the present case. Therefore, the findings in GMR case regarding change in law cannot be considered in the context of “change of law” used in clause 9 of the BPTA. Even if for the sake of argument, cancellation of coal block is considered as “change of law” in terms of clause 9 of the BPTA, it cannot relieve the Petitioner from its obligation under the BPTA without any liability since force majeure condition under clause 9 of the BPTA grants temporary amnesty to the affected party as held in our decision under Issue No. 1 of this order.

Issue No.3: What should be the date of relinquishment of LTA under the BPTA dated 24.2.2010?

42. The Petitioner vide its letter dated 12.12.2016 sought relinquishment of LTA of 1100 MW with effect from 12.12.2016. The said request has been reiterated in its letter dated 13.1.2017. 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. The Commission vide Order dated 8.3.2019 in Petition No. 92/MP/2015 has directed as under with respect of 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.”

43. PGCIL/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, it has computed the stranded capacity and relinquishment charges of various generators including the Petitioner who have relinquished the LTA. PGCIL/CTU has considered the date of

relinquishment as 12.4.2017. In the light of our decision in para 161(b) of the order dated 8.3.2019 in Petition No.92/MP/2015, date of relinquishment of 350 MW shall be 20.1.2016 and for remaining 750 MW, the date of relinquishment shall be considered as 12.12.2016 and the relinquishment of the LTA from the above dates is subject to payment of relinquishment charges.

Issue No.4: What are the reliefs admissible to the Petitioner in terms of the prayers in the petition?

44. The first prayer of the Petitioner is for a declaration for relinquishment of LTA of 1100 MW without any liability for payment of relinquishment charges under Regulation 18 of the Connectivity Regulations. The said prayer is rejected in the light of our decision on Issue No. 1 in this order. The Petitioner is liable to pay the relinquishment charges for the capacity relinquished as determined in accordance with our order dated 8.3.2019 in Petition No.92/MP/2015.

45. The second prayer of the Petitioner is for a direction to PGCIL to return the bank guarantee given for LTA of 1100 MW. We observe that the Petitioner shall be liable for 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. 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 and return the balance amount, if any, to the Petitioner.

46. The third prayer of the Petitioner is for a declaration that events set out in paragraphs 14 to 48 of the petition constitutes force majeure as defined under the

BPTA. The said prayer is rejected in the light of our decision on Issue No.2 in this order.

47. Petition No. 21/MP/2017 is disposed of in terms of the above.

Sd/-
(I.S. Jha)
Member

sd/-
(P.K. Pujari)
Chairperson