

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 261/MP/2020**

**Coram:**

**Shri I. S. Jha, Member  
Shri Arun Goyal, Member  
Shri P. K. Singh, Member**

**Date of Order: 30<sup>th</sup> December 2022**

**IN THE MATTER OF:**

Petition seeking release of Bank Guarantee issued in favour of Respondent No. 1 owing to frustration of the Long Term Access Agreement dated 19.10.2012 between the Petitioner No. 1 and Respondent No. 1 in exercise of powers under Regulation 33A of the CERC (Grant of Connectivity, Long-Term Access, And Medium-Term Open Access In Inter-State Transmission And Related Matters) Regulations, 2009.

**AND IN THE MATTER OF:**

1. M/s Dirang Energy Private Ltd.  
Regd. Office: Patel Engineering Compound,  
Patel Estate Road, Jogeshwari (West),  
Mumbai -400102

.....**Petitioner No. 1**

2. M/s Patel Engineering Limited,  
Regd. Office: Patel Estate Road, Jogeshwari (W),  
Mumbai – 400 102.  
Maharashtra

.....**Petitioner No. 2**

**Versus**

1. Power Grid Corporation of India Ltd. (PGCIL),  
Regd. Office: B-9, Qutub Institutional Area,  
Katwaria Saria,  
New Delhi- 110016

....**Respondent No. 1**

2. IDBI Bank of India  
Andheri Large Corporate Branch,  
M.D.I. Building, 1st Floor,  
28, S.V. Road,  
Andheri (W), Mumbai - 400058  
.....**Respondent No. 2**
3. Central Transmission Utility of India Limited (CTUIL)  
Plot #2, Sector- 29, Gurgaon- 122001  
.....**Respondent No. 3**

**Parties Present:** Shri Sushil Verma, Advocate, SNPCL  
Shri Gopal Jain, Sr. Advocate, DEL  
Ms. Namrata Saraogi, Advocate, DEL  
Ms. Sayan Ray, Advocate, DEL  
Shri Samrat Sengupta, Advocate, DEL  
Shri Sourav Dutta, Advocate, DEL  
Ms. Suparna Srivastava, Advocate, CTUIL  
Ms. Soumya Singh, Advocate, CTUIL  
Shri Tushar Mathur, CTUIL  
Shri Rajesh Kumar, CTUIL  
Shri Jyoti Prasad, PGCIL  
Shri Manish Ranjan Keshari, CTUIL  
Shri Swapnil Verma, CTUIL  
Shri Siddarth Sharma, CTUIL  
Shri Ranjeet Singh Rajput, CTUIL  
Ms. Priyanshi Jadiya, CTUIL

### **ORDER**

The Petitioner No.1, Dirang Energy Private Ltd., has filed the instant Petition seeking release of Bank Guarantee issued in favour of Respondent No. 1, Power Grid Corporation of India Limited (PGCIL) owing to frustration of the Long Term Access Agreement (LTAA) dated 19.10.2012 executed with PGCIL in exercise of power conferred under Regulation 33A of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access, and Medium-Term Open Access in Inter-State Transmission System and related matters) Regulations, 2009 ( hereinafter '2009 Connectivity Regulations').

2. The Petitioner has made following prayers in this petition:

- a. *Release the Bank Guarantee No. 0119IPEBG120231 dated 11.10.2012 for a sum of Rs. 8.25 Cr. issued by the Respondent No. 2 in favour of Respondent No. 1, and*
- b. *Restrain and injunct the Respondent No. 1 from invoking and/or encashing the aforesaid Bank Guarantee No. 0119IPEBG120231 pending adjudication of this Petition, and*
- c. *Pass any order or such other orders as this Hon'ble Commission may deem fit in the interests of justice.*

