

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petitions No. 278/MP/2018  
303/MP/2018  
304/MP/2018  
339/MP/2018**

**Coram:**

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

**Date of Order: 7<sup>th</sup> December 2022**

**Petition No. 278/MP/2018**

**In the matter of:**

Petition under Section 79(1)(b), 79(1)(c) and 79(1)(f) of the Electricity Act, 2003 read with Regulation 32 and the Detailed Procedure as envisaged under the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access, Medium term Open Access in inter-State Transmission and related matters) Regulations, 2009.

Jindal India Thermal Power Limited  
Plot No. 2, Pocket C, 2nd Floor  
Nelson Mandela Road, Vasant Kunj  
New Delhi – 110070

**Petitioner**

**Versus**

Indian Railways  
Office of Chief Electrical Engineer  
South East Central Railways  
1st Floor, "C" Wing, Bilaspur,  
Chhattisgarh – 494 402

Railway Energy Management Company Limited  
Ground Floor, Central Wing, Plot-No.1,  
Sector 29, Gurugram, Harayana

**Respondents**

**Petition No. 303/MP/2018**

**In the matter of:**

Petition under Section 79(1)(b), 79(1)(c) and 79(1)(f) of the Electricity Act, 2003 read with Regulation 32 and the Detailed Procedure as envisaged under the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access, Medium term Open Access in inter-State Transmission and related matters) Regulations, 2009.

Jindal India Thermal Power Limited,

Plot No. 2, Pocket C, 2nd Floor,  
Nelson Mandela Road, Vasant Kunj,  
New Delhi – 110070

**Petitioner**

**Versus**

Indian Railways,  
Office of Sr. DEE (TRD),  
Northern Railways,  
Ambala Cantt.-133001.

Railway Energy Management Company Limited  
Ground Floor, Central Wing, Plot-No.1,  
Sector 29, Gurugram, Haryana.

**Respondents**

**Petition No. 304/MP/2018**

**In the matter of:**

Petition under Section 79(1)(b), 79(1)(c) and 79(1)(f) of the Electricity Act, 2003 read with Regulation 32 and the Detailed Procedure as envisaged under the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access, Medium term Open Access in inter-State Transmission and related matters) Regulations, 2009.

Jindal India Thermal Power Limited  
Plot No. 2, Pocket C, 2nd Floor  
Nelson Mandela Road, Vasant Kunj  
New Delhi – 110070

**Petitioner**

**Versus**

Indian Railways,  
Office of Chief Electrical Engineer,  
East Central Railways,  
Dighi Kala, Hajipur,  
Bihar – 844101

Railway Energy Management Company Limited,  
Ground Floor, Central Wing, Plot-No.1,  
Sector 29, Gurugram, Haryana

**Respondents**

**Petition No. 339/MP/2018**

**In the matter of:**

Petition under Section 79(1)(b), 79(1)(c) and 79(1)(f) of the Electricity Act, 2003 read with Regulation 32 and the Detailed Procedure as envisaged under the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access, Medium term Open Access in inter-State Transmission and related matters) Regulations, 2009.

Jindal India Thermal Power Limited,  
Plot No. 2, Pocket C, 2nd Floor  
Nelson Mandela Road, Vasant Kunj  
New Delhi – 110070

**Petitioner**

**Versus**

Indian Railways,  
Office of Chief Electrical Engineer,  
East Coast Railways,  
3<sup>rd</sup> Floor, South Block, Rail Sadan,  
Odisha, Bhubneshwar- 751017

Railway Energy Management Company Limited,  
Ground Floor, Central Wing, Plot-No.1,  
Sector 29, Gurugram, Haryana

**Respondents**

**Parties present:**

Shri Amit Kapur, Advocate, JITPL  
Shri Pradeep Dahiya, Advocate, JITPL  
Shri Akshat Jain, Advocate, JITPL  
Shri Pratyush Singh, Advocate, JITPL  
Shri Pulkit Aggarwal, Advocate, IR and REMCL  
Shri Pulak Srivastava, JITPL  
Shri Sanjay Singh, REMCL  
Shri Manish Tiwari, REMCL

