

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 214/MP/2019

Coram:

Shri P.K. Pujari, Chairperson

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of Order: 9th November, 2021

In the matter of

Petition under Sections 79(1)(c) and 79(1)(f) of the Electricity Act, 2003 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 impugning the wrongful rejection of open access.

And

In the matter of

Tata Power Trading Company Limited,
Shatabdi Bhawan, Sector-4, Noida,
Uttar Pradesh

...Petitioner

Vs.

Power Grid Corporation of India Limited (CTUIL),
Through Managing Director,
Saudamini, Plot No. – 2, Sector-29,
Gurgaon – 122 001 (Haryana)

Power System Operation Corporation Limited,
1st Floor, 8-9 Qutab Institutional Area, Katwaria Sarai,
New Delhi-110 016

Eastern Regional Load Despatch Centre,
14 Golf Club Road, Tollyganj,
Kolkatta-700 033

.... Respondents

Parties present:

Shri Amit Kapur, Advocate, TPTCL
Shri Vishrov Mukerjee, Advocate, TPTCL
Shri Rohit Venkat, Advocate, TPTCL
Shri Damodar Solnaki, Advocate, TPTCL
Ms. Suparna Srivastava, Advocate, CTUIL
Ms. Soumya Singh, Advocate, CTUIL
Shri Tushar Mathur, Advocate, CTUIL
Shri Swapnil Verma, CTUIL

Shri Siddharth Sharma, CTUIL
Shri Laxmi Kant, CTUIL
Shri Alok Kumar, POSOCO
Shri Nadim Ahmed, POSOCO

ORDER

The Petitioner, Tata Power Trading Company Limited (TPTCL), has filed the present Petition purported to be filed under Sub-sections (1)(c) and (1)(f) of Section 79 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') 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 (hereinafter referred to as 'the Connectivity Regulations') *inter alia* seeking declaration that procurement of power by TPTCL from Dagachhu Hydro Power Corporation is covered under paragraph 1.2 of the 'Guidelines for Import/Export (Cross Border) of Electricity-2018' dated 18.12.2018 issued by the Ministry of Power (hereinafter referred to as 'the MoP Guidelines') and Regulation 3(3) of the Central Electricity Regulatory Commission (Cross Border Trade of Electricity) Regulations, 2019 (hereinafter referred to as 'the CBTE Regulations').

Background of the case

2. The Petitioner, a wholly owned subsidiary of the Tata Power Company Limited, has been granted a licence for inter-State trading in electricity by the Commission. Druk Green Power Corporation Limited (a Royal Government of Bhutan Undertaking) and Tata Power Company Limited entered into a joint venture namely, Dagachhu Hydro Power Corporation (DHPC) for development of 126 MW hydro Power project (hereinafter referred to as 'the generating station') in Bhutan.

Unit I and Unit II of the generating station achieved commercial operation on 20.2.2015 and 15.3.2015 respectively.

3. The Petitioner, TPTCL, procures power from the generating station in terms of Power Purchase Agreement dated 25.6.2008 entered into between TPTCL and DHPC (in short, 'DHPC PPA').

4. The supply of power under DHPC PPA commenced from 20.2.2015. Initially, power procured from DHPC was being sold to various entities on short term basis. Thereafter, pursuant to PPA dated 8.1.2019 entered into between TPTCL and West Bengal State Electricity Distribution Company Limited (in short, 'WBSEDCL PPA'), power is being sold to West Bengal State Electricity Distribution Company Limited ('WBSEDCL').

5. On 22.9.2019, the Petitioner made an application to Power Grid Corporation of India Limited in its capacity as CTU (now known as Central Transmission Utility of India Limited and hereinafter referred to as 'CTUIL') for supply of power to WBSEDCL. CTUIL rejected the application of the Petitioner on the ground of non-furnishing of requisite approval from the Designated Authority, i.e. Central Electricity Authority (in short 'the DA') in terms of Regulation 12 of the CBTE Regulations. Accordingly, the Petitioner has filed the present Petition with the following prayers:

“(a) Declare that procurement of power by TPTCL from DHPC is saved by Para 1.2 of the Ministry of Power guidelines dated 18.12.2018 and Regulation 3 (3) of the CBTE Regulations and accordingly, no further/additional permission is required by TPTCL under the CBTE Regulations for procurement of open access;

(b) Declare that CBTE Regulations are not applicable to transactions undertaken by TPTCL including transaction with WBSEDCL;

(c) Direct PGCIL to grant open access to TPTCL for supply of power to WBSEDCL (from DHPC) in accordance with the Connectivity Regulations; and

(d) In the interim, direct PGCIL to not take any coercive steps with respect to supply of power by TPTCL to WBSEDCL.”

Submissions of the Petitioner

6. The Petitioner has mainly submitted the following:

(a) On 25.6.2008, the Petitioner entered into DHPC PPA for purchase of 114 MW (subsequently revised to 126 MW) from the generating station for onward sale to utilities in India. DHPC PPA was subsequently amended on 4.7.2008, 10.9.2008 and 29.9.2014.

(b) The Petitioner vide its letters dated 17.5.2013 and 21.5.2013 requested Ministry of Power ('MoP') for issuance of 'No Objection Certificate' (NOC) to obtain connectivity for the generating station. In response, MoP vide letter dated 11.11.2013 informed the Petitioner that since import of power had been shifted from restricted category to free category by Ministry of Commerce, there was no need to obtain licence from the Directorate General of Foreign Trade ('DGFT') for import of electricity from Bhutan. It was further informed that since CTUIL was the Nodal Agency for grant of connectivity, the Petitioner may approach CTUIL for the same.

(c) On 5.3.2014, the Petitioner informed MoP that TPTCL had initially made an application to CTUIL for grant of Short Term Open Access (STOA) to import power and sell the same in the Indian market. In response, CTUIL directed the Petitioner to obtain authorization/ clarification from MoP to undertake the import. The Petitioner further informed that it had approached Eastern Regional Load Despatch Centre (ERLDC) to schedule power from the generating station. However, ERLDC informed TPTCL that PTC India Limited (PTC) was the only notified agency for importing power from Bhutan to India and advised the Petitioner to seek clarification/ NOC from MoP to start such import.

(d) DHPC vide its letter dated 22.7.2014 has agreed to “New Siliguri” West Bengal as the delivery point for sale of power. On 24.7.2014, the Petitioner through Petition No. 187/MP/2014 approached the Commission seeking appropriate directions to facilitate import of power from the generating station for onward sale to entities in India. The Commission in its order dated 11.9.2014 approved interim arrangement for scheduling and interim energy accounting of power procured by the Petitioner from the generating station, injected at Indian periphery i.e. at Binaguri (New Siliguri) and Birpara. Subsequently, the Commission in its final order dated 16.2.2016 directed that the interim arrangement approved vide order dated 11.9.2014 shall continue till the notification of regulations on cross border transactions.