**Submissions of the Petitioner No. 1:**

3. The Petitioner No. 1 has mainly submitted as under:

- a) The Petitioner No. 2, Patel Engineering Limited, executed a Memorandum of Agreement (MoA) dated 18.5.2007 read with the Amended MOA dated 05.08.2011, with the Government of Arunachal Pradesh for development of the Gongri Hydro Electric Project (144 MW) on Build, Own, Operate and Transfer (BOOT) basis.
- b) As per the terms of the MoA, Petitioner No. 1, a SPV of Petitioner No. 2, applied to PGCIL for grant of Long-Term Access and consequently entered into a Long Term Access Agreement (LTAA) for 165 MW on 19.10.2012.
- c) Petitioner No. 1 was tasked with the building and maintenance of two transmission lines, viz. a 220 KV line from Gongri HEP to Dinchang Pooling Station (a distance of 22 km) and from Saskang Rong to Gongri (132 KV line) along with line bays at both ends.
- d) In compliance of the LTAA, a Bank Guarantee (BG) of Rs. 8.25 crore was furnished in favour of Respondent No. 1 with Respondent No. 2 being the guarantor.
- e) However, on account of various reasons beyond the control of the Petitioners, execution work of the Project could not be achieved.
- f) Government of Arunachal Pradesh vide its termination Notice dated 01.03.2018 terminated the MoA. The termination of the MoA was challenged by the Petitioner No. 2 before the Gauwhati High Court in WP(C) No. 207 of 2018. The Hon'ble High Court issued an Order of status-quo dated 26.6.2018

in respect of the termination notice. It is submitted that this interim order is still subsisting as of today.

- g) Owing to negligible progress of the generating hydroelectric projects, it requested in the 1st Joint Co-ordination Committee conducted by Respondent No. 1 on 20.12.2018 to explore the option of relinquishment considering that the LTAA had now been effectively rendered frustrated. After that the representative of the Petitioner made a similar plea during 2nd Joint Co-ordination Committee meeting held on 25.3.2019. However, Committee recommended the encashing the Bank Guarantee of Rs. 8.25 crore in addition to revocation of the LTAA.
- h) The invocation of Bank Guarantee would be unreasonable and arbitrary considering that the LTAA has been effectively frustrated as per Section 56 of the Indian Contract Act, 1872 and the termination of the MoA has effectively nullified the very essence of the LTAA.
- i) Clause 1.0(d) of the LT Agreement categorically states that the Bank Guarantee is liable to be encashed only "*in case of adverse progress of work under the scope of the LTC, assessed during Joint Co-ordination Meeting*". It is a matter of record that the reasons owing to which the project has not operationalized are not attributable to the Petitioners and the Bank Guarantee needs to be returned forthwith.
- j) This Court has, in the past, granted similar reliefs to an aggrieved party in exercise of its powers under Regulation 33A, in its Order dated 07.1.2020 in Petition No. 159/MP/2019 in the matter of "*Toramba Renewable Energy India Pvt. Ltd. vs. PGCIL and Ors.*" and the present petition we are seeking substantially identical relief.

**Submissions of the Respondent No. 1:**

- 4. The Respondent No. 1 submitted as under:
  - a) As per the prayer clause in the present Petition, the Petitioners are only seeking refund of the bank guarantee of Rs. 8.25 Cr. There is no relief sought with respect to the alleged frustration of the LTA Agreement on account of the stated force majeure events nor have the Petitioners claimed any reliefs qua

the relinquishment of LTA rights under the applicable Regulations. As such, the claims of the Petitioners as made in the present Petition are liable to be viewed in the limited context of the prayer for return of the subject bank guarantee and not beyond.