**ORDER**

Jindal India Thermal Power Limited (hereinafter to be referred as 'the Petitioner') has filed the present Petitions under Section 79(1) (b), (c) (f) of the Electricity Act, 2003 read with Regulation 32 of Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access, Medium term Open Access in inter-State Transmission and related matters) Regulations, 2009 seeking for termination of the Power Purchase Agreements

(hereinafter referred to as “PPA or APP”) dated 08.04.2016, entered into between the Petitioner and the Indian Railways for supply of power.

2. The issues raised in present batch of Petitions are based on similar set of facts and law, except for dates of execution of the agreements and the commissioning schedule of the projects, hence the petitions have been tagged together for convenience of discussion. The Petitioner in 278/MP/2018 shall be known as petitioner hereinafter. The detail of PPAs entered into by the different Petitioners with the Indian Railways are as follows:

S.No.	Petition No.	Date of PPA	Quantum	Railway Zone	Status of PPA
1.	278/MP/2018	8.4.2016	70 MW	South East Central Railways-Chhattisgarh	Not materialized
2.	303/MP/2018	12.4.2016	40 MW (Haryana) 25 MW (Punjab)	Northern Railways	Not materialized
3.	304/MP/2018	15.3.2016	50 MW	East Central Railways	Not materialized
4.	339/MP/2018	4.3.2016	110 MW	East Coast Railways	Not materialized

3. The Petitioner has made the following prayers in Petition No. 278/MP/2018:

- a) Hold and direct that the PPA dated 08.04.2016 stands terminated by virtue of Article 4.4 of the PPA;
- b) Direct the respondent to return the bank guarantee of an amount of Rs. 7 Crores furnished by JITPL as performance security and EMD of Rs. 10.25 Crore submitted to respondent no.2 as in the form of Bank Guarantee
- c) Permit the petitioner to utilize the 70 MW power for sale in Medium Term and Long Term bids, which was contracted for under the PPA;

d) Direct Respondent No.1 to compensate the Petitioner on account of loss of profit due to non-off take and non-scheduling of Petitioners power tied up with the Respondent no.1 for the period from 05.10.2016 till date of decision of the petition.

e) Direct the Respondent No.1 to compensate the Petitioner as per clause 19.3.2 for termination of the contract due to Utility default, an amount equal to the Fixed Charge that would have been due and payable for Normative Availability for a period of [3 (three) months].

f) Pass any such further order(s) as deemed fit and proper

4. The Petitioner has made the following prayers in Petition No. 303/MP/2018 :

a) Hold and direct that the PPA dated 12.04.2016 stands terminated by virtue of Article 4.4 of the PPA;

b) Direct the respondent to return the bank guarantee of an amount of Rs. 2.5 Crores furnished by JITPL as performance security as per Article 9 of the PPA;

c) Permit the petitioner to utilize the 25 MW power for sale in Medium Term and Long Term bids, which was contracted for under the PPA;

d) Direct Respondent No.1 to compensate the Petitioner on account of loss of profit due to non-offtake and non-scheduling of Petitioners power tied up with the Respondent no.1 for the period from 10.10.2016 till date of decision of the petition.

e) Direct the Respondent No.1 to compensate the Petitioner as per clause 19.3.2 for termination of the contract due to Utility default, an amount equal to the Fixed Charge that would have been due and payable for Normative Availability for a period of [3 (three) months].

f) Pass any such further order(s) as deemed fit and proper;

5. The Petitioner has made the following prayers in Petition No. 304/MP/2018

a) Hold and direct that the PPA dated 15.03.2016 entered into between the Petitioner and Respondent No.1 stands terminated by virtue of Article 4.4 of the PPA;