(e) On 5.12.2016, MoP issued ‘Guidelines on cross border trade of electricity’. Subsequently, MoP vide its notification dated 14.12.2016 appointed Member (Power System), CEA as the Designated Authority.

(f) The Petitioner through its letter dated 7.12.2018, offered WBSEDCL to sell power from the generating station on medium-term basis for a period of five year or on a long-term basis for the period equal to the remaining useful life of the generating station. The Petitioner further informed that till the time MTOA/LTA was granted, power would be supplied through STOA. On 13.10.2018, WBSEDCL granted in-principle approval for purchase of 126 MW from TPTCL on medium-term basis.

(g) Subsequently, on 18.12.2018, MoP repealed Guidelines on cross border trade of electricity dated 5.12.2016 and issued the Guidelines for import/export of electricity.

(h) On 8.1.2019, TPTCL entered into PPA with WBSEDCL for sale of 126 MW from the generating station for the period from 8.1.2019 to 28.2.2023. As per the PPA, power was initially to be scheduled through STOA and thereafter on MTOA basis. Accordingly, supply of power from TPTCL to WBSEDCL commenced from 21.2.2019 on STOA for which permission was granted by POSOCO.

(i) Pursuant to the MoP Guidelines, the Commission notified the CBTE Regulations on 8.3.2019.

(j) On 22.5.2019, the Petitioner made an application to CTUIL for grant of MTOA for supply of power to WBSEDCL. In response, on 29.5.2019, CTUIL returned the said application with direction to rectify the defects, namely, (i) application fee has not been paid in terms of CBTE Regulations, (ii) affidavit is not per the prescribed format, (iii) PPA between DHPC and TPTCL was not attached, (iv) approval from CEA and corresponding competent authority from Bhutan has not been submitted along with application.

(k) Bhutan Power Corporation Limited vide its letter dated 3.6.2019 requested DHPC to grant approval to use cross boarder transmission link (interconnecting Bhutan and India) for export of power to India through TPTCL till 14.3.2040.

(l) On 5.6.2019, the Petitioner informed CTUIL that defects pointed out by it have been rectified.

(m) On 20.6.2019, the application for grant of MTOA was rejected by CTUIL on the grounds that (i) approval from the DA with regard to eligibility of the participating entity for cross border trade of electricity, and use of cross border transmission link in case connectivity is not through dedicated transmission line are not in terms of Regulations 12(2)(a) and 12(2)(b) of the CBTE Regulations, (ii) MTOA sought by the Petitioner amounted to a new transaction and would be governed by the requirements of the CBTE Regulations including the requirement for approval from DA.

(n) The sale of power from DHPC and TPTCL (which qualifies as a cross border sale of electricity) was prior to the issuance of the MoP Guidelines and the CBTE Regulations and in this regard, the Petitioner had secured approval from the Commission for procurement of power from DHPC for onward sale in India in terms of order dated 11.9.2014. The onward sale of power from TPTCL to WBSEDCL does not amount to a cross border transaction requiring approval from the DA for the purpose of seeking medium term open access.

This position is in conformity with the judgment of Appellate Tribunal for Electricity (APTEL) dated 18.2.2009 in Appeal No. 15 of 2009 in the case of PTC Vs. CERC which was confirmed by the Hon`ble Supreme Court in its order dated 20.3.2009 in CA No. 1331 of 2009. Although the said judgment was passed prior to the enactment of the CBTE Regulations, the rationale of the judgment is squarely applicable to the instant Petition. Therefore, in any event CBTE Regulations will not apply to sale of power by TPTCL to WBSEDCL.

(o) Sale of power from DHPC to TPTCL is saved by paragraph 1.2 of the MoP Guidelines, Regulation 3(3) of the CBTE Regulations and clause 1.5 of the Procedure made thereunder which provides for saving clause. Therefore, TPTCL is not required to take any additional/ new permission from the DA for procurement of power from DHPC.

(p) The treatment of CTUIL for sale of power from TPTCL to WBSEDCL (as a single and new) transaction and rejection of application of TPTCL for want of approval of the DA is also contrary to its earlier accepted position. Prior to the agreement with WBSEDCL, TPTCL was selling power on short term basis to various entities. If the reasoning adopted by CTUIL for rejecting the application of TPTCL was correct, then TPTCL would have to procure separate permissions/ approvals for such transactions also. The fact that in the past, fresh approval was not required for various short-term transactions makes it clear that the only approval required was for the PPA (between DHPC and TPTCL) which is already in place and is still subsisting and that no further approval is required for onward sale of power. In this regard, reliance has been placed on the judgment of the Hon`ble Supreme Court in the case of K.C. Javaregowda Vs. State of Karnataka [(2008) 17 SCC 641].

(q) In light of the above, the Petitioner is not required to seek approval of the DA for grant of MTOA and is only required to comply with the provisions of the Connectivity Regulations. Therefore, CTUIL ought to have considered the application of the Petitioner under the provisions of the Connectivity Regulations and rejection of the application on the ground of non-compliance of the provisions of the CBTE Regulations is contrary to law.

7. Notice was issued to the Respondents to file their replies. Vide Record of Proceedings for the hearing dated 15.10.2019, CTUIL and POSCOCO were directed not to take any coercive measures against the Petitioner till further orders. Reply has been filed by the Respondents and the Petitioner has filed rejoinders thereof.

Reply of the Respondents

8. The Respondent, CTUIL, in its reply dated 13.12.2019, has mainly submitted the following:

(a) Grant of open access to ISTS (inter-State transmission system) for the entities situated in India is governed by the Connectivity Regulations. The MoP Guidelines allow import/ export of electricity under the overall framework of agreements signed between with neighbouring countries and consistent with the prevailing laws in both countries. As per Clause 4 of the MoP Guidelines, the process for import/ export of electricity is to be facilitated under the aegis and with the approval of the DA. As per MoP Guidelines, 'any entity' proposing to import or export electricity may do so only after taking approval of the DA. An 'entity' is defined in the Guidelines to mean a company/ authority/ Board/ autonomous body/ body corporate/ juridical person (of India or of neighboring country) which proposes to participate in cross border trade of electricity. Clause 5 of the MoP Guidelines mandates seeking approval of the DA by an Indian entity engaging in import of electricity from generation projects located in neighboring countries.

(b) Any transaction involving import or export of electricity between India and its neighbouring countries, can be undertaken by only those entities (which include a trading licensee also) that have been approved by the DA for cross border trade of electricity and such transactions are necessarily governed by the provisions of the CBTE Regulations.