- b) The reliefs as claimed for by the Petitioners in the present Petition are not admissible. However, considering that the associated transmission system identified for the Petitioners' project has not been taken up for implementation and has subsequently been denotified, the Commission may pass such directions as it may deem fit and appropriate for the treatment of the subject bank guarantee by Respondent No.1
- c) Progress of the Gongri HEP was deliberated in various JCC Meetings of the North-Eastern Region where the status of the project of Petitioner No.1 was discussed.
  - i. During 1st JCC Meeting held on 20.12.2018, Petitioner No.1 informed that the project work was presently stalled due to funds constraint. Petitioner was informed that under adverse progress, LTA of Petitioner No.1 could be revoked along with liability for payment of relinquishment charges.
  - ii. During 2nd JCC Meeting held on 25.3.2019, Petitioner No.1 maintained its position that the project work was stalled due to fund constraint. Respondent No.1 informed that owing to negligible progress of HEPs in the region, establishment of 400/220 kV 7x166 MVA pooling station (GIS) at Dinchang and Dinchang-Rangia/Rowta PP 400 kV D/c line had been de-notified by the CEA in the 3rd Meeting of Empowered Committee on Transmission held on 21.12.2018.
  - iii. In 3rd JCC Meeting held on 25.6.2019, Petitioner No.1 was once again informed that under adverse progress, its LTA could be revoked along with liability for payment of relinquishment charges.
  - iv. Petitioner No.1 did not attend the 4th JCC Meeting held on 26.9.2019 and reiterated view of financial stress being faced by it during 5th JCC Meeting held on 23.12.2019.

- v. During 6<sup>th</sup> JCC Meeting held on 29.6.2020, Petitioner No.1 informed that it approached the Commission by filing the Petition No.261/MP/2020 seeking release of the said bank guarantee.
- d) During the entire period, Petitioner No.1 at no point in time inform Respondent No. 2 of any “force majeure” occurrences as are now being pleaded by it in the present Petition nor did it convey any intention of abandoning the project and/or relinquishing the LTA rights. Instead, the Petitioners chose to directly approach the Commission seeking return of the subject bank guarantee by pleading frustration of the LTA Agreement on grounds of force majeure occurrences.
- e) The reliance placed by the Petitioners on the Order dated 7.1.2020 in Petition No.159/MP/2019 passed by this Commission is misplaced as the facts the circumstances of the present case are completely in contrast with the facts of the Petitioners therein.

#### **Hearing dated 6.8.2020**

5. The matter was heard on 6.8.2020 through video conferencing and notices were issued to the Respondents to file their reply. Reply to the Petition has been filed by the Respondent, PGCIL and the Petitioner has filed rejoinder. During the course of hearing, learned senior counsel for the Petitioners submitted that during the pendency of the present Petition, PGCIL may be restrained from invoking/ encashing the Bank Guarantee furnished by the Petitioners. Respondent, PGCIL submitted that the entire transmission system envisaged for evacuating the power from Hydro Electric Projects located has been de-notified. After hearing the learned senior counsel for the Petitioner, the Commission directed the Respondent, PGCIL not to encash the Bank Guarantee furnished by the Petitioners till the next date of hearing and the Petitioners were directed to keep the Bank Guarantee valid.

The Petitioner vide ROP for hearing dated 6.8.2020 was directed to submit information regarding *latest status of Gongri Hydro Electric Project and dedicated transmission lines i.e. Saskang-Rong-Gongri (132 kV) TL and Gongri-Dinchang (220 kV) TL under the scope of the Petitioner as per LTAA; and*

*Whether any request has been made to PGCIL for relinquishment of LTA granted?*

Further, the Respondent vide ROP for hearing dated 6.8.2020 was also directed to submit information regarding *current status of Associated Transmission System identified in LTAA required for transmission of power from the Petitioner's project; and whether Associated Transmission System has been awarded and if so, whether any investment has been made thereon?*

6. The Petitioner vide affidavit dated 27.8.2020 has submitted as under:

- a) Project is stalled and no progress is made on site since 20.10.2016 due to various reasons. Time period from 8.11.2013 to 19.5.2014 was lost owing to the State Pollution Control Board refusing Consent to Establish till it was finally granted in May 2014. PPAs could not be executed owing to adverse market conditions and uncertainty over the pooling station at Dinchang. The activities pertaining to Saskang-Rong-Gongri (132 kV) TL was deferred by 2 years due to delay in getting major clearances of Saskang HEP. Regarding Gongri- Dinchang (220 kV) TL, it was submitted that a consultant was engaged to conduct detailed topographical survey. Location of towers was finalized and district administration was approached for initiating the process for according RoW for the TL. However, with uncertainty surrounding the erection of the Dinchang Pooling Station and for various reasons the district administration failed to cooperate in a timely manner leading to cost escalation and delays.
- b) The Commission may permit the Petitioners to relinquish the LTAA without payment of any relinquishment charges, with simultaneous return of the BG.

