

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 202/MP/2018**

**Coram:**

**Shri P.K. Pujari, Chairperson**

**Shri I.S.Jha, Member**

**Shri Arun Goyal, Member**

**Shri P.K. Singh, Member**

**Date of Order: 27.5.2022**

**In the matter of**

Petition under Sections 79(1)(c) read with 79(1)(f) of the Electricity Act, 2003, *inter-alia*, seeking setting aside of communication dated 27.6.2018 issued by Respondent No. 1.

**And in the matter of**

Lanco Amarkantak Power Limited,  
397, Udyog Vihar, Phase-III, Gurgaon,  
Haryana-122016.

**.....Petitioner**

**Versus**

2. Power Grid Corporation of India Limited,  
'SAUDAMINI', Plot No.2, Sector-29,  
Near IFFCO Chowk, Gurugram,  
Haryana-122001.

3. Allahabad Bank,  
Industrial Finance Branch,  
6-3-850/3, 1<sup>st</sup> Floor,  
Hyderabad.

**.....Respondents**

**For Petitioner** : Shri Deepak Khurana, Advocate, LAPL  
Ms. Nishtha Wadhwa, Advocate, LAPL  
Shri Vineet Tayal, Advocate, LAPL

**For Respondents** : Ms. Suparna Srivastava, Advocate, PGCIL  
Shri Tushar Mathur, Advocate, PGCIL  
Ms. Soumya Singh, Advocate, PGCIL  
Shri J. Mazumder, PGCIL



Shri V. Srinivas, PGCIL  
Shri Ajay Upadhyay, PGCIL  
Shri Yogeshwar, PGCIL

### **ORDER**

The Petitioner, Lanco Amarkantak Power Limited (LAPL) has filed the present petition under Section 79(1)(c) read with Section 79(1)(f) of the Electricity Act, 2003 (the 2003 Act) with the following prayers:

- a. Pass an order setting aside/quashing the impugned invocation communication dated 27.06.2018 (Annexure P-1) issued by Respondent No.1;*
- b. Pass an order restraining Respondent No.1 from taking any coercive steps / actions under the Bulk Power Transmission Agreement dated 24.02.2010 including in respect of the Bank Guarantee Bearing No. 0195610IPG000001 dated 29.01.2010;*
- c. Pass an ad-interim order staying the effect and operation of the impugned communication dated 27.06.2018 (Annexure P-1) issued by the Respondent No. 1;*
- d. Pass an ad-interim order restraining the Respondents from invoking/ encashing the 'Bank Guarantee Bearing No. 0195610IPG000001 dated 29.01.2010, during the pendency of the present petition;*
- e. Pass such other or further orders as the Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."*

### **Submissions of Petitioner**

2. The gist of submissions of the Petitioner made vide affidavit dated 30.6.2018 are as follows:

- a) The Petitioner is a generating company incorporated under the Companies Act, 1956 and is a subsidiary of Lanco Infratech Limited (also incorporated under the Companies Act, 1956).
- b) Respondent No. 2, Allahabad Bank has issued the subject Bank Guarantee in favour of PGCIL on behalf of the Petitioner.
- c) Lanco Infratech Limited (LITL) is the EPC (Engineering-Procurement-Construction) Contractor with respect to 2x660 (1320) MW (Unit 3 & Unit 4) coal-based Thermal Power Plant at Village-Pathadi, Tehsil-Korba, District Korba,



Chhattisgarh (hereinafter referred to as 'the Project') being set up by the Petitioner. The Petitioner has availed loan facilities from Financial Institutions/ Banks who are also monitoring the execution of the said project.

- d) For the purposes of availing Long Term Open Access (LTOA) for power transfer from place of generation to places of delivery, a Bulk Power Transmission Agreement (BPTA) dated 24.2.2010 was entered into between the Petitioner and PGCIL.
- e) In terms of aforesaid BPTA, a Bank Guarantee dated 29.1.2010 amounting to Rs.4290.00 lakh was furnished in favour of PGCIL.
- f) An Agreement dated 20.12.2010 was executed between the Petitioner and PGCIL for turnkey execution of 2 numbers 400 kV bays at new 765/400 kV Champa Pooling station of PGCIL for power evacuation from the Project and in terms of the said Agreement, PGCIL's scope of work included 'Design, Engineering, NIT, Tender Evaluation and Finalization of Contract, Procurement, Erection, Project Management, Testing and Commissioning and other works incidental thereto'. Also, the completion schedule of the said work was 33 months from the date of signing of the said Agreement. Hence, the scope of the transmission system to be implemented by PGCIL under the BPTA was supplemented.
- g) Pursuant to the Central Electricity Regulatory Commission (Sharing of Transmission Charges and Losses) Regulations, 2010 (hereinafter referred to as "the 2010 Sharing Regulations") a Transmission Service Agreement (TSA) dated 6.8.2012 was executed between the Petitioner and PGCIL.
- h) Despite the Petitioner augmenting all its resources for proper and timely execution of its project, Scheduled Commissioning Date (as mentioned in the BPTA) was not achieved on time because of reasons beyond the control of the Petitioner, *inter-alia*, unexpected delays in getting various statutory clearances/ approvals from Central/ State Authorities, land from State Government and as per the provisions of the BPTA and TSA, the said reasons were made known to PGCIL.



- i) PGCIL also delayed the implementation of the transmission system falling within its scope under the BPTA and the Petitioner till date has not received any notice from PGCIL, as regards commissioning of the transmission system falling within its scope and/ or operationalization of LTA.
- j) PGCIL vide communications dated 4.7.2017, 23.8.2017 and 12.9.2017 erroneously started demanding opening of LC to start/ operationalize 858 MW LTA granted to the Petitioner. While on the one hand, PGCIL raised the said demand but on the other hand, in the very same communications, the non-completion of the requisite transmission system for power evacuation was acknowledged and admitted by it.
- k) The Petitioner vide its communication dated 30.8.2017 responded to the said erroneous demand by specifically pointing out that:
  - a) PGCIL delayed the augmentation of certain elements of the transmission system as well as the implementation of the bays at Champa Pooling Station;
  - b) The said bays were not ready despite full payment of Rs. 1315.00 lakh for construction and execution of bays at Champa Pooling Station.
  - c) Champa Pooling Station-Dharamjaygarh Pooling Station 765 kV S/C, Raigarh Pooling Station (Near Kotra)-Champa Pooling Station 765 S/C and Establishment of 765/400 kV, 2X1500 MVA Padghe (PG) Sub-station as well as other elements as specified in BPTA for WR System Strengthening were not operationalized and their completion was necessary before the commencement of Long-Term Access (LTA).
- l) Further, no response was given by PGCIL to the said communication dated 30.8.2017.
- m) The Petitioner achieved 85% completion of its generating plant, which was duly acknowledged in 16<sup>th</sup> JCC Meeting for High Capacity Corridor (HCC) for IPPs in Western Region dated 16.6.2017 despite all the hindrances and delays, which were beyond the control of the Petitioner.
- n) A Petition under the Insolvency and Bankruptcy Code, 2016 was admitted on 7.8.2017 by the National Company Law Tribunal (NCLT-Hyderabad Bench) against LITL, the promoter of Petitioner company and the EPC contractor. The



proceedings before NCLT stalled the progress of the works as notified and acknowledged in the minutes of 17<sup>th</sup> JCC Meeting for HCC for IPPs in Western Region dated 20.9.2017, which were amended and corrected in the minutes of 18<sup>th</sup> JCC Meeting for HCC for IPPs in Western Region dated 20.12.2017.

- o) PGCIL was apprised of the gross delay in the turnkey execution works of the bays at Champa Pooling Station lying incomplete, by the Petitioner vide communication dated 13.3.2018. With respect to its dedicated transmission line which was under Petitioner's scope, the Petitioner vide email dated 28.3.2018 provided a status report of its generation project, wherein, it was stated that out of total 144 Towers, the foundation works of 119 Towers and erection works of 108 Towers was completed, with 11.5 km of stringing works was completed. Also, the pendency of the insolvency proceedings against LITL was once again notified vide the said letter due to which the works were suspended.
- p) PGCIL vide communication dated 12.4.2018 admitted the non-commissioning of the bays at Champa Pooling Station under its scope. The minutes of 19<sup>th</sup> JCC Meeting for HCC for IPPs in Western Region dated 28.3.2018 duly noted and acknowledged the aforesaid status, submitted by the Petitioner on 28.3.2018. In the said minutes as circulated by PGCIL vide communication dated 29.5.2018, it was remarked "Action on account of adverse progress may be taken in terms of BPTA / Regulations".
- q) Further, the Petitioner, in 20<sup>th</sup> JCC Meeting for HCC for IPPs in Western Region dated 29.6.2018 (wherein the minutes of 19<sup>th</sup> JCC were to be confirmed), apprised the Committee that no occasion had arisen for any action as stated in the minutes of 19<sup>th</sup> JCC meeting. The Petitioner further informed and reiterated that the progress of works had been suspended due to reasons beyond its control, being the Corporate Insolvency Resolution Process (CIRP) of the LITL, which aspect had been duly notified and acknowledged in earlier JCC's meetings. All the aforesaid was also communicated to PGCIL vide email dated 29.6.2018.
- r) PGCIL fraudulently and illegally invoked the Bank Guarantee vide communication dated 27.6.2018, which was forwarded to the Petitioner by Allahabad Bank vide email dated 29.6.2018.



### **Submissions of PGCIL**

3. PGCIL vide reply dated 12.7.2018 submitted a compilation of various judgments and submitted that the stay on the Bank Guarantee can be granted only in case of fraud or irretrievable injustice or where irretrievable injury would occur if the injunction is not granted.

The compilation of judgments in support of aforesaid argument submitted is as follows:

- (a) IA No. 542/2017 in Appeal No. 205/2017 in Simhapuri Energy Limited Vs. Central Electricity Regulatory Commission & Others (Appellate Tribunal)
- (b) I.A No. 384/2017 in Appeal No. 161/2017 in Shapoorji Pallonji Energy (Gujarat) Private Limited V. Gujarat Electricity Regulatory Commission &Anr (Appellate Tribunal)
- (c) Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd. &Anr. [(1996) 5 SCC 450]
- (d) U.P. State Sugar Corporation v. Sumac International Limited [(1997) 1 SCC 568]
- (e) Adani Agri Fresh, and Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Limited & Anr [ (2016) 10 SCC 46]
- (f) U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd. [(1988) 1 SCC 174]
- (g) Centax (India) ltd. Vs. Vinmar Impex Inc. & Others [ (1986)4 SCC 136]
- (h) Syndicate Bank Vs. Vijay Kumar & Others [(1992) 2 SCC 330]

### **Commission's Order dated 3.8.2018**

4. Commission vide order dated 3.8.2018 in the instant Petition issued directions on prayer (c) and prayer (d) of the Petitioner as follows:

- a) The Commission rejected Petitioner's prayer (c) to issue an ad interim directions for stay on the impugned letter of PGCIL dated 27.6.2018 and PGCIL was provided liberty to take action with regard to invocation of BG as per provisions of LTAA and TSA.
- b) The Commission also clarified that action of PGCIL with regard to invocation of BG shall be subject to final decision in the main petition.