(c) Proviso to Regulation 3(1) of the CBTE Regulations requires all Indian entities seeking long-term/ medium term open access to the India grid 'in the course of cross border trade of electricity' to be governed by the Connectivity

Regulations meaning thereby, that the entities situated in India who have been approved by the DA for the purpose of cross-border trade of electricity, are to be governed by the provisions of the Connectivity Regulations as regards various procedural aspects pertaining to open access sought by and granted to them. The proviso cannot be construed to mean that entities in India engaged in cross border trade of electricity are to be governed only by provisions of the Connectivity Regulations and that neither the CBTE Regulations nor the MoP Guidelines are be applicable to them. The proviso to Regulation 3(1) of the CBTE Regulations is not to be read in isolation but is to be read with clauses of the MoP Guidelines so as to provide the regulatory regime for cross border power transactions which is the legislative intent.

(d) The rationale behind the mandatory requirement for obtaining approval from the DA is clear from a perusal of clause 6 of the MoP Guidelines.

(e) The position which emerges from a combined reading of the provisions of the CBTE Regulations and the MoP Guidelines is that any person including an entity such as the Petitioner, who is a trading licensee situated in India, that seeks access to the Indian grid for the purpose of supplying power (to Indian entities) procured through an entity situated in a neighboring country, qualifies to be a cross border customer. Therefore, the transaction involving procurement of power under a PPA between a trading licensee in India with a generating company situated in a neighbouring country and a transaction involving selling of power under a PSA between the said trading licensee with a distribution licensee in India, together constitutes a single transaction and qualifies to be a cross border transaction. Such trading licensees are bound by the CBTE Regulations and have to mandatorily seek approval of the DA for securing access into the Indian grid for undertaking cross border transaction. Therefore, it cannot be contended that approval from the DA is required to be taken only by participating entities located in neighboring countries and that participating entities (such as the Petitioner) which are situated in India are only required to comply with the Connectivity Regulations and do not require approval from the DA for power under cross-border transactions. In other words, it may be considered whether the mere inclusion of a trading entity

acting on behalf of a neighbouring-country based generation project, in the overall transaction of power being injected from a foreign country and being drawn in India may alter the basic nature of the transaction and render it outside the definitional purview of 'Cross Border Trade of Electricity'.

(f) In terms of Regulation 3(3) of the CBTE Regulations, it becomes clear that any transaction for cross border trade of electricity that has taken place prior to the coming into force of the MoP Guidelines and the CBTE Regulations, is to be deemed to have been done/ taken under the provisions of the said Regulations and are to continue to be governed by the said Regulations till the expiry of the underlying LTA/MTOA.

(g) As per Regulation 4(5) of the CBTE Regulations, the Respondent acting as CTUIL is responsible for grant of long-term access and medium-term open access with respect to the cross-border trade of electricity between India and the neighbouring countries. While submitting an application for grant of LTA/MTOA, the applicant is also required to submit the approval of the DA to demonstrate that the cross-border transaction proposed to be undertaken by it, has been duly examined and approved by the DA.

(h) The contention of the Petitioner that it is not bound by CBTE Regulations inasmuch as the definition of 'applicant' only includes a participating entity in a neighbouring country and does not include the Petitioner who is an entity in India, is misplaced. In other words, the present Petition may afford an opportunity to the Commission to regulate and regularize such cross-border transactions in power in which an Indian trading entity is involved on behalf of a foreign based generation project.

(i) Vide order dated 11.9.2014 in Petition No. 187/MP/2014, the Commission approved an interim arrangement for scheduling and energy accounting of power procured by the Petitioner at the Indian periphery i.e. at Binaguri (New Siliguri) and Birpara.

(j) The Petitioner is acting as the agent of DHPC for exporting power to entities situated in India. It is a settled principle of law that when an agency relationship

is created, the agent steps into the shoes of the principal and acts on the principal's behalf, as per the terms of the agreement. Thus, by agreeing to act as an agent of DHPC, the Petitioner had stepped into its shoes and thus qualified to be an applicant in a transaction for cross-border trade of electricity and became liable to comply with the CBTE Regulations. In a case like the present one where the Petitioner had agreed to act as an agent of DHPC (an entity located in a neighboring country) for the purpose of cross-border trade of electricity, the PPA between the Petitioner and DHPC and the PSA between the Petitioner and WBSEDCL constituted one single transaction. Even otherwise, it is a settled law that although PPA and PSA are two different documents between different parties, both these documents become part of one contract between the generating company and the distribution company when a trading licensee (the Petitioner in the present case) acts as an agent of the generating company and enters into the PSA with the distribution licensee (WBSEDCL). While applying for connectivity/ access to sell power to entities in India, an applicant (being a trading licensee) is mandatorily required to furnish a copy of the PPA executed between the trading licensee and a generating company situated in a neighbouring country.

(k) Vide order dated 16.2.2016, Petition No. 187/MP/2014 was disposed of with the direction that the interim arrangement for procurement of power from the Project approved vide order dated 11.9.2014 be continued till the issuance of the CBTE Regulations. Thus, while passing the order dated 16.2.2016 and directing the continuation of interim arrangement till notification of the CBTE Regulations which were in the process of being drafted/ formulated at the time, the Commission specifically observed that the said interim arrangement was to continue only till the Regulations on cross-border trade of electricity were notified and subsequent thereto, the transaction for evacuation of power from DHPC was to be governed in accordance with the said Regulations.

(l) In the meanwhile, the Ministry of Power issued the MoP Guidelines which laid down various mandatory terms and conditions that were to be complied with by an entity seeking connectivity/ LTA/ MTOA for cross border transactions. As a natural corollary, any transactions that were to take place

after notification of the said Regulations, were to be in accordance with the provisions of the said Regulations meaning thereby that any fresh application for connectivity or access into the Indian grid was to be made as per the provisions of the CBTE Regulations. On conjoint reading of Regulation 3(3) and order dated 16.2.2016, it can be clearly deduced that any new cross-border transaction for supply of power purchased from DHPC (generating station located in neighbouring country) to any entity located in India subsequent to notification of MoP Guidelines on cross border trade of electricity and the CBTE Regulations, was to be in accordance with the provisions of the said Regulations. Therefore, the Petitioner is required to first seek approval of the DA in order to engage in cross-border trade of electricity and then approach the Respondent for grant of open access into ISTS.

(m) On 8.1.2019, after the MoP Guidelines, the Petitioner entered into a PPA with WBSEDCL for sale of 126 MW power from the Project for the period from 8.1.2019 to 28.2.2023. Power under the said PPA was initially to be scheduled through STOA and thereafter, through MTOA. Pursuant thereto, supply of power from the Project to WBSEDCL commenced from 21.2.2019 on short-term basis. Thereafter, the Petitioner made an application to CTUIL on 5.6.2019 for grant of MTOA for supply of power to WBSEDCL on medium-term basis. In the said application, the injection of power was stated to be by "TPTCL (Dagachhu Hydro Power Plant, Bhutan)" and the drawal of Power was stated to be by WBSEDCL. Thus, under the said MTOA, power was to be supplied from Bhutan to West Bengal i.e. across border from Bhutan to India. Being a fresh transaction of power from Bhutan and to be supplied to WBSEDCL, the Petitioner was mandatorily required to seek the approval of the DA for the purpose of securing access into the Indian grid for cross-border trade of electricity. Thus, the Petitioner cannot contend that since the arrangement to procure power from DHPC for onward sale to utilities in India predated the MoP Guidelines and the CBTE Regulations, its entire transaction was saved by paragraph 1.2 of the MoP Guidelines and Regulation 3(3) of the CBTE Regulations. Even otherwise, by seeking shelter under the saving clause, i.e. Regulation 3(3) of the CBTE Regulations, the Petitioner by way of admission has accepted the applicability of the above Regulations to the cross-border

transactions being undertaken by it. Having thus accepted the applicability of CBTE Regulations, the Petitioner cannot contend that the provisions of the said Regulations are not applicable in its case since the subject transaction is not a cross border transaction.