7. The Respondent No.1 has submitted as under:

- a) "Transmission system for Phase-1 generation projects in Arunachal Pradesh" was reviewed in various Meetings of National Committee on Transmission and Empowered Committee on Transmission conducted by the CEA based upon the progress of the HEPs. Owing to no progress of

the HEPs, the Ministry of Power, Government of India vide Gazette S.O.639 (E) dated 1.2.2019 de-notified the ISTS scheme “Transmission system for Phase-I generation projects in Arunachal Pradesh”.

- b) However, considering that the associated transmission system identified for the Petitioners’ project has not been taken up for implementation and has subsequently been denotified, this Commission may pass such directions as it may deem fit and appropriate for the treatment of the subject bank guarantee by Respondent No.1.

**Rejoinder by Petitioners:**

8. The Petitioners in its rejoinder dated 16.10.2020 have mainly submitted as under:

- a) The Petitioner alone cannot be penalized (through invocation of BG) as the Respondent No. 1 also failed to do its bit to ensure the Common Transmission System was implemented in time. As per LTAA dated 19.10.2012, Petitioners were responsible only for establishment of Gongri HEP and 2 Transmission Lines i.e. 132 kV D/C line along with associated line bays at both ends from Saskang Rong – Gongri and a 220 kv D/C line along with associated line bays at both ends from Gongri- Dinchang Pooling Point as well as a 31.5 MVar Bus Reactor at Gongri generation switchyard. However, the Common Transmission System included the establishment of a 400/220 kV Pooling Station at Dinchang to be implemented by the Respondent No. 1 through TBCB.
- b) BG was to serve as a security against the Transmission System which was to Built, Owned, Operated by ISTS licensee(s) selected by Respondent No.1 through TBCB. However, No endeavors have been made till date by Respondent No. 1 seek bids and invite tenders etc.
- c) The Respondent No. 1 has not incurred any expense in the creation of any transmission asset as mandated under Annexure- 3 of the LTAA. No losses have been suffered by the Respondent No. 1 on account of the Petitioners. Consequently, the Commission may direct the Respondent No. 1 to return the BG to the Petitioners.

- d) The impediments faced by the Petitioners in respect of establishment of Gongri HEP and two associated Transmission Lines are in the nature of Force Majeure events leading to frustration of LTAA.
- e) The concept of relinquishment of LTA is inapplicable in a case like this where grant of LTA did not materialise. The provisions of Regulation 18 of the 2009 Connectivity Regulations regarding relinquishment of LTA by a LTC are only applicable in a case where LTA has been granted to an LTTC but has remained unutilized or under-utilized for some reason and the said LTC wishes to relinquish its LTA.
- f) In present case, the most equitable solution would be for both parties to follow the principle of restitution i.e. BG is returned to the Petitioners simultaneously with the Petitioners exiting the LTA Agreement.

#### **Hearing dated 22.8.2022**

9. The matter was further heard on 22.8.2022. The following was recorded in ROP:

*“3. Learned counsel for the Respondent, PGCIL submitted that the present Petition involves the question of treatment of Bank Guarantee furnished under the LTA agreement in the event when LTA has not been operationalized and the transmission system envisaged for evacuation of power from the above Hydro Electric Projects has already been de-notified.*

*4. The Commission observed that the issue of the treatment of Bank Guarantee in the event when the project has not come up and at the same time PGCIL/CTUIL has not incurred any expenditure towards transmission system for evacuation of power from such project, has already been considered by the Commission in the previous orders. Accordingly, the Commission directed CTUIL to convene a meeting with the aforesaid Hydro Electric Projects (Petitioner herein and Dirang Energy Limited) to discuss & resolve the issue involved in terms of the orders of this Commission on the subject matter and the applicable regulatory framework. The Commission also directed the parties that in the event the issue is resolved, the Petitioner and CTUIL may file a joint affidavit to this effect within a month. If the parties are*

*unable to resolve the issue, the Petitioner and CTUIL are at liberty to file their respective comments on affidavit within three weeks”.*