### **Submissions of PGCIL**

5. The gist of submissions made by PGCIL vide affidavit dated 10.1.2019 are as follows:

- a) Referring the Commission's findings in order dated 3.8.2018 in Petition No. 202/MP/2018, declining the grant of interim relief to the Petitioner, PGCIL has



filed the reply with respect to the reliefs claimed by the Petitioner in prayers (a) and (b) only as prayers (c) and (d) in the present petition do not survive.

- b) The Petitioner had applied to PGCIL for LTA vide application dated 20.5.2008 in the inter-State transmission system (ISTS) for evacuation of power from its project. The aforesaid application of the Petitioner was discussed in the 29<sup>th</sup> Meeting of Standing Committee in Western Region held on 10.9.2009. Pursuant to the said discussions, the LTA as applied for was granted to the Petitioner vide intimation dated 1.10.2009, subsequently revised vide intimation dated 24.2.2010 wherein LTA was granted with the commissioning of HCPTC-V transmission corridor. However, the construction of the dedicated transmission line i.e. LANCO TPS – Champa pooling station 400 kV D/c (Quad) line was under the scope of generation developer.
- c) It was reiterated at the time of grant of LTA itself that the Petitioner was to provide adequate security with PGCIL for “partly mitigating its risk towards capital investment”.
- d) In furtherance of the aforesaid LTA grant, the Petitioner (along with other generators) executed a BPTA dated 24.2.2010 with PGCIL for the LTA quantum of 858 MW.
- e) Under the aforesaid BPTA, PGCIL agreed to provide to the Petitioner open access in ISTS as required by the LTTCs, from the date and in the manner mentioned in Annexures 1 to 4 of the Agreement for a period of 25 years from the scheduled date of open access of individual LTA customer.
- f) BPTA recorded a clear right and entitlement of PGCIL to receive transmission charges from the Petitioner for the transmission system to be put in place by it for evacuating power from the project notwithstanding that the Petitioner failed to construct the generating station/dedicated transmission system or abandon the same.
- g) The agreement thus was that if the Petitioner failed to construct the generating station/dedicated transmission system, or made an exit, or abandoned its project, PGCIL had the right to collect transmission charges and/or damages, as the case may be, in accordance with the applicable Regulations. For that purpose, the



Petitioner was required to furnish to PGCIL a bank guarantee from a nationalized bank for an amount equivalent to Rs.5 lacs/MW to “compensate such damages”. PGCIL was within its right and entitlement to encash the said bank guarantee in case of adverse progress of individual generating units assessed during coordination meetings.

- h) In Clause 9 of the BPTA, a provision was made with regard to claim for any loss or damages arising out of failure to carry out the terms of BPTA on account of force majeure/change in law events. The provision made was that if any of the parties to the BPTA failed to carry out its terms on account of any of the specified force majeure events, then they were not liable for any claim for loss or damage arising out of such failure. The only “terms” of the BPTA related to:
- i. providing of open access by PGCIL in the manner mentioned in the BPTA; and
  - ii. payment of transmission charges by the Petitioner for availing such access.
- i) As per Annexure-1 to the aforesaid BPTA, the 858 MW LTA granted to the Petitioner was on target region basis with power evacuation in the Western Region. The unit-wise time frame agreed under Annexure-1 was January, 2012 and March, 2012. Further, 423 MW LTA was granted for the trading company in Chhattisgarh with 254 MW in the Western Region and 169 MW in the Northern Region. The transmission system to be implemented by the Petitioner was set out in Annexure-2 as,
- “a) 400 kV LANCO-Champa Pooling Station D/c (Quad);”*
- j) Further, in aforesaid BPTA, a comprehensive transmission system under the scope of PGCIL was set out in Annexure-3 and the transmission charges for the transmission system of the respective generation projects was set out in Annexure-4.
- k) In furtherance of the aforesaid BPTA, the Petitioner furnished to PGCIL a bank guarantee in the sum of Rs.42.90 crores drawn on Allahabad Bank/Respondent No. 2.





- l) By virtue of the aforesaid bank guarantee, the Allahabad bank became the principal debtor with respect to the unpaid transmission charges/damages, if any, of the Petitioner under the BPTA towards failure/delay to construct the Generating Station and which debt the bank was bound to discharge (when demanded) without any demur or protest and without any recourse to the Petitioner.
- m) In addition to the BPTA, the Petitioner also entered into TSA dated 6.8.2012 with PGCIL wherein the agreement as regards sharing of transmission charges and losses was recorded.
- n) The methodology for accounting of PoC charges was agreed under clause 11.2 wherein the Regional Power Committee was to issue monthly Regional Transmission Accounts as per the Sharing Regulations for the previous month to all the DICs, Respondent No.2 and ISTS licensees. The Petitioner thus unequivocally agreed under the TSA to not only pay the PoC charges to PGCIL as billed, but also to have any non-payment thereof enforced through invocation of LC and/or regulation of power supply. Importantly, the adverse consequences of non-payment of PoC charges by any DIC were acknowledged in clause 13.0 of the TSA itself.
- o) The Petitioner could not be heard to seek any deferment of its liability for paying PoC charges as per Regulations which was to cause corresponding financial injury to other DICs and licensees.
- p) The firming up of beneficiaries of the Petitioner's project and signing of contractual arrangements with them thus clearly not being within the ambit of the TSA, the Petitioner could not be heard to contend that non-signing of PPAs with its beneficiaries for reasons beyond its control was a force majeure event under the TSA, relieving it of its obligation to pay transmission charges to PGCIL.
- q) The Petitioner was required to construct two nos. of 400kV bays at Champa pooling station of PGCIL for evacuation of its power. The Petitioner desired to obtain consultancy services from PGCIL on turnkey basis for constructing the said bays. For that purpose, the Petitioner entered into an Agreement dated 20.12.2010 with PGCIL. Entering into the said agreement with PGCIL did not absolve the Petitioner from its obligation of constructing the dedicated system as



per Annexure-2 of the BPTA and the contractual/regulatory responsibility in that behalf continued to be that of the Petitioner at all material times; the BPTA/TSA with all its corresponding rights and obligations between the parties as set out above, also continued to be binding and in force between the Petitioner and PGCIL.

- r) After receipt of Minutes of 17<sup>th</sup> JCC Meeting of Western Region held on 20.9.2017, the Petitioner vide letter dated 13.11.2017 clarified their status that presently work was stalled as LITL, who was the promoter and EPC contractor of the project, had been admitted into NCLT for Corporate Insolvency Resolution based on progress initiated by its lenders. Further, the Petitioner vide letter dated 28.09.2018 informed that the progress of the work had been suspended due to CIRP of the promoter and EPC contractor. However, it was observed that the overall progress of the project remained as 84% since the 15<sup>th</sup> Western Region Joint Coordination Committee Meeting held on 27.3.2017.
- s) While the matter stood as above, the Petitioner began raising issues as regards existence of force majeure and change in law situations with respect to project implementation and, vide its letter dated 4.4.2016, served a notice in that behalf upon PGCIL.
- t) The transmission system identified for evacuating power from the Petitioner's project was nearing completion and PGCIL vide its letter dated 4.7.2017, requested the Petitioner to open a letter of credit (LC) in the sum of Rs.45.72 crores towards payment security mechanism. The Petitioner, however, failed to open the required LC.
- u) Vide further letter dated 23.8.2017 and 12.9.2017, PGCIL again requested Petitioner to open LC. Despite repeated requests for opening of LC, the Petitioner continued to insist that owing to the occurrence of force majeure and change in law event which had led to delay in implementation of the project, it was not liable to pay any charges to PGCIL. Vide its letter dated 30.8.2017, the Petitioner further contended that till date it had been unable to execute any long-term power purchase agreement with distribution companies and in the absence of the same, its LTA to target region could not be operationalized. Vide Order dated 31.5.2010



in Petition no. 233/2009, the Commission had clarified that non-signing of PPAs with its beneficiaries could not be linked with execution of transmission projects. Non-signing of PPAs with the project beneficiaries was thus wrongly being claimed by the Petitioner as a force majeure event and as such the said claim was inadmissible.

- v) In its aforesaid letter dated 30.8.2017, the Petitioner also raised the issue as regards construction of bays by PGCIL at the Champa pooling station under consultancy works and citing alleged non-completion of bays as also transmission system elements by PGCIL, the Petitioner sought to evade its liability for putting in place the security mechanism in the form of LC/payment of transmission charges under the subject LTA. The Petitioner did not inform PGCIL either through a letter or during discussions in the Joint Coordination Committee Meetings that its promoter i.e. LITL had been facing insolvency proceedings and that a Petition under the Insolvency and Bankruptcy Code, 2016 had come to be admitted on 7.8.2017 by the National Company Law Tribunal (Hyderabad Bench) against it. The Petitioner informed about the initiation of the Corporate Insolvency Process only in November 2017 vide its letter dated 13.11.2017.
- w) The status of the Petitioner's project as informed in the 16<sup>th</sup> JCC Meeting was that its units 3 and 4 were now proposed to be commissioned in November, 2017 and February, 2018 respectively; the dedicated line was expected to be commissioned by August, 2017 and 85% of the generation project had been completed. The subject LTA was granted to the Petitioner with HCPTC-V system which inter alia included Champa – Kurukshetra  $\pm$  800 kV, 3000 MW HVDC Bipole. As per the directions of the Commission in Petition No.229/RC/2015 and 12/SM/2017, the date of effectiveness of subject LTA was 1.10.2017 based on the commissioning of the above HVDC link.
- x) In the meantime, the National Company Law Tribunal passed its Order dated 7.8.2017 appointing an Insolvency Resolution Professional (IRP) for the promoter company of the Petitioner. A perusal of the aforesaid order shows that not only was the Petitioner's promoter company facing bankruptcy, its investments in SPVs and EPC works from where it denied its value, were also stressed. The



entire Lanco group was facing financial difficulty and the debts of the holding company had risen to more than Rs.234 crores. There was no longer any financial stream available with the Petitioner for completing the execution of its generation project.