(n) Vide letter dated 29.5.2019, the Respondent returned the said application requesting the Petitioner to rectify the defects pointed out in the letter, and to make payment of application fee as per Regulation 9 of the CBTE Regulations and also to submit the required certificate from the DA along with the revised application after curing the deficiencies within one week of receipt of the said letter.

(o) Thus, while making amendments/ corrections in its application, the Petitioner submitted the balance fee as per Regulation 9 of the CBTE Regulations. The Petitioner neither raised any issue regarding submission of balance application fee nor submitted it in protest, thereby accepting and complying with the provisions of CBTE Regulations. Having thus accepted the applicability of CBTE Regulations, the Petitioner was estopped from choosing to dispute the applicability of the said Regulations on the aspect of submission of the approval of DA. Despite being aware that its MTOA application was to be closed by the Respondent on its failure to rectify the deficiencies in its application, the Petitioner failed to submit its revised application as per the Regulations.

(p) On failure of the Petitioner to rectify the deficiencies in its application form within a period of 40 days from the last date of the month in which its application was submitted, the Respondent rejected the application of the Petitioner and informed the Petitioner vide letter dated 20.6.2019 that since the Petitioner had entered into a PPA with WBSEDCL for supplying imported power on 8.1.2019, i.e. subsequent to notification of the MoP Guidelines and the application seeking MTOA had been made subsequent to notification of the CBTE Regulations, the same qualified to be a new cross-border transaction and, therefore, the Petitioner was mandatorily required to seek approval of the DA under the CBTE Regulations for the purpose of securing access to the Indian grid.

(q) In view of the above facts and circumstances, CTUIL has rightly rejected the Application of the Petitioner seeking MTOA in the ISTS and for which CTUIL cannot be faulted with. Therefore, the present Petition is liable to be dismissed by the Commission.

9. POSOCO/ERLDC, in its reply dated 25.6.2020, has mainly submitted the following:

(a) TPTCL while submitting its application had neither submitted the DA approval nor the Inter-Governmental Agreement (IGA) in terms of the CBTE Regulations.

(b) The application of TPTCL for transactions from DHPC to WBSEDCL was not approved by NLDC as these STOA transactions do not fall under the category provided in paragraph 1.2 of the MoP Guidelines or Regulation 11.2 of the CBTE Regulations and, thus, it was disallowed by NLDC with effect from 29.4.2020.

(c) There is no clarification available regarding treatment of these STOA transactions as to whether it will be treated under paragraph 1.2 or paragraph 4.4 of the MoP Guidelines.

(d) Regulation 11(2) of the CBTE Regulations provides for approval of the DA for cross-border sale of electricity in addition to satisfying the conditions under the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008, as amended from time to time (hereinafter referred to as 'the Open Access Regulations').

(e) The import of Regulation 11(2) of the CBTE Regulations is that since under the Connectivity Regulations, a change in drawal point is treated as a fresh transaction requiring fresh application, the sale of power from TPTCL to WBSEDCL was a fresh transaction subsequent to notification of the MoP Guidelines. Thus, the approval of DA is required for sale of power from TPTCL to WBSEDCL.

(f) NLDC was acting in accordance with CEA's communication that TPTCL-WBSEDCL transaction does not have approval of the DA and, thus, also disallowed the transaction from 25.5.2020 onwards.

(g) Every STOA transaction will be treated as a separate transaction which requires approval of the DA since it is a new transaction as per Open Access Regulations.

Rejoinder of the Petitioner

10. The Petitioner, in its response to the reply of CTUIL, has reiterated the submissions made in the Petition and has additionally submitted the following:

(a) Proviso to Regulation 3(1) of the CBTE Regulations applies only in cases where access to the Indian grid is required in course of cross-border trade. However, in the present case, sale of power by TPTCL to WBSEDCL is not "in course" of cross border trade.

(b) Regulation 8(3) of the CBTE Regulations specifically provides that the provisions of the Connectivity Regulations shall apply *mutatis mutandis* to the participating entities for cross border trade of electricity. The aforesaid having been clearly provided in the CBTE Regulations, the interpretation given by CTUIL would render Regulation 3(1) of the CBTE Regulations otiose.

(c) CTUIL in its reply has admitted that the sale of power from TPTCL to WBSEDCL is a fresh transaction. CTUIL cannot blow hot and cold at the same time by contending, on one hand, that the sale of power from TPTCL to WBSEDCL was a fresh transaction which was subsequent to the notification of the MoP Guidelines and the CBTE Regulations, and, on the other hand, contending that sale of power from DHPC to TPTCL and thereafter sale to WBSEDCL was a single transaction. Sale of electricity from TPTCL to WBSEDCL is a domestic transaction, for which the CBTE Regulations have no application. If the sale of power from TPTCL to WBSEDCL is not covered under the CBTE Regulations, then there is no question of obtaining the approval of DA.

(d) Merely because sale of power under WBSEDCL PPA takes place on short-term basis (by STOA), it does not mean that every STOA transaction will be treated as a separate transaction requiring approval of the DA. The mode of supply of power (short-term or long-term) does not have a bearing on whether the approval of the DA is required.

(e) Prior to the agreement with WBSEDCL, TPTCL was selling power on short-term basis to various entities. However, no objection was raised by CTUIL or POSOCO/ ERLDC regarding want of approval of the DA. The nature of open access has no bearing on whether approval of the DA was required by TPTCL for sale of power. The fact that in the past, fresh approval was not required for various short-term transactions makes it clear that approval of the DA was only required for the DHPC PPA, which is already in place and is still subsisting, and that no such approval is further required for onward sale of power either by way of STOA or MTOA. This also establishes that the DHPC -TPTCL transaction is separate cross-border transaction and subsequent sale by TPTCL is a domestic transaction not covered under the CBTE Regulations.

11. The Petitioner, in its rejoinder dated 12.8.2020 to the reply of POSOCO/ ERLDC, has mainly submitted the following:

(a) POSOCO/ ERLDC has tried to give the transaction a different colour by suggesting that the supply is from DHPC to WBSEDCL. On the contrary, the transaction between TPTCL and WBSEDCL is a separate domestic transaction not covered by the CBTE Regulations. Thus, the sale of power from TPTCL to WBSEDCL in terms of WBSEDCL PPA does not require approval of the DA.