10. The Petitioner vide affidavit dated 20.9.2022 has submitted that in compliance of the directions passed by the Commission, the authorized representatives of the parties participated in a joint meeting held through Video-Conference mode on 02.09.2022. After detailed discussion, the parties herein have reached a mutually acceptable agreement, under which the Respondent No. 1 has agreed to return the Construction Bank Guarantee, being BG No. 0119IPEBG120231 dated 11.10.2012 for an amount of Rs. 8.25 crore to the Petitioner, without deduction of any relinquishment charges or any other charges, given the fact that the associated transmission system never came up on the project site. The detailed discussions and decisions taken during the aforesaid meeting held on 2.9.2022 have been reproduced into a Minutes of Meeting dated 2.9.2022 which is annexed along with the affidavit. Accordingly, the grievance of the Petitioners stand fully redressed, and the Commission may take cognizance of the facts stated in this affidavit and the Minutes of Meeting dated 02.09.2022, and dispose of Petition No. 261/MP/2020 in terms of the same.

11. The Respondent PGCIL vide affidavit dated 13.9.2022 has mainly submitted as follows:

a) In compliance of the directions passed by the Commission, the authorized representatives of the parties to the instant Petition (representatives of M/s Dirang Energy Private Limited, M/s Sew Nafra Power Corporation Limited, North Eastern Regional Power Committee and Respondent No. 1 (Central Transmission Utility of India Limited)) participated in a joint meeting held through Video- Conference mode on 02.09.2022 in good faith to explore the possibility of a resolution of the pending impasse toward their mutual satisfaction. Accordingly, after detailed discussion, the Respondent No. 1 along with the representatives of the parties present in the meeting came to a consensus that as the ISTS transmission system in question has been de notified vide MoP, GOI Gazette Notification dated 01.02.2019, it can be

recommended to the Commission that the CBG's submitted by M/s SNPCL & M/s DEPL can be returned.

### **Hearing dated 22.12.2022**

12. The matter was heard on 22.12.2022 where learned counsel for the Petitioners and the representative of the CTUIL submitted that pursuant to the direction of the Commission vide Record of Proceedings for the hearing dated 22.8.2022, a joint meeting was convened and the parties came to a consensus that since ISTS transmission system in question came to be de-notified by the Ministry of Power, Govt. of India on 1.2.2019, the Commission may direct CTUIL to return of the Construction Bank Guarantees to the Petitioners. It was also submitted that no expenditure had been incurred by either side. Commission reserved the case for Order.

### **Analysis and Decision**

13. We have considered the submissions of the Petitioner and the Respondents. The issue which arises for our consideration is whether Petitioner is entitled for return of Bank Guarantee dated 11.10.2012? The issue hinges around the following facts and circumstances:.
14. The Petitioners executed a MoA dated 14.9.2007 with the Government of Arunachal Pradesh for development of Gongri HEP on BOOT basis and entered into a LTAA on 19.10.2012 with the PGCIL to evacuate power from the Project. The Petitioners issued a bank guarantee of Rs. 8.25 crore to Respondent under the LTAA.
15. On account of adverse progress of HEP, Ministry of Power de notified said transmission scheme vide notification dated 1.2.2019. Government of the Arunachal Pradesh vide its termination notice dated 23.12.2019 terminated the MoA.
16. The Respondents have submitted that the associated transmission system identified for the Petitioners' project has not been taken up for implementation and has subsequently been de-notified.