- y) This position became evident in the 17<sup>th</sup> JCC Meetings of the generation project granted connectivity/LTA in the Western Region held on 20.9.2017 wherein the status of the Petitioner's project recorded was that the 2 units were now expected to be commissioned in September, 2018 and December, 2018 respectively, the evacuation line was expected to be commissioned by April, 2018 and 85% of the generation project had been completed: "presently work is stalled due to financial constraints".
- z) The 18<sup>th</sup> JCC Meeting was not attended by the Petitioner's representatives, however, the position remained that work of project execution had been stalled as the promoter and EPC contractor of the Petitioner had gone into National Company law Tribunal for corporate insolvency resolution based on progress initiated by its lenders.
- aa) As far as the execution of bays at the Champa pooling station was concerned, PGCIL vide its letter dated 12.4.2018 informed that as per Agreement dated 20.12.2010 PGCIL would execute the work on behalf of the Petitioner on cost plus basis only. The non-implementation of bays as per the agreed schedule was due to acts of omission of the Petitioner alone and for which PGCIL could not be held responsible.
- bb) In the 19<sup>th</sup> JCC Meeting of generation projects granted connectivity/LTA in Western Region held 28.3.2018, the status submitted with regard to the Petitioner's project was that the promoter and EPC contractor of the project were before the NCLT for CIRP initiated by its lenders; at present the work was suspended and project lenders were taking steps required for restart and completion at the earliest. In the Minutes of the said Meeting issued on 29.5.2018, it was categorically recorded that, "*Action on account of adverse progress may be taken in terms of BPTA/Regulation.*"



- cc) There had been no progress in construction of the Petitioner's project for more than one year and as such, in terms of the BPTA, PGCIL came within its right and entitlement to invoke the bank guarantee on account of adverse progress in project implementation. Accordingly, vide letter dated 27.6.2018 to Allahabad Bank, PGCIL invoked the said bank guarantee and demanded Allahabad Bank to release the payment immediately and remit the full guarantee sum of Rs.42.90 crores towards proceeds of bank guarantee in the form of demand draft in favour of PGCIL.
- dd) Instead of remitting the amount under the bank guarantee to PGCIL as demanded from them, Allahabad Bank in violation of all applicable banking norms and procedures, informed the promoter of the Petitioner of the invocation by email dated 29.6.2018 and requested to arrange/reimburse Rs.42.90 crore *"towards the payment to be made by our bank"*.
- ee) Pursuant to the interim Order dated 3.8.2018 passed by the Commission, the bank guarantee furnished by the Petitioner has since then been encashed.
- ff) The invocation of bank guarantee furnished by the Petitioner is in accordance with the provisions of the BPTA/TSA and as such, does not suffer from any infirmity as has been wrongly alleged in the present Petition. In a recent Order dated 3.12.2018 passed in Petition No.242/MP/2017, the Commission has upheld the action of PGCIL in invoking and en-cashing the bank guarantee as per provisions of clause 6 of the BPTA on account of adverse progress of the generating station.
- gg) Vide letter dated 28.11.2018 of PGCIL, the TSA has been terminated on account of non-opening of the required LC. Accordingly, the Petitioner has become ineligible from transacting power through the ISTS lines. Further, the Petitioner has failed to discharge its duties towards establishment of its generation project. Failure in construction of generating station/dedicated transmission system or making an exit or abandoning or falling in adverse progress, is a default on part of the generating project in terms of the BPTA. Accordingly, vide letter dated 13.12.2018 of PGCIL, the LTA granted to the Petitioner has been revoked w.e.f. 1.10.2017 along with the liability of the Petitioner to pay the attendant



relinquishment charges and consequently, the BPTA dated 24.2.2010 also stands terminated.

**I.A No. 69/2019 and Review Petition No. 26/RP/2020**

6. The Petitioner filed an I.A vide affidavit dated 16.7.2019 stating that while pendency of the instant Petition, certain events have occurred which requires the instant Petition No. 202/MP/2018 to be amended. The Commission vide order dated 9.6.2020 in I.A No. 69/2019 in Petition No. 202/MP/2018 observed the following:

*“31. In the light of the above discussions, we are of the view that the proposed amendments sought by the Petitioner through the IA deserve to be allowed for the purpose of determining the real questions in controversy between the parties and for proper adjudication of the case. Accordingly, the Petition filed by the Petitioner shall stand modified to the extent prayed in the IA. The Respondents are directed to file their reply to the amended Petition within three weeks. PGCIL is at liberty to take all such objections as it may consider appropriate in its reply to the amended Petition. It is clarified that in this order, the Commission has decided the issue whether amendment sought by the Petitioner should be allowed or not. The Commission has not expressed any view on merit of the case and the same will be decided after hearing the parties at the stage of final disposal of the Petition.*

*32. IA No. 69 of 2019 in Petition No. 202/MP/2018 is disposed of in terms of the above.”*

7. The Commission vide order dated 9.6.2020 in I.A No. 69/2019 in Petition No. 202/MP/2018 allowed the proposed amendments by the Petitioner for proper adjudication of the instant case without going into the merit of the case in hand.

8. PGCIL filed a Review Petition No. 26/RP/2020 against the aforementioned order dated 9.6.2020 to rectify the impugned order in respect of Amendment allowed in prayers/pleadings. The Commission disposed of the Review Petition vide order dated 24.7.2021 without examining its admissibility and directed the parties to complete their pleadings in instant Petition i.e. Petition No.202/MP/2018.



## **Submissions of Petitioner in the Amended Petition**

9. The gist of additional submissions of the Petitioner in the Amended Petition filed vide affidavit dated 16.7.2019 are as follows:

- a) PGCIL, vide letter dated 28.11.2018, unilaterally and illegally terminated the TSA.
- b) In response to the aforesaid purported and illegal termination, the Petitioner vide its communication dated 13.12.2018, brought to PGCIL's notice of reasons for delay in the project works were beyond the control of the Petitioner. The Petitioner vide its response dated 13.12.2018 also brought to PGCIL's notice of the High Level Empowered Committee's (HLEC) Report of November 2018, wherein it has been recommended – to the DISCOMS, CIL, PGCIL, Ministry of Environment and forests, and appropriate Govt. to not cancel PPA, FSA, transmission connectivity, EC/FC, and other approvals – of Stressed Thermal Power Projects, which amongst others, includes the Project of the Petitioner herein. Furthermore, the Petitioner herein also apprised PGCIL of the fact that their current disputes were already sub-judice before the Commission in the instant petition.
- c) Despite all the aforesaid, PGCIL vide letter dated 13.12.2018 purportedly also revoked the 858 MW LTOA granted to the Petitioner for transfer of power from the generation project in question in Chhattisgarh to beneficiaries.
- d) Petitioner vide its letter dated 07.01.2019 requested PGCIL to withdraw the revocation of the LTA as well as the termination of the TSA, as summarily reiterated in the Petitioner's aforementioned communication dated 13.12.2018. It was brought to PGCIL's notice that the generating station/dedicated transmission line was in advance stage of construction, with the achieved overall progress of the generating station being 84% and of the dedicated transmission line being around 70%. As such, there was no default on the part of the Petitioner in terms of the BPTA.
- e) The aforementioned BPTA, specifies that when any event or circumstance is beyond the control of any party to the contract and prevents it from carrying out the terms of the agreement, that, would be a force majeure event and for which



the said party would not be liable for any claim of loss or damage. Such being the admitted position, wherein, no default could be attributed on the part of the Petitioner, the impugned revocation of LTOA and termination of TSA is wholly arbitrary, illegal and fraudulent.

- f) The EPC Contractor for the Project, LITL, is facing proceedings under IBC Code and is under liquidation and on account of which, the project works have been stalled. Such causes of delay, being beyond the control of the Petitioner, inter alia, constitute an event of Force Majeure.
- g) Petitioner has sought the following addition or amendment in the prayer:

*“(dd) Pass an order setting aside/quashing the impugned communication dated 28.11.2018 (purportedly terminating the TSA) and communication dated 13.12.2018 (purportedly revoking the LTOA) issued by Respondent No. 1.”*

### **Reply of PGCIL in the Amended Petition**

10. The gist of additional submissions of PGCIL made in its reply vide affidavit dated 16.8.2021 are as follows:

- a) The invocation of bank guarantee furnished by the Petitioner had been in accordance with the provisions of the BPTA/TSA and as such, did not suffer from any infirmity as has wrongly been alleged in the present Petition. There had admittedly been an adverse progress in so far as the implementation of its generation project by the Petitioner was concerned and there had been no force majeure condition affecting the Petitioner’s project. The grim scenario then existing had been that there were no longer any funds available with the Petitioner and/or its promoter company for executing and commissioning of the project, which made it even more imperative that the bank guarantee was to be taken recourse to for *“partly mitigating”* the investments already made by PGCIL in implementing the associated transmission system.
- b) Vide letter dated 28.11.2018 of the Respondent No.1 PGCIL, the TSA signed with the Petitioner was terminated on account of non-opening of the required LC. Accordingly, the Petitioner became ineligible from transacting power through the ISTS lines. Further, the Petitioner had failed to discharge its duties towards establishment of its generation project and coordination with Respondent No.1





regarding commissioning of the project from time to time. Failure in construction of generating station/dedicated transmission system or making an exit or abandoning or falling in adverse progress, was a default on part of the generating project in terms of the BPTA. Accordingly, vide letter dated 13.12.2018 of PGCIL, the LTA granted to the Petitioner was revoked w.e.f. 1.10.2017 along with the liability of the Petitioner to pay the attendant relinquishment charges as under:

*“After receipt of minutes of 17<sup>th</sup> JCC Meetings of WR held on 20.09.2017, M/s LAPL vide letter dated 13.11.2017 clarified their status that “presently work is stalled at their generation project as Lanco Infratech Ltd. (LITL) who is the promotor and EPC contractor of the project, has gone into National Company Law Tribunal (NCLT) for corporate insolvency resolution based on progress initiated by its lender”...*

.....

*M/s. LAPL has already been intimated regarding termination of Transmission Service Agreement due to non-compliance of CERC Regulations and Procedures vide letter dated 28.11.2018 (Ref. (iii)) as per the reasons and details stated in this above letter.*

*From the above, it is observed that M/s LAPL has failed in its duties towards establishment of its generation project and coordination with CTU regarding commissioning of the project from time to time. It is to mention that failure in construction of generating station/dedicated transmission system or making an exit or abandoning or falling in adverse progress, is a default on the part of generation project in terms of BPTA.*

*Keeping above in view, the LTOA grant is revoked w.e.f. 01.10.2017. Since, the TSA termination/DIC-Status termination and LTOA revocation has been compelled by LAPL's own defaults and non-compliances, therefore, revocation shall be accompanied by liability for payment of applicable relinquishment charges as may be determined by CERC in light of Petition No.92/MP/2015.”*

- c) In the proceedings before the Commission with respect to termination of LTA, reference may be drawn from I.A No.55/2018 in Petition No.127/MP/2016: Ind Bharat Energy (Utkal) Limited Vs. Power Grid Corporation of India Ltd.
- d) So far as the Petitioner's plea of force majeure is concerned, the position has been well settled by the Commission in various Orders passed from time to time. Reference may be drawn from its Order dated 31.10.2017 passed in Petition No.69/MP/2014: Aryan MP Power Generation Pvt. Ltd. Vs. Power Grid Corporation of India Ltd. &Ors.



- e) On the aspect of non-availability of PPAs as a force majeure occurrence, reference may be drawn from the Tribunal Order dated 5.2.2020 passed in Petition No. 303/MP/2015: M/s Vedanta Limited Vs. Power Grid Corporation of India Ltd. & Anr.