(b) No objection was raised by POSOCO for approving the sale of power by TPTCL in the past makes it clear that no additional approval of the DA was required for sale of power (sourced from DHPC) by TPTCL to entities in India.

(c) Sale of power by TPTCL to WBSEDCL is not "in course" of cross border trade and, thus, does not require any approval of the DA. The CBTE Regulations do not apply to TPTCL-WBSEDCL transaction. On account of change of drawal points (when TPTCL supplies power to different entities),

TPTCL is only required to furnish separate applications for grant of STOA for different entities under the provisions of the Open Access Regulations. TPTCL has complied with the aforesaid requirement. The aforesaid cannot be interpreted to construe a domestic sale of power as a cross-border sale requiring approval of the DA.

Hearing dated 3.9.2021

12. During the course of hearing, the learned counsel for the Petitioner submitted as under:

(a) Cross-border sale of electricity from Dagachhu Hydro Power Corporation, Bhutan ('DHPC') to the Petitioner pre-dates the MoP Guidelines, the CBTE Regulations and the Procedure made under the CBTE Regulations and is, therefore, saved by paragraph 1.2 of the MoP Guidelines, Regulation 3(3) of the CBTE Regulations and Clause 1.5 of the Procedure.

(b) Since sale of power by TPTCL to West Bengal State Electricity Distribution Company Limited ('WBSEDCL') is not 'in course' of cross border trade, it does not require any approval of the DA. The CBTE Regulations do not apply to the TPTCL - WBSEDCL transaction.

(c) CBTE Regulations are not applicable for grant of Medium Term Open Access ('MTOA').

(d) Supply of power to WBSEDCL is a domestic transaction and not import. In this regard, reliance was also placed on the decision of Appellate Tribunal for Electricity dated 18.2.2009 in Appeal No. 15/2009 in the matter of PTC v. CERC.

13. The learned counsel for the Respondent No.1, CTUIL submitted as under:

(a) Subsequent to its application for MTOA dated 22.5.2019, which was closed by the Respondent on 22.6.2019 in absence of approval of the DA for the transaction, no new application for MTOA has been filed by the Petitioner till date.

(b) Transaction involving procurement of power under PPA between a trading licensee in India with a generating company situated in neighbouring country and a transaction involving selling of power under PSA between the said trading licensee with distribution licensee in India constitutes a single transaction and qualifies to be a cross-border transaction inasmuch as imported power is being sold to the entities of India through trading licensee. Such trading licensee is bound by the CBTE Regulations.

(c) As per the MoP Guidelines, any 'Entity' (including a trading licensee such as the Petitioner) proposing to import or export electricity may do so only after taking approval of the DA.

(d) Since any transaction carried out after issuance of the CBTE Regulations are required to be in accordance with the provisions of the said Regulations, any fresh application for connectivity or open access into the Indian grid is required to be made as per the provisions of CBTE Regulations.

(e) Since MTOA sought by the Petitioner being a fresh transaction of power import from Bhutan to be supplied to WBSEDCL, the Petitioner is required to seek approval of the DA and is also required to make an application in accordance with Regulation 12 of the CBTE Regulations.

Analysis and Decision

14. We have considered the submissions made by the parties and have perused the documents/ material available on the record. Based on the above, the following issues arise for our consideration in the matter:

Issue No.1: Whether the cross-border sale of electricity from DHPC to TPTCL is covered under the saving clause provided at paragraph 1.2 of the Guidelines and Regulation 3(3) of the CBTE Regulations?

Issue No.2: Whether the Petitioner is required to meet the additional requirement as specified under Regulation 12(2) including furnishing approval of the DA for its MTOA application for supplying electricity to WBSEDCL?

The issues are discussed in the succeeding paragraphs of this order.

Issue No.1: Whether the cross-border sale of electricity from DHPC to TPTCL is covered under the saving clause provided at paragraph 1.2 of the MoP Guidelines and Regulation 3(3) of the CBTE Regulations?

15. The Petitioner has submitted that agreement dated 25.6.2008 for sale of power from DHPC to the Petitioner (which qualifies as cross border sale of electricity) was prior to the notification of the MoP Guidelines and the CBTE Regulations. The Petitioner has further submitted that paragraph 1.2 of the MoP Guidelines and Regulation 3(3) of the CBTE Regulations contain a saving clause in terms of which anything done or purported to have been done for cross border trade of electricity under any agreement in force prior to the MoP Guidelines or the coming into force of the CBTE Regulations, would be deemed to have been done under the MoP Guidelines/ the CBTE Regulations and would be effective till the expiry of the said agreement. Since the agreement for sale of power from DHPC to the Petitioner was prior to the notification of the MoP Guidelines and the CBTE Regulations, the said transaction comes within the ambit of paragraph 1.2 of the Guidelines and Regulation 3(3) of the CBTE Regulations and, therefore, TPTCL is not required to take any additional/ new permission for procurement of power from DHPC.

16. *Per contra*, the Respondents CTUIL and POSOCO/ ERLDC have submitted that the transaction between DHPC and the Petitioner as per agreement dated 25.6.2008 on one hand, and between the Petitioner and WBSEDCL as per agreement dated 8.1.2019 on the other hand are part of one and the same transaction and, therefore, these transactions are not covered under the saving clause of the MoP Guidelines or the CBTE Regulations.

17. While the Respondent, CTUIL has not submitted any response on whether the agreement between the Petitioner and DHPC qualifies under the saving clause

of the MoP Guidelines or the CBTE Regulations, it has contended that the MTOA application of the Petitioner for supplying electricity so imported from DHPC to WBSEDCL under the PPA dated 8.1.2019 constitutes a fresh transaction of import of electricity and for which the Petitioner is required to furnish approval of the DA as provided in the MoP Guidelines and the CBTE Regulations.

18. The Respondent, POSOCO has sought clarification regarding transaction qua STOA and whether with change in either the drawal point or injection point in the transaction under STOA, it ought to be considered as new transaction requiring fresh approval of the DA. This issue has been discussed under Issue No. 2.

19. We have considered the submissions made by the Petitioner and the Respondents. Admittedly, TPTCL entered into a PPA with DHPC on 25.6.2008 for purchase of 114 MW (which was later revised to 126 MW) power from 126 MW (2x63 MW) Hydro Power Project established in Bhutan for onward sale of electricity to the utilities in India. We have considered that pursuant to signing of the DHPC PPA and prior to the commercial operation of the Project, the Petitioner had approached the Ministry of Power vide its letters dated 17.5.2013 and 21.5.2013, *inter alia*, seeking 'No Objection Certificate' as requisitioned by CTUIL when the Petitioner approached it for seeking the connectivity for transfer of electricity. The Ministry of Power vide its letter No. 11/11/2013-BBMB dated 11.11.2013 informed TPTCL that since the import of electricity had been shifted from restricted category to free category by Ministry of Commerce, there was no need to obtain licence from DGFT for import of electricity from Bhutan and accordingly, the Petitioner was informed to approach CTUIL, being the nodal agency, for processing its request for connectivity. Hence, it is not the case that the Petitioner had not approached the

Central Government with regard to its PPA with DHPC but at the relevant point of time, no licence for import of electricity from Bhutan was required. It is also noticed that Bhutan transmission network and PGCIL's network is already connected and DHPC's Project, being already connected to Bhutan network, is also connected to PGCIL's network. Further, as per the supply arrangement under the PPA, the delivery point has been identified as 'New Siliguri' which is within India.