17. Pursuant to direction of the Commission vide ROP dated 22.8.2022, a joint meeting was held between the authorized representatives of the parties to the instant Petition. In the said meeting, it came to consensus that as the ISTS transmission system in question has been de-notified vide MoP, GOI Gazette Notification dated 1.2.2019, it can be recommended to this Commission that the CBG's submitted by the Petitioner can be returned to the Petitioner. The relevant excerpt of the minutes of the meeting held on 2.9.2022 is reproduced below:

*“3. CTU informed that LTA of 80 MW and 165 MW was granted to M/s Sew Nafra Power Corporation Limited (SNPCL) and M/s Dirang Energy Private Limited (DEPL) respectively with the ISTS system inter alia including 220 kV Dinchang pooling station, 400/220 kV Rangia substation, Dinchang – Rangia 220Kv D/c line and associated 400 kV lines at Rangia. In line with CERC Connectivity Regulations 2009 and amendments thereof, the parties had submitted the Construction Bank Guarantee (CBG) of amount Rs. 4 Cr. by M/s SNPCL & Rs. 8.25 Cr. by M/s DEPL.*

- 4. It was further informed that in the 3rd Meeting of Empowered Committee on Transmission held on 21.12.2018, the entire identified ISTS scheme viz, “Transmission system for Phase-1 generation projects in Arunachal Pradesh” for both the projects was recommended for de-notification on account of adverse progress of both the generation projects, thereafter, Ministry of Power, Govt. of India vide Gazette Notification dated 01.02.2019 de-notified the said transmission scheme. (copy attached at Annexure-III).*
- 5. Counsel of both M/s SNPCL and M/s DEPL, mentioned that in Petition No. 127 of 2012, it has been observed by CERC that in case of no progress in the implementation of the transmission system and based on the report of CTU, the subject transmission could not be executed and therefore CTU was directed to refund the bank guarantees associated with LTA.*
- 6. It was observed by CTU that aspect of non-implementation of the subject transmission system and return of construction phase bank guarantees*

*associated with LTA bears certain similarities in the present case with that of aforesaid Petition No. 127 of 2012.*

- 7. Further, it was also observed that in the context of renewable energy based generators/LTCs also; an Order was passed in Petition No. 159/MP/2020 (Toramba Renewable Energy Private Limited) wherein the return of connectivity bank guarantee (Conn-BG) was related in part to non-expenditure towards implementation of transmission system. However, the said Order had been passed with respect to connectivity bank guarantee (Conn-BG).*
- 8. Representative of M/s SNPCL submitted that no transmission system has been taken up for implementation of ISTS as same has been de-notified. Accordingly, he requested to return their CBG of amount Rs. 4Cr. The representative also submitted that their bank guarantee of Rs. 4 Cr is expiring on 20.09.2022, therefore he requested for early resolution of the matter. CTU informed that it shall coordinate for expeditious issuance of the Minutes of Meeting, after which M/s SNPCL may mention the matter for urgency before CERC. However, it was advised that incase M/s SNPCL's petition could not be listed for directions by or before 20.09.2022, it may extend the bank guarantee for a further period of one (1) month or above, to which M/s SNPCL consented.*
- 9. Representative from M/s DEPL mentioned that as no LTA system under ISTS was taken up and no investment was made on it, therefore he requested to return their CBG of amount Rs. 8.25 Cr without any penalty.*
- 10. NERPC also agreed to the proposal of returning of the CBGs to the respective parties as no expenditure was done for implementation of the transmission system under ISTS.*
- 11. Notwithstanding the aforesaid CERC orders, it was observed by consensus of members present on behalf of NERPC, CTU, SNPCL, DEPL, & Anr. that as the ISTS transmission system in question has been de notified vide MoP, Gol Gazette notification dated 01.02.2019, it can be recommended to CERC that in light of the aforesaid discussion, the CBG submitted by M/s SNPCL (INR 4 Cr.) and M/s DEPL (INR 8.25 Cr) can be returned."*

18. Perusal of minutes of meeting reveals that the parties in the Petition have agreed for return the BG to the Petitioner. We observe that the transmission system associated with LTA of the project has not been taken up and has been de-notified. Further, PGCIL in the said meeting has agreed to return the Bank Guarantee of the Petitioner.

19. Keeping in view that transmission system has not been taken up and as per the consensus that emerged in meeting held on 2.9.2022, we direct PGCIL/CTUIL to return the Bank Guarantee of Rs. 8.25 crore dated 11.10.2012 to the Petitioner within a week of issue of this order.

20. Petition No. 261/MP/2020 is disposed of in terms of the above.

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

Sd/  
**(Arun Goyal)**  
Member

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