**Petitioner's Rejoinder to Reply of PGCIL**

11. The gist of submissions of the Petitioner made in its rejoinder vide affidavit dated 13.9.2021 are as follows:

- a) PGCIL agreed to provide the open access required by the Petitioner (being the Long Term Transmission Customer) from “the date of availability of evacuation of transmission system” for transfer of power. [Clause (F) of BPTA].
- b) The Petitioner shall pay the applicable Transmission Charges from “the date of commissioning of the transmission system”. [Clause 2.0(c) of BPTA].
- c) Clause 2.0 (a) of the BPTA, which has been relied upon by PGCIL read with the aforementioned terms of the BPTA, would lead to the inference that the Transmission System was to be commissioned by PGCIL on the scheduled date of commissioning of the Petitioner's Project. In other words, both dates of commissioning i.e. of the Transmission System by PGCIL and of the Power Project by the Petitioner were to coincide with each other for purposes of evacuation of power and consequent payment of Transmission Charges. PGCIL, however, cannot be permitted to read and rely upon Clause 2.0 (a) in isolation and seek to contend that the Petitioner was liable to make payment from the scheduled date of commissioning of its power project, irrespective as to whether or not the Transmission System (using which the power could be evacuated), had been implemented and commissioned by PGCIL.
- d) The question of liability of payment of Transmission Charges could arise only when the Transmission System was implemented and commissioned by PGCIL, which, it admittedly failed to do.
- e) PGCIL has gone into the aspect of non-signing of PPA, as being the limited reason claimed by the petitioner for applicability of Force Majeure, even though



pleading to the said effect has not been taken by the Petitioner. Such being the case, with there being no denial of the reasons cited by the Petitioner for claiming applicability of Force Majeure, it is submitted that the present Petition and the reliefs claimed therein merit being allowed by the Commission.

- f) Reference and reliance by PGCIL upon an Order passed by the Commission in another proceeding (Order dated 03.12.2018 passed in Petition No. 242/MP/2017), to justify invocation and encashment of the Petitioner's Bank Guarantee in the present case, is wholly erroneous, misconceived and untenable. Each case has to be considered and adjudicated in the peculiar facts and circumstances subsisting therein. Orders passed in another case cannot be blanketly applied to every case, as sought to be done by PGCIL herein, without showing its relevance to the subject.

#### **Hearing dated 14.10.2021**

12. Both the Petitioner and PGCIL made detailed oral submissions. The Commission directed the Petitioner to submit the current status of commissioning of generating units, dedicated transmission line including the scheduled vis-à-vis actual deadline for completion of milestone activities thereof, under the scope of the Petitioner. Commission also directed PGCIL to submit the Scheduled CoD and Actual CoD of the transmission assets for evacuation of proposed generation under the scope of PGCIL and whether the Petitioner was informed of the date of operationalisation of LTA.

13. Subject to above, the Commission reserved the order in the matter.

#### **Submissions of Petitioner in compliance of ROP of hearing dated 14.10.2021**

14. The gist of additional submissions made by the Petitioner vide affidavit dated 22.10.2021 are as follows:



- a) The Petitioner is implementing two generating units i.e. Unit-3 and Unit-4, each of capacity of 660 MW (Total capacity of 1320 MW) coal-based Supercritical Thermal Power Project at Village Pathadi in Korba District, Chhattisgarh. Both the Units are composite in nature with Balance of Plant as common. As far as Unit-3 is concerned, the Main Plant (Boiler, Turbine and Generator –BTG), majority of Design Engineering, Supply, Civil and Mechanical construction works, Boiler Hydro test, Turbine Generator installation etc. is complete and is ready for commissioning. As regards Unit-4, the Main Plant (Boiler, Turbine and Generator –BTG), major Design Engineering, Supply and civil works completed, mechanical construction including pressure parts erection is partly completed. Balance of Plant (Common) i.e. Cooling Water System, Water Pre-treatment System, Chimney, Ash Handling system, Coal Handling System etc. is partly completed. As far as the Dedicated Transmission Line is concerned, there are 144 Towers in the transmission line out of which the foundation works of 119 Towers, erection works of 108 Towers completed. Stringing of transmission wire of 11.5 km out 47 Km also completed.
- b) The generating units which includes Main Plant, Balance of Plant and Dedicated Transmission Line is stalled at advanced stage of construction since August 2017, as the Promotor and EPC Contractor of the project, LITL was admitted to Corporate Insolvency Resolution Process ('CIRP') by an Order dated 07.08.2017 passed by the National Company Law Tribunal, Hyderabad Bench ('NCLT'). LITL is now under liquidation.
- c) Pursuant to an Application filed before the NCLT against the Petitioner under Section 7 of the Insolvency and Bankruptcy Code, 2016, the NCLT vide its order dated 05.09.2019 admitted the Application for the initiation of CIRP of the Petitioner. The purpose of the CIRP is to undertake insolvency resolution of the company by operating the company as a going concern during the CIRP period to obtain maximum value of the assets of the company. In terms of the Explanation to Section 14(1) of the IBC, the scope of moratorium includes as follows:

*“Explanation- For the purpose of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law from the time being in force, a*



*license, permit, registration, quota, concession, clearances or similar grant or right given by Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law from time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of certain dues arising for the use or continuation of the license, permit, registration, quota, concession, clearance or a similar grant or right during moratorium period”.*

- d) The Corporate Insolvency Resolution Process of the Petitioner is currently at an advanced stage of resolution.
- e) The scheduled vis-a-vis actual deadline of completion of milestone activities of the aforesaid two units is as under:

Sr. No	Activity	Original Scheduled Date		Actual Date	
		Unit-3	Unit-4	Unit-3	Unit-4
1	Boiler structural erection start	01-Aug-10	01-Oct-10	21-Sep-10	21-Dec-10
2	Pressure part erection start	01-Jan-11	01-Mar-11	13-Oct-11	20-Jan-12
3	400KV switchyard charging	10-July-11	10-July-11	-	-
4	Availability of DM water	30-June-11	30-June-11	-	-
5	Boiler Hydro test	31-July-11	30-Sept-11	22-Jul-16	-
6	Power House Building structural erection start	31-July-10	30-Sept-10	19-Aug-10	18-Nov-10
7	TG deck casting	01-Mar-11	01-May-11	22-Jan-11	30-May-11
8	Condenser erection start	15-Aprl-11	15-June-11	31-May-11	30-Dec-11
9	TG erection start	01-May-11	01-July-11	20-Dec-11	30-Apr-15
10	TG box up	31-Oct-11	31-Dec-11	26-Nov-16	-
11	Oil Flushing	01-Dec-11	01-Feb-12	-	-
12	TG on barring	10-Dec-11	10-Feb-12	-	-
13	Boiler Light Up	18-Dec-12	18-Feb-12	-	-
14	Steam Blowing	20-Dec-11	20-Feb-12	-	-
15	Synchronization	20-Jan-12	20-Mar-12	-	-
16	COD	31-Jan-12	31-Mar-12	-	-

### **Submissions of PGCIL in compliance of ROP of hearing dated 14.10.2021**

15. The gist of additional submissions made by the PGCIL vide affidavit dated 2.12.2021 are as follows:

- a) Petitioner was granted LTA with the High Capacity Power Transmission Corridor - V (HCPTC-V) which included a number of transmission elements. As per the



records relating to investment approval, the last element of HCPTC-V (i.e. Champa - Kurukshetra HVDC Bipole-1) was scheduled to be commissioned by June 2015. Further, the said transmission element commissioned by 01.10.2017.

- b) The progress of the generation project as well as transmission system was reviewed from time to time in various joint coordination committee meetings. The JCC meetings are conducted as per the combined mandate of (i) Section 38 of the Electricity Act, 2003 which requires Central Transmission Utility of India Limited (CTUIL) to undertake coordination with various stakeholders with respect to ISTS; (ii) directions of the Commission in petitions relating to grant of regulatory approval of ISTS schemes and (iii) provisions under BPTA/ LTA Agreements which prescribe such meetings to be conducted by CTUIL. In the aforesaid JCC Meetings, CTUIL obtains data from both the generation project developers as well as transmission licensees and in this way coordinates the development of both the generation as well as transmission projects in order to match the implementation schedule of both the projects.
- c) The commissioning status of HCPTC-V Corridor with which the Petitioner had been granted LTA was also updated from time to time in JCC meetings.
- d) PGCIL also served letters to the Petitioner vide dated 23.8.2017 wherein it was informed that the transmission system is likely to commissioned by 31.8.2017 and vide dated 12.9.2017 wherein it was informed that the transmission system was likely to be commissioned shortly.
- e) The transmission system for evacuation of power from the Petitioner's generation project was commissioned in September 2017 with the commissioning of the last element of HCPTC-V Corridor i.e. Champa-Kurushetra +/- 800 kV, 3000MW HVDC Bipole-I and the associated LTAs were operationalized w.e.f 01.10.2017.
- f) The LTA granted to the Petitioner would also have been operationalized in the ordinary course w.e.f. 01.10.2017. However, on account of adverse progress of the Petitioner, the said LTA was revoked w.e.f. 01.10.2017 and since the said revocation had been compelled by Petitioner's own defaults and non-compliances, therefore it was accompanied by liability for payment of applicable relinquishment charges. Subsequently, liability towards payment of



relinquishment charges has been determined in accordance with the Commission's Order dated 08.03.2019 in Petition No. 92/MP/2015 is Rs.173.01 crore vide CTUIL letter dated 20.5.2019.

### **Analysis and Decision**

16. The Petitioner, Lanco Amarkantak Power Limited (LAPL) is setting-up a 2x660 MW (1320 MW) (Units 3 & 4) coal based thermal power project (“the Project”), in District Korba in the State of Chhattisgarh, with Lanco Infratech Limited (LITL) being the EPC contractor and the promoter of LAPL.

17. The Petitioner has entered into Bulk Power Transmission Agreement (BPTA) dated 24.2.2010 with PGCIL for availing Long-Term Access (LTA) for 858 MW and furnished Bank Guarantee (BG) of Rs.42.90 crore in favour of PGCIL under the provisions of BPTA. On 6.8.2012, LAPL entered into Transmission Service Agreement (TSA) with PGCIL in terms of the 2010 Sharing Regulations.

18. The Petitioner and PGCIL have also entered into an Agreement dated 20.12.2010 under which PGCIL shall provide consultancy services for turnkey execution of 2 numbers of 400 kV bays at new 765/400 kV Champa Pooling Station of PGCIL which are terminating bays of dedicated lines to be developed by Petitioner.