20. Thereafter, the Petitioner had approached this Commission through Petition No. 187/MP/2014, *inter alia*, seeking appropriate directions to enable it to import the power from DHPC's Project in Bhutan and that in terms of the interim arrangement for scheduling and energy accounting of power injected from the Project as specified by the Commission vide its order dated 11.9.2014 in Petition No. 187/MP/2014, the Petitioner has been undertaking various transactions for supplying electricity so imported from DHPC to the various entities in India through STOA.

21. Subsequently, the first framework for the cross border trade of electricity was notified by the Ministry of Power vide the Guidelines for Cross Border Trade of Electricity issued in 2016, which was repealed and replaced by the 'Guidelines for Import/Export (Cross Border) of Electricity, 2018' dated 18.12.2018. Thereafter, the Commission notified the CBTE Regulations on 14.5.2019.

22. Clause 1.2 of the MoP Guidelines provides as under:

"1.2 Notwithstanding anything done or any action taken or purported to have been done or taken for import/export of electricity with neighbouring country(ies) shall be deemed to have been done or taken under provisions of these guidelines (Guidelines for Import/Export (Cross Border) of Electricity – 2018) and shall continue to be in place till the expiry of the existing contracts. The Guideline on Cross Border Trade of Electricity issued in 2016 shall stand repealed after the issuance of "Guidelines on Import/Export (Cross Border) of Electricity – 2018."

23. In Regulation 3(3) of the CBTE Regulations, a similar provision has been incorporated, which reads as under:

“3(3) Notwithstanding the provisions of these regulations, anything done or any action taken or purported to have been done or taken for cross border trade of electricity with neighbouring country(ies) under any Agreement in force prior to the date of coming into force of these Regulations, shall be deemed to have been done or taken under the provisions of these Regulations and shall continue to be in place till the expiry of the said Agreements.”

24. Thus, as per clause 1.2 of the MoP Guidelines and Regulation 3(3) of the CBTE Regulations, anything done or any action taken for cross border trade of electricity with neighbouring country under any Agreement in force prior to the date of coming into force of the MoP Guidelines/ the CBTE Regulations shall be deemed to have been done or taken under the provisions of the MoP Guidelines/ the CBTE Regulations and shall continue to be in place till the expiry of the said Agreement. In the present case, as already noted above, the Petitioner and DHPC have entered into a PPA dated 25.6.2008 for the purpose of supply of 126 MW power from the generating station located in Bhutan to the delivery point of ‘New Siliguri’ located in India. Further, the said PPA is valid up to 15.3.2040.

25. In view of the fact that the PPA between TPTCL and DHPC is dated 25.6.2008 and the point of delivery of the said electricity is ‘New Siliguri’ located in India and in the light of Clause 1.2 of the MoP Guidelines and In Regulation 3(3) of the CBTE Regulations, we are of considered view that the said PPA for import of electricity is within the purview of the saving clause of the MoP Guidelines as well as the CBTE Regulations and by fiction of a law it is required to be treated as if the same has been entered into as per the provisions of the MoP Guidelines and the CBTE Regulations. As a natural corollary to this, TPTCL (for the purpose of importing power in terms of DHPC PPA) cannot be placed on the same position as

the 'entities' proposing to import or export electricity after the notification of the MoP Guidelines and/or the CBTE Regulations.

26. Accordingly, the issue is answered.

Issue No.2: Whether the Petitioner is required to meet the additional requirement as specified under Regulation 12(2) including furnishing the approval of the DA for its MTOA application for supplying electricity to WBSEDCL?

27. The Petitioner has submitted that the CBTE Regulations require approval from the DA only by entities that are not located in India and are proposing to export electricity to India or to a neighbouring country and that it does not apply to domestic transactions. In terms of Regulation 2(e) of the CBTE Regulations, an 'Applicant' refers to a participating entity situated in a neighbouring country. Also, the reading of Regulation 3(1) and Regulation 8(1) of the CBTE Regulations makes it clear that only the participating entities situated outside India are required to take approval from the DA, whereas the participating entities situated in India such as the Petitioner, are required to apply for MTOA/LTA under the Connectivity Regulations. It has also been submitted that the import of proviso to Regulation 3(1) as contended by CTUIL is also misplaced as said proviso applies only in case where the access to Indian grid is in the course of cross border trade, whereas in the present case, the sale of power by the Petitioner to WBSEDCL is not in the course of cross border trade.

28. The Petitioner has further contended that while sale of power from DHPC to the Petitioner qualifies as the cross-border sale of electricity, sale of electricity from the Petitioner to WBSEDCL is a domestic sale and, therefore, the CBTE Regulations have no application. The electricity having crossed the border (from Bhutan into

India) and having entered into the Indian territory is to be considered as domestic power and the same is to be governed by the Connectivity Regulations like any other domestic power. It has been submitted by the Petitioner that having exchanged the ownership and dominion while entering and passing through the border, the power acquires the domestic complexion and ceases to be imported power. In this regard, reliance has also been placed on the judgment of APTEL dated 18.2.2009 in Appeal No. 15 of 2009 in the matter of PTC v. CERC.

29. *Per contra*, the Respondent, CTUIL has submitted that the CBTE Regulations read with the MoP Guidelines govern the cross-border import/ export of electricity by the entities in India and, therefore, the proviso to Regulation 3(1) of the CBTE Regulations cannot be construed to mean that the Indian entities engaged in cross-border trade of electricity are to be governed only by the Connectivity Regulations and that neither the CBTE Regulations nor the MoP Guidelines are applicable. It has been submitted that the transaction involving procurement of power under the PPA between the Petitioner with a generating company (DHPC) situated in neighbouring country and a transaction involving selling of power under PSA between the Petitioner with a distribution licensee (WBSEDCL) constitute a single transaction and qualifies to be a cross border transaction and, therefore, the Petitioner is bound by the CBTE Regulations. It cannot be implied that an Indian trading entity transacting in the capacity of an agent for a foreign based generation project is to be solely governed under the Connectivity Regulations and not under the CBTE Regulations.