19. The Petitioner vide its letter dated 4.4.2016 issued a notice of Force majeure and Change in Law to PGCIL under Clause 9 of the BPTA and Clause 14 and Clause 15 of the TSA claiming that the execution of its project was affected by unexpected delays in getting various statutory clearances/approvals from the Central/State Authorities and land from State Government that were beyond the control of the Petitioner and these have led to delay



in commissioning of the generation project including dedicated transmission lines. The Petitioner has mentioned reasons such as (a) Change in location of PGCIL pooling station; (b) Delay in obtaining forest clearance of the transmission line; (c) Delay in possession of land; (d) Post-award change in specification due to statutory requirements for coal handling plant and ash handling plant; (e) Delay in Railway siding approval; and (f) New MOEF Notification regarding Environment (Protection) Rules, 2015. The Petitioner through the said notice sought extension of time in completing and commissioning of the Units in respect of BPTA and TSA and also informed that the Petitioner would not be liable to pay any claim or charges to PGCIL as a result of the said delay which was beyond its control.

20. The Petitioner has also submitted that the Petitioner's Promoter and EPC Contractor LITL is under Corporate Insolvency Resolution Process ('CIRP') by an Order dated 7.8.2017 passed by the NCLT (Hyderabad Bench). Due to this, the progress of the said balance works related to the Project and the dedicated transmission line under the scope of Petitioner have been stalled since the date of the aforesaid order dated 7.8.2017 and the same is beyond the control of the Petitioner.

21. PGCIL vide its letters dated 4.7.2017, 23.8.2017, 12.9.2017 had intimated the Petitioner to open Letter of Credit (LC) of Rs.45.72 crore in terms of BPTA and TSA stating that the required transmission system for evacuation of power from the generating units of the Petitioner was to be commissioned shortly. The Petitioner vide its letter dated 30.8.2017 submitted that it was not liable to pay the transmission charges as the delay in execution was on account of occurrence of various change in law and force majeure events.





22. PGCIL invoked the BG of Rs.42.90 crore vide its communication dated 27.6.2018 to Allahabad Bank which was forwarded by the Bank to the Petitioner on 29.6.2018. Aggrieved by the aforesaid action of PGCIL, the Petitioner filed the instant Petition No. 202/MP/2018, inter-alia, for setting aside/quashing of letter of PGCIL dated 27.6.2018 and to restrain PGCIL from taking any coercive steps/ actions under BPTA dated 24.2.2010 including in respect of BG dated 29.1.2010.

23. The Petitioner has submitted that during the pendency of the Petition No. 202/MP/2018, PGCIL vide its letter dated 28.11.2018 terminated TSA and vide its letter dated 13.12.2018 revoked LTA (858 MW) granted to LAPL.

24. The prayers after considering the prayers already concluded vide Order dated 3.8.2018 in the instant Petition and as amended by the Petitioner vide amended Petition dated 16.7.2019 are as follows:

“

- a) *Pass an order setting aside/quashing the impugned invocation communication dated 27.06.2018 (Annexure P-1) issued by Respondent No.1;*
- b) *Pass an order restraining Respondent No.1 from taking any coercive steps / actions under the Bulk Power Transmission Agreement dated 24.02.2010 including in respect of the Bank Guarantee Bearing No. 0195610IPG000001 dated 29.01.2010;*
- dd) *Pass an order setting aside/quashing the impugned communication dated 28.11.2018 (purportedly terminating the TSA) and communication dated 13.12.2018 (purportedly revoking the LTOA) issued by Respondent No. 1.”*
- e) *Pass such other or further orders as the Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the present case and in the interest of justice.”*

25. We have considered submissions of Petitioner and the Respondents placed on record. The following issues arise for our consideration in the instant Petition:

**Issue No.1: Whether the Bank Guarantee invoked by PGCIL is in accordance with Agreements and/or Regulations?**



**Issue No. 2: Whether the termination of TSA dated 6.8.2012 vide PGCIL letter dated 28.11.2018 and revocation of 858 MW LTA granted to LAPL vide PGCIL letter dated 13.12.2018 are in accordance with Agreements and/or Regulations?**

The issues are discussed in the succeeding paragraphs.

**Issue No. 1: Whether the Bank Guarantee invoked by PGCIL is in accordance with Agreements and/or Regulations?**

26. The Petitioner entered into the Bulk Power Transmission Agreement (BPTA) dated 24.2.2010 with PGCIL for availing Long-Term Access (LTA) for transfer of power of 858 MW and furnished the Bank Guarantee (BG) of Rs.42.90 crore in favour of PGCIL under the provisions of BPTA.

27. The Petitioner has submitted that as per the BPTA, the PGCIL is secured from any damages that it may suffer on account of failure/delay in construction of the generating station/dedicated transmission system by the Petitioner. However, PGCIL without incurring any losses or damages due to Petitioner's actions has fraudulently and illegally invoked the Bank Guarantee vide communication dated 27.6.2018.

28. The Petitioner has submitted that the Petitioner's project could not get commissioned on time due to reasons beyond the control of the Petitioner, which include, inter-alia, unexpected delays in getting various statutory clearances and approvals from Central and State Authorities and land from State Government. The Petitioner has further submitted that the Petitioner has completed 84% works of its project and 70% of its scope of the transmission line, which has been duly notified to PGCIL and also in various meetings in JCC. The Petitioner has submitted that the Petitioner's Promoter and EPC Contractor LITL is under Corporate Insolvency Resolution Process ('CIRP'), by an Order dated 7.8.2017 passed by the NCLT (Hyderabad Bench). Due to this, the progress of the said balance



works related to the Project and the dedicated transmission line under the scope of the Petitioner have been stalled since the aforesaid order dated 7.8.2017, which is beyond the control of the Petitioner.

29. The Petitioner has claimed that PGCIL had delayed the augmentation of certain elements of transmission system as well as implementation of the bays at Champa pooling station associated with dedicated line of Petitioner.

30. The Petitioner has submitted that as per clause 9 of BPTA no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of BPTA to the extent that such a failure is due to force majeure events which are beyond the control of the party, in this case the Petitioner.

31. The Petitioner vide its letter dated 4.4.2016 issued a notice of Force majeure and Change in Law to PGCIL under Clause 9 of the BPTA and Clause 14 and Clause 15 of the TSA claiming that the execution of its project was affected by unexpected delays in getting various statutory clearances/approvals from the Central/State Authorities and land from State Government that were beyond the control of the Petitioner and these led to delay in commissioning of the generation project including dedicated transmission lines. The Petitioner has mentioned such reasons as (a) Change in location of PGCIL pooling station; (b) Delay in obtaining forest clearance of the transmission line; (c) Delay in possession of land; (d) Post-award change in specification due to statutory requirements for coal handling plant and ash handling plant; (e) Delay in Railway siding approval; and (f) New MOEF Notification regarding Environment (Protection) Rules, 2015. The Petitioner through the said notice sought extension of time for completing and commissioning of the Units in respect of



BPTA and TSA and also informed that the Petitioner would not be liable to pay any claim or charges to PGCIL as a result of the said delay which was beyond the control of the Petitioner.

32. The Respondent, PGCIL has submitted that to partly mitigate the risk towards capital investment made by PGCIL for implementation of transmission strengthening scheme, provisions are made under Clause 6 of BPTA for furnishing Bank Guarantee by the Petitioner, which could be encashed by PGCIL in following situations:

- i. if the Petitioner failed to construct the generating station/dedicated transmission system, or
- ii. if the Petitioner made an exit, or
- iii. if the Petitioner abandoned its project, or
- iv. there is adverse progress of individual generating station.

33. The Respondent, PGCIL has submitted that there had been no progress in construction of the Petitioner's project since 15<sup>th</sup> JCC meeting held on 23.3.2017. Therefore, in terms of the BPTA, PGCIL came within its right and entitlement to invoke the bank guarantee on account of adverse progress in project implementation.

34. PGCIL has submitted that in the BPTA, the only consequence contemplated on occurrence of any force majeure event is that transmission/ drawl of power is to be started as soon as practicable by the parties concerned after the force majeure comes to an end or ceases to exist. Further, PGCIL has submitted that in terms of the provisions of BPTA, there is no embargo on the operation of other provisions of BPTA during the period force majeure. As such, the provisions contained in Clause 2.0 regarding payment/sharing of transmission charges by the Petitioner continues to be applicable irrespective of the occurrence of any



force majeure event. Therefore, the liability to pay transmission charges commenced as soon as the transmission system of PGCIL was commissioned as per the scheduled date of commissioning as set out in the BPTA, even if the generating unit had not yet actually been commissioned.

35. We have considered the submissions of the Petitioner and the Respondents. Petitioner has disputed the invocation of Bank Guarantee vide PGCIL letter dated 27.6.2018, which is extracted as under:

*“Sub: Demand for release of Payment against the Bank Guarantee issued by Allahabad Bank in favour of M/s POWER GRID CORPORATION OF INDIA LIMITED (POWERGRID)*

*Dear Sir.*

*This with reference to the above subject Following Bank Guarantee has been issued by Allahabad Bank in favour of POWERGRID.*

<i>BG No.</i>	<i>Date of issue</i>	<i>Amount (in Rs Crs.)</i>	<i>Expiry Date</i>	<i>Issued on behalf of</i>
<i>0195610IPG000001</i>	<i>29.01.2010</i>	<i>42.90</i>	<i>26.04.2019</i>	<i>M/s Lanco Amarkantak Power Ltd.</i>

*In line with the conditions of the above mentioned Bank Guarantee as reproduced below the bank has agree that,*

*“..... Do hereby guarantee and undertake to pay the POWERGRID on demand any and all monies payable by the LTOA CUSTOMER to the extent to Rs.42.90 Crores only as aforesaid at any time up to 28.01.2013, without any demur, reservation, context, recourse of protest and/or without any reference to the LTOA CUSTOMER”*

*We are invoking the said bank guarantee and demand Allahabad Bank to release the payment immediately and remit the full guaranteed sum of Rs.42,90,00,000/- (Rupees Forty Two Crores and Ninety Laks only) towards proceeds of Bank Guarantee in the form of demand draft in favour of “Power Grid Corporation of India Ltd” payable at Gurgaon New Delhi or wire transfer/RTGS/NEET into POWERGRID account in State Bank of india, New Delhi as per the details mentioned below.....  
.....”*



36. We have perused the BPTA under which the said Bank Guarantee had been furnished by the Petitioner. The relevant Clause 5, Clause 6 and Clause 7 of the BPTA regarding the BG and its encashment are reproduced as under:

*“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/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 nationalized bank for an amount which shall be equivalent to Rs.5 (five) Lakhs/MW to compensate such damages.....*

*(b) This bank guarantee would be initially valid for a period of six months after the expected date of commissioning schedule of generating unit(s) mentioned at Annexure-1 or actual date of commissioning whichever is earlier. The bank guarantee would be encashed by POWERGRID in case of adverse progress of individual generating unit(s) assessed during coordination meeting as per para 7 below. However, the validity should be extended by 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 Open Access Customer(s) proportionate to its commissioned capacity (which otherwise would have been paid by the concerned Long Term Open Access Customer (s) to POWERGRID) provided generation is ready and POWERGRID fails to make alternate arrangement for dispatch of power.*

*7.0. In order to monitor/ review the progress of generating units along with its direct evacuation lines and also the common transmission system, Joint co-ordination meeting with the representative of each developers and POWERGRID shall be held at regular interval (preferably quarterly) after signing of this Agreement.*

*...”*

37. As per above, it is clear that in case any project developer fails to construct the generating station/ dedicated transmission system or makes an exit or abandons its project, PGCIL shall have the right to collect the transmission charges and/or damages as the case



may be, in accordance with the notification/regulation of CERC. Further as per sub-clause (b) of Clause 6, the Bank Guarantee “would be encashed by PGCIL in case of adverse progress of the individual generating unit(s) assessed during coordination meeting”.

38. We have perused the minutes of various meetings of Joint Co-ordination Committee (JCC) for High Capacity Corridor for IPPs in Western Region Western Region. The relevant extracts related to progress of the Petitioner’s project as recorded in the said minutes are as under:

<b>JCC Meeting</b>	<b>Meeting Date</b>	<b>Dedicated/Connectivity line &amp; Status</b>	<b>Remarks</b>
<b>15<sup>th</sup></b>	27.3.2017	LANCO – Champa PS 400kV D/c (Quad) line - expected by Aug '17	85% of the generation project has been completed. With regard to dedicated line, representative stated that they are aware that they won't be allowed to inject any power including infirm in absence of dedicated line as per the decision in Meeting held in CEA.
<b>16<sup>th</sup></b>	16.6.2017	LANCO – Champa PS 400kV D/c (Quad) line - expected by Aug '17	85% of the generation project has been completed. With regard to dedicated line, representative stated that they are aware that they won't be allowed to inject any power including infirm in absence of dedicated line as per the decision in Meeting held in CEA. Work on the BTG and BOP is in progress.
<b>17<sup>th</sup></b>	20.9.2017	LANCO – Champa PS 400kV D/c (Quad) line - expected by Apr'18	85% of the generation project has been completed; presently work is stalled due to financial constraints.
<b>18<sup>th</sup></b>	20.12.2017	LANCO – Champa PS 400kV D/c (Quad) line - expected by Apr' 18	Presently work is stalled as Lanco Infratech Ltd (LITL) who is the promoter and EPC contractor of the project, has gone into National Company Law Tribunal (NCLT) for corporate insolvency resolution based on progress initiated by its lenders
<b>19<sup>th</sup></b>	28.3.2018	LANCO – Champa PS 400kV D/c (Quad) line - (Status submitted through email dtd 28.03.2018: Total Tower: 144 Foundation Completed: 119 Erection Completed: 108 Stringing – 11.5 Kms)	As per status submitted on 28.03.2018, “the promoter and EPC Contractor of the project, LITL was admitted to NCLT in August 2017 for Corporate Insolvency Resolution Process (CIRP) initiated by LITL lenders, at present the work is suspended. Project Lenders are taking steps required for restart and completion at the earliest.” • Action on account of adverse progress may be taken in terms of BPTA/Regulations.
<b>20<sup>th</sup></b>	29.6.2018	LANCO – Champa PS 400kV D/c (Quad) line - Total Tower: 144 Foundation Completed: 119 Erection Completed : 108 Stringing – 11.5 Kms)	The promoter and EPC Contractor of the project, LITL was admitted to NCLT in August 2017 for Corporate Insolvency Resolution Process (CIRP) initiated by LITL lenders & presently the project work is stalled at 84%. Project Lenders are taking steps required for restart and completion of works at the earliest. • It was observed that the overall project progress of



			84% has been reported since the 15th WR JCC held on 27.03.2017 and accordingly appropriate action on account of adverse progress may be taken in terms of BPTA/Regulations.
21 <sup>st</sup>	28.9.2018	LANCO – Champa PS 400kV D/c (Quad) line - Foundation Completed: 119 out of 144 Erection Completed: 108 Stringing – 11.5 Kms)	<p>The promotor and EPC Contractor of the project, LITL was admitted to NCLT in August 2017 for Corporate Insolvency</p> <ul style="list-style-type: none"> <li>• Resolution Process (CIRP) initiated by LITL lenders &amp; presently the project work is stalled at 84%. Project Lenders are taking steps required for restart and completion of works at the earliest.</li> <li>• M/s Lanco Amarkantak Power Ltd. (LAPL) vide e-mail dated 28.09.2018 has once again reiterated that no occasion has arisen for any action (on account of adverse progress) as the progress of work has been suspended due to Corporate Insolvency Resolution Process of the promotor and EPC contractor, Lanco Infratech Ltd. (LITL), the above reasons beyond the control of Lanco Amarkantak Power Ltd. (LAPL). Further, the matter of invocation of BG on 06.08.2018 by PGCIL is sub-judice before CERC.</li> <li>• However, it was observed that the overall project progress of 84% has been reported since the 15th WR JCC held on 27.03.2017 and accordingly appropriate action on account of adverse progress may be taken in terms of BPTA/Regulations.</li> </ul>
22 <sup>nd</sup>	20.12.2018	LANCO – Champa PS 400kV D/c (Quad) line - Foundation Completed: 119 out of 144 Erection Completed: 108 Stringing – 11.5 Kms)	<ul style="list-style-type: none"> <li>• The promotor and EPC Contractor of the project, LITL was admitted to NCLT in August 2017 for Corporate Insolvency Resolution Process (CIRP) initiated by LITL lenders &amp; presently the project work is stalled at 84%. Project Lenders are taking steps required for restart and completion of works at the earliest.</li> <li>• M/s Lanco Amarkantak Power Ltd. (LAPL) vide e-mail dated 28.09.2018 has once again reiterated that no occasion has arisen for any action (on account of adverse progress) as the progress of work has been suspended due to Corporate Insolvency Resolution Process of the promotor and EPC contractor, Lanco Infratech Ltd. (LITL), the above reasons beyond the control of Lanco Amarkantak Power Ltd. (LAPL). Further, the matter of invocation of BG on 06.08.2018 by PGCIL is sub-judice before CERC.</li> <li>• However, it was observed that the overall project progress of 84% has been reported since the 15th WR JCC held on 27.03.2017.</li> <li>• TSA terminated vide letter dtd 28.11.2018 &amp; LTA terminated vide letter dated 13.12.2018 w.e.f. 01.10.2017.</li> </ul>





39. Thus, we observe from the table above that the progress of the Project remained static around 84% since the 15th JCC meeting held on 27.3.2017. In other words, there was no progress of the Project after 27.3.2017 as per the records.

40. We also observe that as per the BPTA, the scheduled COD for Petitioner's generating units were January 2012 and March 2012. The last milestone achievement as submitted by the Petitioner was relating to TG box up which was on 26.11.2016 and 30.4.2015 in respect of Unit-3 and Unit-4 respectively and thereafter no further achievement or completion of any milestone in any of the units has been submitted by the Petitioner.

41. The Petitioner has submitted that under Force Majeure and Change in Law clauses of BPTA and TSA, PGCIL cannot invoke Bank Guarantee. We have perused provisions of BPTA and TSA for Force Majeure and Change in Law and the Notice issued by Petitioner.

42. The relevant Clause 9 of BPTA dated 24.2.2010 regarding Force Majeure is reproduced as under:

*"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 another causes 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/ drawl of power shall be started soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist."*

43. We note that as per Clause 9 of BPTA dated 24.2.2010 notice has to be given by a party within 30 days to the other party.



44. The Petitioner has claimed relief under Article 14 (Force Majeure) of the TSA. Article 14.1 of the TSA provides as under:

“

**14.1 Notification of Force Majeure Event**

*14.4.1 The Affected Party shall give notice to the other Party and the CTU of any event of Force Majeure as soon as practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as practicable after reinstatement of communications, but not later than one (1) working day after such reinstatement*

*Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party and the CTU regular reports on the progress of those remedial measures and such other information as the other Party and the CTU may reasonably request about the Force Majeure.*

*14.4.2 The Affected Party shall give notice to the other Party and the CTU of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.”*

45. We note that under Article 14.1 of the TSA, an affected party shall give notice to the other party and the CTU of any event of Force Majeure as soon as reasonably practicable, but not later than seven days after the date on which the party knew or should have reasonably known of the commencement of the event of Force Majeure. It further provides that such notice shall be a pre-condition to the affected party's entitlement to claim relief under the TSA.



46. The Notice for Force Majeure and Change in Law has been issued by the Petitioner vide letter dated 4.4.2016 only to PGCIL (CTUIL). The Petitioner did not give notice to other party (other DICs and ISTS licensees) as required under Article 14.1 of the TSA.

47. The events claimed under Force Majeure and Change in Law under the subject BPTA and TSA by the Petitioner vide its letter dated 4.4.2016 to PGCIL are as under:

<b>Event</b>	<b>Time-line of the Event</b>	<b>Date of the Event</b>	<b>Nature of Event as claimed by Petitioner - Force Majeure or Change in Law</b>
Change in location of PGCIL pooling station		24.02.2011 & 29.07.2011	Change in Law
Delay in obtaining forest clearance of the transmission line	Date of Application- January 2012 Normal time- 300 days	2013 New Notification dated 13.2.2012	Force Majeure
Delay in possession of land	Application submitted- October 2008 Normal time- 2 years	Actual land possession in March 2013	Not specified whether Force Majeure or Change in Law
Post-award change in specification due to statutory requirements for coal handling plant and ash handling plant	No details provided	No dates provided	Change in Law
Railway siding approval	No details provided	No dates provided	Force Majeure
New MOEF Notification regarding Environment (Protection) Rules, 2015	Effective from 8.12.2015		Force Majeure



48. From the details in the Table under the paragraph 47, we clearly observe that the notice dated 4.4.2016 issued by the Petitioner to PGCIL is much beyond the specified notice period of 7 days in TSA or 30 days in BPTA. The notice was issued on 4.4.2016 whereas the events occurred during 2011 to 2015. Further, the Petitioner did not even issue notice to other parties such as other DICs and ISTS licensees. In addition, in the notice dated 4.4.2016, the Petitioner has not even provided as to when some of the alleged events happened while seeking relief. Since Petitioner did not comply with requirements of issuing notice to CTUIL and other parties within the specified timeline under TSA, we are of the view that the relief under Force Majeure and Change in Law as claimed by the Petitioner under TSA are not admissible.

49. Subsequently, the Petitioner vide its letter dated 30.8.2017 issued a separate notice under BPTA and TSA to PGCIL (and not to any other party) claiming Force Majeure due to unwillingness of the State Discoms to enter into long term PPAs as well as non-availability of any new Case-1 bids. Till date, the Petitioner is unable to execute any long term PPA with Discoms and hence the claim of Force Majeure.

50. We observe that in the said letter dated 30.8.2017, the Petitioner has not even indicated under which Clause of BPTA or TSA it is issuing the notice of Force Majeure. Therefore, we are of the view that the said letter dated 30.8.2017 cannot be treated as a notice for Force Majeure.