30. The Respondent, CTUIL has submitted that MTOA sought by the Petitioner for supply of electricity to West Bengal imported from Bhutan, qualifies as cross border transaction and it being a fresh transaction of import of electricity, the

Petitioner is mandatorily required to seek approval of the DA and to make the MTOA application in accordance with Regulation 12 of the CBTE Regulations for the purpose of securing access into the Indian grid for cross-border trade of electricity. It has been submitted that by mere involvement of the Petitioner, an Indian trading entity, does not render the essential cross border nature of the transaction nugatory.

31. We have considered the submissions made by the parties. We would like to refer to the relevant provisions of CBTE Regulations, which are relevant to the controversy involved in the present case:

“8. General provisions for Connectivity, Long Term Access, Medium Term Open Access and Short Term Open Access

(1) A Participating Entity located in a neighbouring country shall be required to seek connectivity or long-term access or medium-term open access or short-term open access, as the case may be, through separate applications.

(2) Applications for grant of connectivity or long-term access or medium-term open access shall be made to CTU and Application for grant of short-term open access shall be made to NLDC under these Regulations.

.....

12. *Application for Long-Term Access and Medium-Term Open Access*

(1) The application for long-term access or medium-term open access to India grid and across Indian grid for cross border trade of electricity shall be made to CTU.

(2) In addition to the requirements specified under Connectivity Regulations for grant of long-term access or medium-term open access to the Indian grid, the Applicant shall furnish the following:

(a) Approval from Designated Authority with regard to the eligibility of the Participating Entity for cross border trade of electricity or copy of the Inter Government Agreement (IGA) wherever available; and

(b) Approval from Designated Authority in India and Competent Authority in neighbouring country(ies) to use Cross Border Transmission Link(s) in case connectivity is not through dedicated transmission lines; and

(c) Access Bank Guarantee as specified under Regulation 15 for long-term access...”

32. Further, the terms 'Applicant' and the 'Participating Entity' have been defined as under:

"2(e) 'Applicant' means an entity located in neighbouring country who has been recognized as a Participating Entity as defined in these regulations;"

"2(II) 'Participating Entity' means an entity approved by the Designated Authority for the purpose of cross border trade of electricity between India and any of the neighbouring countries or any entity as designated by Government of India for import or export of power through bilateral agreement between Government of India and Government of any of the neighbouring countries."

33. In terms of the above provisions of the CBTE Regulations, it is clear that the general provisions for connectivity and open access as specified in Regulation 8 therein are applicable to the 'Participating Entity' located in the neighbouring country and not to an Indian entity. Similarly, the additional requirements as specified under Regulation 12(2) of the CBTE Regulations for the application for connectivity and long/ medium terms open access are only for the 'Applicant' which is an entity located in the neighbouring country and has been approved by the DA for the purpose of cross border trade of electricity. Clearly, the said regulation or the additional requirement specified therein is not applicable in the case of Indian entity, which requires connectivity or open access to the Indian grid in course of cross border trade of electricity between India and any of the neighbouring countries. The CBTE Regulations contain a specific provision for the entities located in India and seeking connectivity or open access to the Indian grid in the course of cross border trade of electricity, which reads as under:

"3(1)

....

Provided that the entities located in India who are seeking connectivity or long-term access or medium-term open access or short-term open access to the Indian grid in the course of cross border trade of electricity between India and any of the neighbouring countries shall continue to be governed by the Connectivity Regulations and the STOA Regulations."

34. As per the above-quoted provision, an entity located in India seeking connectivity or open access to the Indian grid in the course of cross border trade of electricity between India and any of the neighbouring countries shall continue to be governed by the Connectivity Regulations and the Open Access Regulations. Therefore, TPTCL, being an entity located in India, its application seeking MTOA for onward supply of electricity to WBSEDCL has to be governed by the provisions of the Connectivity Regulations alone and it cannot be subjected to the additional requirements as specified in Regulation 12(2) of the CBTE Regulations as applicable in the case of entity located in the neighbouring country.

35. At this point, it is relevant to note that the Petitioner has contended that proviso to the Regulation 3(1) of the CBTE Regulations is also not applicable in its case as the supply of electricity by the Petitioner to WBSEDCL under the WBSEDCL-PPA dated 8.1.2019 is not in the course of cross border trade of electricity and that such sale of electricity from the Petitioner to WBSEDCL constitutes a domestic sale, making the CBTE Regulations not applicable in respect of such transaction. CTUIL, on the other hand, has contended that transaction under both the DHPC-PPA and the WBSEDCL-PPA forms a single transaction that is in the nature of cross border trade of electricity.

36. However, we are of the view that rather than examining whether both the PPAs are independent or form part of the same transaction of cross border trade of electricity, the relevant question which merits consideration is whether the application of the Petitioner seeking MTOA falls within the proviso to Regulation 3(1) of the CBTE Regulations. In other words, whether the Petitioner, being an Indian entity, was seeking access to Indian grid in the course of cross border trade of

electricity. Admittedly, the Petitioner is an Indian entity and a perusal of its MTOA application as well as various STOA applications, clearly reveals that open access has been sought only for the Indian grid. It is worth noting that the Project of DHPC is already connected to the Indian grid and delivery point under the PPA is within India. Such access to the Indian grid was for the purpose of importing the electricity from Bhutan and supplying such electricity to WBSEDCL. Thus, in our view, the applications of the Petitioner seeking access to the Indian grid clearly fall within the proviso to Regulation 3(1) of the CBTE Regulations. Resultantly, the Petitioner, in respect of such application seeking access to the Indian grid, will continue to be governed as per the Connectivity Regulations and Open Access Regulations.

37. However, CTUIL has contended that the aforesaid proviso to Regulation 3(1) of the CBTE Regulations cannot be construed to mean that entities engaged in cross-border trade of electricity are to be governed by the Connectivity Regulations alone for all purposes and that the CBTE Regulations or the MoP Guidelines are not applicable to them. It has also been contended that such an interpretation sought by the Petitioner is a wrong interpretation of Regulation 3(1) of the CBTE Regulations and that the said Regulation is required to be read in harmony with other provisions in the CBTE Regulations and the MoP Guidelines so as to provide the regulatory regime for the cross border trade of electricity as per the legislative intent. CTUIL has submitted that any entity desirous of engaging in the cross-border trade of electricity is necessarily required to obtain approval of the Designated Authority. CTUIL has further submitted that the definition of 'Applicant' does not cover case involving a trading licensee such as the Petitioner, located in India and acting as an agent of a generating company situated in a neighbouring country and proposing to sell electricity imported from the said generating company to the entities located in India.

CTUIL has added that the definition of 'Applicant' only includes a "Participating Entity" situated in a neighbouring country. Therefore, it is relevant to read the CBTE Regulations as a whole in harmony with the other provisions of the regulations and the MoP Guidelines and the definition of 'Applicant' cannot be read in isolation.