51. We also note that the Petitioner has pleaded that NCLT proceedings is a Force Majeure event. However, the Petitioner has not issued any notice under the provisions of



BPTA or TSA in this regard, and hence the claim of the Petitioner seeking this event as Force majeure is not sustainable.

52. With regard to applicability of Clause 9 of BPTA, the Commission vide Order dated 5.2.2020 in Petition No. 303/MP/2015 and Petition No. 3/MP/2015 has observed as under:

*“24....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.....”*

53. We observe that in the instant petition, the Petitioner has not been able to declare COD and complete the work. Therefore, as noted in the Order dated 5.2.2020 in Petition No. 303/MP/2015 and Petition No. 3/MP/2015, Clause 9 is not applicable to the Petitioner's case.

54. Therefore, we observe that as per the provisions of BPTA, PGCIL assessed progress of the project of the Petitioner during coordination meeting and noted that there was no progress of the project after 27.3.2017 and after waiting for more than a year, proceeded to encash the Bank Guarantee vide its letter dated 27.6.2018 . We are of the view that PGCIL was well within its right to invoke the Bank Guarantee in terms of the BPTA Agreement.

55. The Commission in its Order dated 3.12.2018 in Petition No. 242/MP/2017 with IA No.80/2017 had observed as under:

*“16. The settled legal position is that the BG is an independent contract between the bank and beneficiary and is not dependent on the dispute between the parties, in case of the breach. In this context, the judgment of the Hon'ble Supreme Court in the case of Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd & Anr [(1996) 5 SCC 450] is relevant:*



*“4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was and the beneficiary. Unless fraud or special equity exists, is pleaded and prime facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the Works undertaken in furtherance thereof. The Bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.*

*It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of the bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power cannot interfere with enforcement of bank guarantee/ letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief...”*

17. The only exception to encashment of BG is where very foundation of BG is violated by fraud and when it would result in irretrievable harm or injustice to one of the parties concerned. In this connection, the Hon`ble Supreme Court in the case of U.P. State Sugar Corporation vs Sumac International Limited [AIR 1997 SC 1644 (1997) 1 SCC 568] has held as under:

*“12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where*



*allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.”*

18. *Since, there is neither any fraud nor special equity in favour of the Petitioner which would require interference in the encashment of BG. The Petitioner has unconditionally agreed in the BPTA that in case of adverse progress, the BG shall be encashed by PGCIL. The Commission in the order dated 31.10.2017 in Petition No. 69/MP/2014 has come to the conclusion that the Petitioner cannot be granted any relief from its liability for payment of transmission charges under clause 9 of the BPTA. Since, PGCIL has encashed the BG for adverse progress of the generating station, we do not find any infirmity or illegality in the action of PGCIL for invocation of BG.”*

56. In light of above observations of the Commission read with the terms of BPTA and considering the adverse progress of the generating Unit 3 & Unit 4 of the Petitioner as assessed during various JCC meetings including the status submitted by the Petitioner vide affidavit dated 21.10.2021, we do not find any fraudulent and illegal action on part of PGCIL in invocation of the bank guarantee of the Petitioner in question.

57. The Issue No.1 and the Petitioner's prayer (a) and prayer (b) are answered accordingly.

58. The Petitioner has claimed relief on account of non-completion of terminating bays of dedicated line of the Petitioner by Powergrid. We observe that construction of 2 number of bays along with dedicated line is in the scope of the Petitioner and the Petitioner and PGCIL have entered into an Agreement dated 20.12.2010 wherein the Petitioner has agreed to obtain consultancy services from PGCIL for turnkey execution of 2 numbers of 400 kV bays at new 765/400 kV Champa Pooling Station of PGCIL. We are of the view that this is a mutual and bilateral commercial agreement between the Petitioner and PGCIL and it does



not flow from the BPTA under which the BG has been encashed. The PGCIL here acts as a contractor to the Petitioner and any delay in the performance or non-performance of PGCIL as the contractor has to be settled between Petitioner and PGCIL.

**Issue No. 2: Whether the termination of TSA dated 6.8.2012 and revocation of 858 MW LTA granted to the Petitioner, vide PGCIL letter dated 28.11.2018 and dated 13.12.2018 respectively are as per Agreement and/or Regulations?**

59. The Petitioner has submitted that PGCIL vide letter dated 28.11.2018 unilaterally and illegally terminated the TSA and vide letter dated 13.12.2018 revoked the 858 MW LTOA granted to the Petitioner.

60. The Petitioner has submitted that in response to the aforesaid termination, the Petitioner vide its communication dated 13.12.2018, inter-alia, brought to the Respondent No. 1 PGCIL's notice of its earlier correspondences and Minutes of Meetings of the joint Co-ordination committee, wherein it had been brought out and acknowledged that reasons for delay in the project works were beyond the control of the Petitioner, Lanco Amarkantak Power Limited. The Petitioner has further submitted that vide its response dated 13.12.2018, it also brought to the Respondent No. 1 PGCIL's notice of the High Level Empowered Committee's (HLEC) [constituted by the Government of India] Report of November 2018, wherein it has been recommended (to the DISCOMS, CIL, PGCIL, Ministry of Environment and Forests, and appropriate Government) not to cancel PPA, FSA, transmission connectivity, EC/FC and other approvals of Stressed Thermal Power Projects, which amongst others, includes the Project of the Petitioner also. The Petitioner has also submitted that it also apprised the Respondent No. 1 PGCIL of the fact that the disputes concerning the very same project and the same set of facts & circumstances were already *sub-judice* before this Commission under the instant petition and as such, when the matter is *sub-judice*

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the purported action of termination of the TSA by Respondent No. 1 PGCIL was wholly erroneous and illegal.

61. The Petitioner has submitted that vide its letter dated 07.01.2019, it requested Respondent No. 1 PGCIL to withdraw the revocation of the LTA as well as the termination of the TSA stating that the generating station and the dedicated transmission line was in advance stage of construction, with the overall progress of the generating station being 84% and that of the dedicated transmission line being around 70%. The Petitioner has submitted that as such, there was no default on the part of the Petitioner in terms of the BPTA, as the BPTA provides that when any event or circumstance is beyond the control of any party to the contract and prevents a party from carrying out the terms of the agreement, that would constitute a force majeure event, for which the said party would not be liable for any claim of loss or damages. The Petitioner has submitted that such being the admitted position, no default could be attributed on the part of the Petitioner and therefore, the revocation of LTOA and termination of TSA is wholly arbitrary, illegal and fraudulent and merits for being set aside.

62. The Respondent No.1 PGCIL has submitted that as per BPTA, each LTTC shall pay the applicable transmission charges from date of commissioning of the respective transmission assets which would not be prior to scheduled commissioning date of generating stations. The augmentation of transmission system for evacuation of power from the Petitioner's generation project was completed by PGCIL in September 2017 with the commissioning of the last element of HCPTC-V Corridor i.e. Champa-Kurukshetra +/- 800 kV, 3000MW HVDC Bipole-I and the associated LTAs were operationalized w.e.f 1.10.2017.



PGCIL has submitted that the Petitioner along with other IPPs (Independent Power Producers) were updated and informed regarding the commissioning status of all the transmission strengthening system built by PGCIL through various JCC meetings. PGCIL vide letters dated 4.7.2017, dated 23.8.2017 and dated 12.9.2017 requested the Petitioner for opening of LC for 858 MW LTA. However, the Petitioner did not open the LC.

63. PGCIL has submitted that vide letter dated 28.11.2018 the TSA signed with the Petitioner was terminated on account of non-opening of the required LC. Accordingly, the Petitioner became ineligible from transacting power through the ISTS lines. Further, the Petitioner had failed to discharge its duties towards establishment of its generation project and coordination with Respondent No.1 regarding commissioning of the project from time to time. Failure in construction of generating station and dedicated transmission system or making an exit or abandoning or having adverse progress of the generation project becomes a default on part of the generation project in terms of the BPTA. Accordingly, vide letter dated 13.12.2018 PGCIL revoked the LTA granted to the Petitioner w.e.f. 1.10.2017 along with the liability to pay the attendant relinquishment charges.

64. We have considered the submissions of Petitioner and the Respondents. We have perused the letter dated 28.11.2018 of PGCIL vide which PGCIL terminated the TSA dated 6.8.2012 on account of non-opening of the required LC. The relevant part of the aforesaid letter is reproduced as under:

“

1. *M/s Lanco Amarkantak Power Limited (LAPL) had signed Bulk Power Transmission Agreement dated 24<sup>th</sup> February 2010 with CTU for Long Term Access. Further, LAPL had also signed Transmission Service Agreement (TSA) dated 06.08.2012.*

2. *As per Bulk Power Transmission Agreement, LAPL were required to open Letter of Credit (LC) of requisite amount. As per Clause 3.6 of Billing, Collection and Disbursement (BCD)*



*Procedure approved under CERC Sharing Regulations, opening of Letter of Credit is mandatory requirement. Non-opening of requisite LC is an event of default under clause 16.2 of the Transmission Service Agreement (TSA).*

*3. Vide letter ref. no. C/Commr/LTA:858/Lanco Amarkantak/LC/2017 dated 04.07.2017 and subsequent reminders dated 23.08.2017 and 12.09.2017, Lanco Amarkantak Power Limited were requested to open LC which it has not opened till date. In addition to this, as per minutes of various JCC meetings, LAPL has yet to commission its generation project and work on the same is stalled for nearly two years.*

*4. As Lanco Amarkantak Power Limited has defaulted in terms of CERC Regulations and Procedures, BPTA dated 24.02.2010 and Transmission Service Agreement dated 06 08.2012 therefore, LAPL cease to be a DIC from effective date of Operationalisation of LTA for which BPTA was signed on 24.02.2010 and it shall be ineligible to inject power into ISTS through any form of access including STOA, MTOA and LTA, in line with direction issued by CERC in its order dated 08th March, 2018 in Petition no. 229/RC/2015. This TSA Termination is without prejudice to our rights to recover any and all outstanding dues payable by M/s Lanco Amarkantak Power Ltd as per CERC Regulations and Procedures towards Bulk Power Transmission Agreement Dated 24.02.2010 and Transmission Service Agreement dated 06.08.2012 signed by Lanco Amarkantak Power Ltd.”*

65. We have perused TSA dated 6.8.2012. Clause 16.2 of the TSA provides as under:

*“16.2 Event of Default of a DIC*

*16.2.1 The occurrence and continuation of any of the following events shall constitute a DIC Event of Default, unless any such DIC Event of Default occurs as a result of the ISTS Licensee Event of Default or a Force Majeure Event:*

*16.2.1.1 A DIC fails to comply with the prevailing regulations including the Indian Electricity Grid Code or is in material breach of this Agreement and such material breach is not rectified by the said DIC within thirty (30) days of receipt of notice in this regard from the concerned ISTS Licensee or the CTU;*

*.....”*

66. Thus, as per the provisions of the TSA, a DIC shall be a defaulter with respect to TSA if the said DIC fails to comply with the prevailing regulations or is in material breach of the said Agreement.

67. Further, Clause 16.4 of TSA dated 6.8.2012 provides as under:

*“16.4 Cessation of DIC being Party to this Agreement*

*16.4.4 Following the expiry of the Consultation Period, unless the CTU and the concerned DIC shall have otherwise agreed to the contrary or the circumstances giving rise to such*



*notice as mentioned in Article 16.4.1 shall have ceased to exist or shall have been remedied, the concerned DIC shall cease to be a Party to this Agreement and the CTU shall issue a written notice ("Termination Notice") of thirty (30) days to this effect with a copy to the Commission and Implementing Agency. Unless the Lenders of the concerned ISTS Licensee have exercised their rights of substitution as per the provisions of Article 17.3 of this Agreement and the Commission has agreed to such substitution rights of the Lenders or otherwise directed by the Commission, the concerned DIC shall cease to be a Party to this Agreement on the date of expiry of the Termination Notice"*

68. Thus, as per the provisions of the TSA, upon occurrence of a DIC event of default under Article 16.2, TSA may be terminated by CTUIL under Clause 16.4 of TSA. Unless the default has ceased to exist or has been remedied, the concerned DIC shall cease to be a Party to this Agreement. CTUIL shall issue a "Termination Notice" to this effect to the concerned DIC with a copy to the Commission and Implementing Agency. The concerned DIC shall cease to be a Party to the TSA on the date of the expiry of the "Termination Notice".

69. We have perused Order dated 8.3.2018 in Petition No. 229/RC/2015 which provided as follows:

***"Issue No. 3: Whether any guidelines and directions are required to be issued in regard to the procedure to be followed in case of default by the DICs/LTA customers of their obligations in regard to payment/compliance with Payment Security Mechanism and other obligations, for cancellation of Long Term Access, encashment of Construction phase Bank Guarantee and payment of relinquishment charges?"***

45. *The Petitioner has prayed to issue guidelines and directions with regard to the procedure to be followed in case of default by the DIC/LTA Customers in discharge of their obligations in regard to payment/compliance with Payment Security Mechanism and other obligations, cancellation of Long Term Access in the event of default, encashment of Construction phase Bank Guarantee and payment of relinquishment charges.*

46. *Clause 16 of the Transmission Service Agreement provides for Events of Default on the part of DICs and the consequence thereof as under:*

*"16.2 Event of Default of a DIC*

*16.2.1 The occurrence and continuation of any of the following events*



shall constitute a DIC Event of Default, unless any such DIC Event of Default occurs as a result of the ISTS Licensee Event of Default or a Force Majeure Event:

16.2.1.1 A DIC fails to comply with the prevailing regulations including the Indian Electricity Grid Code or is in material breach of this Agreement and such material breach is not rectified by the said DIC within thirty (30) days of receipt of notice in this regard from the concerned ISTS Licensee or the CTU;

16.2.1.2 Any of the representations and warranties made by the DIC in Article 19.1.1 of this Agreement being found to be untrue or inaccurate; or

16.2.1.3 If,

(a) a DIC becomes voluntarily or involuntarily the subject of any bankruptcy or insolvency or winding up proceedings and such proceedings remain uncontested for a period of thirty (30) days; or

(b) any winding up or bankruptcy or insolvency order is passed against a DIC; or

(c) a DIC goes into liquidation or dissolution or a receiver or any similar officer is appointed over all or substantially all of its assets or official liquidator is appointed to manage its affairs, pursuant to Law,

Provided that it shall not constitute a DIC Event of Default where such dissolution or liquidation of such DIC is for the purpose of a merger consolidation or reorganization and where the resulting entity has the financial standing to perform its obligations under this Agreement, similar to such DIC and expressly assumes all obligations of such DIC under this Agreement and is in a position to perform them.”

Clause 16.4 of the Transmission Service Agreement provides as under:

“16.4 Cessation of DIC being Party to this Agreement

16.4.1 Upon the occurrence and continuance of a DIC Event of Default under Article 16.2, the CTU may serve notice on the concerned DIC, with a copy to the CERC, which shall specify in reasonable detail, the circumstances giving rise to such Notice.

16.4.2 Following the issue of such notice, as mentioned in Article 16.4.1, the Consultation Period shall apply and CTU and the concerned DIC discuss as to what steps shall be taken with a view to mitigate the consequences of the relevant Event of Default having regard to all the circumstances.

16.4.3 During the Consultation Period, the DIC shall, save as otherwise provided in this Agreement, continue to perform its obligations under this Agreement.

16.4.4 Following the expiry of the Consultation Period, unless the CTU and the concerned DIC shall have otherwise agreed to the contrary or the circumstances giving rise to such notice as mentioned in Article 16.4.1 shall have ceased to exist or shall have been remedied, the concerned DIC shall cease to be a Party to this Agreement and the CTU shall issue a



*written notice ("Termination Notice") of thirty (30) days to this effect with a copy to the Commission and Implementing Agency. The concerned DIC shall cease to be a Party to this Agreement on the date of expiry of the Termination Notice."*

*As per the above provisions, if a DIC fails to comply with the provisions of the regulations or is in material breach of the TSA which is not rectified within 30 days of the receipt of notice in this regard, it shall constitute a DIC event of defaults. We have already held that maintenance of payment security mechanism is a statutory requirement under Regulation 12 (8) of the Sharing Regulations and BCD Procedure and TSA. Therefore, non-maintenance of LC is not only non-compliance of the provisions of the Sharing Regulations and BCD Procedure but also breach of the terms of the TSA. On occurrence of the DIC's event of default, CTU is required to take necessary action in terms of clause 16.4 of the TSA. At the expiry of termination notice, the defaulting DIC shall cease to be party to the TSA. After the termination of TSA, the concerned DIC shall be ineligible to inject power into ISTS."*

70. In the Order dated 8.3.2018 in Petition No. 229/RC/2015, it is clearly held by the Commission that non-maintenance of LC is an event of default.

71. We observe that PGCIL/CTUIL had issued several notices and given sufficient opportunities to the Petitioner to remedy the default of non-opening of Letter of Credit of the requisite amount. The Petitioner has relied on various events citing them to be beyond its control for not opening the LC, while at the same time disputing the termination of TSA. We have already held under Issue No. 1 that the said events cannot be considered to be Force Majeure events. Since the Petitioner failed to remedy the default, we are of the view that termination of TSA by PGCIL has been done as per the provisions of the Agreement and Regulations.

72. We have also perused the letter dated 13.12.2018 of PGCIL vide which PGCIL revoked the LTA of the Petitioner. The relevant part of the letter dated 13.12.2018 is extracted as under:



“

- *After receipt of minutes of 17<sup>th</sup> JCC Meetings of WR held on 20.09.2017, M/s LAPL vide letter dated 13.11.2017 clarified their status that "presently work is stalled at their generation project as Lanco Infratech Ltd. (LITL) who is the promotor and EPC contractor of the project, has gone into National Company Law Tribunal (NCLT) for corporate insolvency resolution based on progress initiated by its lenders", further, M/s LAPL vide letter and e-mail dated 28.09.2018 informed that the progress of work has been suspended due to Corporate Insolvency Resolution Process of the promotor and EPC contractor. However, it was observed that the overall progress of the project remains as 84% since the 15<sup>th</sup> WR JCC held on 27.03,2017.*
- *The subject LTOA was granted to M/s LAPL with High Capacity Power Transmission Corridor - V system which inter-alia includes Champa - Kurukshetra ± 800 kV, 3000 MW HVDC Bipole. As per the directions of CERC in Petition Nos. 229/RC/2015 & 12/SM/2017, the date of effectiveness of the subject LTOA is 01.10.2017 based upon commissioning of the above HVDC link,*
- *M/s LAPL has already been intimated regarding termination of Transmission Service Agreement due to non-compliance of CERC Regulations and Procedures vide letter dated 28.11.2018 [Ref. (iii)] as per the reasons and details stated in the above letter.*

*From the above, it is observed that M/s LAPL has failed in its duties towards establishment of its generation project and coordination with CTU regarding commissioning of the project from time to time. It is to mention that failure in construction of generating station / dedicated transmission system or making an exit or abandoning or falling in adverse progress, is a default on the part of generation project in terms of BPTA.*

*Keeping above in view, the LTOA grant is revoked w.e.f. 01.10.2017. Since, the TSA termination/DIC-Status termination and LTOA revocation has been compelled by LAPL's own defaults and non-compliances, therefore, revocation shall be accompanied by liability for payment of applicable relinquishment charges as may be determined by CERC in light of Petition No. 92/MP/2015. With this, the BPTA dated 24.02.2010 also stands terminated qua LAPL. The LTOA revocation and termination of BPTA shall be without prejudice to the rights, contentions, receivables, etc. of POWERGRID under the LTA grant & BPTA.”*

73. We observe that there is no provision under the Connectivity Regulations or BPTA to revoke the LTA. Neither PGCIL/CTUIL has specified under which regulations or provision of Agreement, it has revoked the LTA. We observe that PGCIL/CTUIL in the letter dated 13.12.2018 has relied on cessation of the Petitioner DIC to be a party to the TSA and termination of TSA of the Petitioner as the ground to revoke the LTA of the Petitioner.



74. We do recognise that there is no provision under the Connectivity Regulations or BPTA to revoke the LTA. However, once a DIC ceases to be a party to the TSA and the TSA stands terminated, continuation of the LTA of the DIC does not seem to be of any value as the DIC becomes ineligible to inject power into ISTS. Therefore, the revocation of the LTA is only a natural consequence of the termination of the TSA.

75. Accordingly, the Issue No.2 is decided against the Petitioner.

76. The Petitioner has raised the ground of Corporate Insolvency Resolution Process (CIRP) to seek relief. We observe that all the three actions viz. invocation of BG (27.6.2018), termination of TSA (28.11.2018) and revocation of LTA (13.12.2018) were taken by the CTUIL prior to the admittance of the Petitioner Company to the Corporate Insolvency Resolution Process (CIRP) vide order dated 5.9.2019 of NCLT, Hyderabad. Hence we do not find any merit in contention of Petitioner.

77. We observe that LTA has been revoked vide letter dated 13.12.2018 and it has been stated by CTU that LTA is revoked with effect from 1.10.2017. We are of the view that revocation cannot happen from a retrospective date as the TSA does not provide for such retrospective revocation. Accordingly, we direct that the LTA revocation shall be effective from 13.12.2018. The Petitioner shall be liable for all liabilities in terms of Regulations and Orders of the Commission including for the period prior to 13.12.2018. The Bank Guarantee which has been encashed by CTUIL shall be adjusted against the liabilities of Petitioner raised by the CTUIL.





78. This order disposes of Petition No. 202/MP/2018 in terms of the above findings and discussions.

Sd/  
**(P. K. Singh)**  
Member

Sd/  
**(Arun Goyal)**  
Member

Sd/  
**(I. S. Jha)**  
Member

Sd/  
**(P. K. Pujari)**  
Chairperson