38. As we have already noted above, the provisions of the CBTE Regulations, in particular proviso to Regulation 3(1) and Regulation 12(2), are very clear and unambiguous. As per the proviso to Regulation 3(1), Indian entity seeking connectivity and open access in the course of cross border trade of electricity will continue to be governed by the Connectivity Regulations, whereas Regulation 12 and the additional requirements specified under Regulation 12(2) of the CBTE Regulations are applicable only in respect of an "Applicant" i.e. "Participating Entity" located in the neighbouring country. It is well settled law that the first and foremost principle of interpretation of a statute/ regulation in every system of interpretation is the literal rule of interpretation i.e. giving the words employed their usual and ordinary meaning. When the language of the statute/ regulation is clear and unambiguous, as is in the present case, there is no room for any construction.

39. Further, we find no merit in the contention of CTUIL that proviso to Regulation 3(1) creates a regulatory vacuum as regards regulation of Indian entities seeking open access in the course of cross border trade of electricity. We observe that in respect of obtaining connectivity and open access to the Indian grid in the course of cross border trade of electricity that the Indian entity continues to be governed by the provisions of the Connectivity Regulations and Open Access Regulations and not being subject to the additional requirements for connectivity and open access as specified in Regulation 12(2) of the CBTE Regulations. Thus, it is the CBTE

Regulations itself which has carved out an exception for the Indian entities while seeking connectivity or open access. However, in all other aspects, the Indian entity being a Participating Entity, is subject to provisions of the CBTE Regulations as well the provisions of the MoP Guidelines, as applicable. Therefore, it is incorrect to say that the CBTE Regulations are not applicable (and only the Connectivity Regulations and Open Access Regulations are applicable) to Indian entities, as contended by CTUIL.

40. In the course of cross-border trade of electricity taking place after the notification of the MoP Guidelines and CBTE Regulations, where electricity is supplied to Indian utilities, there would be two segments of transaction, namely, one between the neighbouring country and up to the identified delivery point in India and the other being within the Indian territory. While approval of the DA will be required for transaction between the neighbouring country and up to the identified delivery point in India, there would be no requirement of approval of the DA for transacting the same electricity from the said delivery point onwards within the Indian territory. In the present case, as already noted above, the Petitioner has entered into PPA with DHPC for purpose of supply of power from its Project located in Bhutan to the identified delivery point 'New Siliguri' within India. Thus, there is no requirement of approval of the DA for transacting the same electricity from the delivery point 'New Siliguri' onwards within the Indian territory. In addition, in the present case, as the PPA with DHPC pre-dates the notification of the MoP Guidelines and CBTE Regulations, by virtue of the saving clause provided therein, such agreement is deemed to be entered into under the provisions of the MoP Guidelines/ the CBTE Regulations till its validity. Therefore, it is in the above factual background that the

Petitioner is not required to obtain approval of the DA for importing electricity from the DHPC's Project located in the Bhutan under the PPA dated 25.6.2008.

41. CTUIL has also contended that in terms of proviso to Regulation 3(1) of the CBTE Regulations, after expiry of MTOA/ STOA for cross border trade of electricity that were taken prior to coming into force of the MoP Guidelines and the CBTE Regulations, the Petitioner will be required to obtain fresh approval of the DA. While initially the Petitioner undertook various transactions under STOA in terms of the interim arrangement approved by the Commission vide order dated 11.9.2014 in Petition No. 187/MP/2014, it has been submitted that as per the order dated 16.2.2016, the said interim arrangement was to continue only till the Regulations on cross-border trade of electricity were notified and subsequent thereto, the transaction for evacuation of power from DHPC was to be governed as per the said Regulations. CTUIL has further contended that in the application of the Petitioner for MTOA dated 5.6.2019, the injection point was stated to be 'TPTCL (DHPC Plant, Bhutan)' and the drawal of power was stated to be by WBSEDCL and thus, under the said MTOA application, electricity was to be supplied from Bhutan to West Bengal i.e. across the border from Bhutan to India. The aforesaid being a fresh transaction of import of electricity, the Petitioner was mandatorily required to seek approval of the DA for the purpose of securing the access into the Indian grid for cross-border trade of electricity.

42. Based on the above submissions, the question that arises for our consideration is whether, in the factual background of the present case, for each and every application of the open access be it STOA or MTOA, the Petitioner is required to obtain approval of the DA. In our view, the answer to the aforesaid question has to

be in negative. As already noted above, PPA entered into between the Petitioner and DHPC for supply of electricity to the identified delivery point located in India pre-dates the notification of the MoP Guidelines and the CBTE Regulations and, hence, not only qualifies under the saving provisions specified therein but is also deemed to have been entered into under the provisions of the MoP Guidelines and the CBTE Regulations. In other words, the said PPA dated 25.6.2008 entered into for import of electricity to the Indian grid is deemed to have the approval of the DA as required under the MoP Guidelines and the CBTE Regulations. Thus, once this arrangement is considered having approval of the DA, the Petitioner is not required to obtain the DA's approval in respect of each and every open access, either STOA or MTOA, application for accessing the Indian grid for supplying electricity so imported under the said PPA dated 25.6.2008 to the Indian entities. Hence, the STOA/ MTOA applications of the Petitioner will be governed by the Connectivity Regulations and the Open Access Regulations as provided in proviso to Regulation 3(1) of the CBTE Regulations and there shall be no requirement of obtaining approval of the DA for every such application.

43. The above conclusion brings us to the next objection raised by the Respondent, CTUIL. It has been submitted by CTUIL that as per the provisions of the CBTE Regulations, it cannot be implied that an Indian trading entity transacting in the capacity of an agent for a foreign based generation project is to be solely governed only under the Connectivity Regulations and not under the CBTE Regulations. It has been submitted that mere involvement of the Petitioner, an Indian trading entity, does not render the essential cross-border nature of transaction nugatory. In our view, the aforesaid contention is misplaced in the light of above discussions related to proviso to Regulation 3(1) of the CBTE Regulations. We do

not subscribe to the apprehension of CTUIL that involvement of an Indian trading licensee in a cross-border trade of electricity can in any way enable the entities to escape from complying with the requirements of the MoP Guidelines or the CBTE Regulations, as we have already held above that except where the CBTE Regulations itself has carved out an exception for the Indian entities (while seeking connectivity or open access to the Indian grid), in all other aspects, the Indian entity being a Participating Entity, is subject to provisions of the CBTE Regulations as well the provisions of the MoP Guidelines, as applicable.

44. In light of the foregoing observations and findings, in our view, the applications of the Petitioner seeking access to Indian grid in the course of the cross border trade of electricity shall continue to be governed by the provisions of the Connectivity Regulations and Open Access Regulations as per proviso to Regulation 3(1) of the CBTE Regulations and the additional requirements/ approval as specified under the CBTE Regulations shall not apply in the case of the Petitioner. However, we direct that the Petitioner, while making the application to CTUIL for grant of STOA or MTOA, shall intimate the Designated Authority of the same.

45. We accordingly answer the issue.

46. The Petition No. 214/MP/2019 is disposed of in terms of the above discussions and findings.

Sd/-
(P.K.Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(P.K. Pujari)
Chairperson