- b) Direct Respondent No. 1 to return the bank guarantee of an amount of Rs. 5 crores furnished by the Petitioner as a performance security as per Article 9 of the PPA;
- c) Permit the Petitioner to utilize the 50 MW power for sale in Medium Term and Long term bids, which was contracted for under the PPA;
- d) Direct Respondent No. 1 to compensate the Petitioner on account of loss of profit due to non-offtake and non-scheduling of Petitioner's power tied up with the Respondent No.1 for the period from 11.09.2016 till date of decision of the petition;
- e) Direct Respondent No. 1 to compensate the Petitioner as per clause 19.3.2 for termination of the contract due to default by Respondent No. 1, an amount equal to the fixed charge that would have been due and payable for normative availability for a period of [3(three) months]; and
- f) Pass any such further order(s) as deemed fit and proper.

6. The Petitioner has made the following prayers in Petition No. 339/MP/2018

- a) Hold and direct that the PPA dated 04.03.2016 stands terminated by virtue of Article 4.4 of the PPA;
- b) Direct the respondent to return the bank guarantee of an amount of Rs. 11 crores furnished by JITPL as performance security as per Article 9 of the PPA;
- c) Permit the petitioner to utilize the 110MW power for sale in Medium Term and Long Term bids, which was contracted for under the PPA;
- d) Direct Respondent No. 1 to compensate the Petitioner on account of loss of profit due to non-offtake and non-scheduling of Petitioners power tied up with Respondent No.1 for the period from date of signing of PPA till date of decision of the petition;
- e) Direct Respondent No. 1 to compensate the Petitioner as per clause 19.3.2 for termination of the contract due to Utility default, an amount equal to the fixed charge that would have been due and payable for normative availability for a period of 3 months;
- f) Pass any such further orders as deemed fit and proper;

### **Submissions of the Petitioner**

7. The gist of the submissions made by the Petitioner is as under :

- a) The Petitioner entered into a PPA dated 08.04.2016 with the South East Central Railways (SECR) for 70 MW at a tariff of Rs. 3.64 per unit including fixed charge of Rs.1.40 per unit and variable charge of Rs. 2.24 per unit for a period of three

years from the appointed date as defined in PPA. The Ex-bus tariff was 2.80 per unit excluding the transmission charges and losses.

b) As per the terms of the PPA, the Petitioner and SECR, were required to fulfill certain conditions precedent to arrive at the appointed date. Clauses 4.1.2 and 4.1.3 of the PPA enumerate the conditions precedent to be fulfilled by the Petitioner and Respondent No.1. The Petitioner has fulfilled all the conditions except one i.e. 4.1.3 (e), which requires the Petitioner **to procure access to transmission system required for carrying electricity from power station at Orissa to delivery point.**

c) The process for power flow from generating plant of the Petitioner to the Delivery Point involves two different Transmission networks. Petitioner's generating station is connected to CTU (Central Transmission Utility) and the Delivery Point of SECR is connected to STU network of Chhattisgarh. It was agreed that the Power will flow from Generating Station at Orissa through CTU network till CTU periphery & then to STU interconnection periphery of Chhattisgarh state and then will flow through STU transmission network of Chhattisgarh till Traction Substation(TSS) points of SECR.

d) In order to obtain access to transmission system, the Petitioner was required to submit an application to the Central Transmission Utility (CTU) along with all necessary documents as prescribed in the detailed procedure to the 2009 Connectivity Regulations, which mandates submission of No Objection Certificate (NoC) from SLDC for use of intra-state transmission network for delivery of power at TSS points.

e) From the glance of the format, it is noticed that the format is to be furnished by intra state entity. The SECR-Chhattisgarh being the intra state entity in this case was obliged to obtain the NOC from SLDC. Further, as per the State Regulation, a generating station, including captive generating plant or a bulk consumer or a captive user who is not connected to state grid cannot apply for long-term or medium-term open access without applying for connectivity. Therefore, in the present case SECR had to apply for connectivity.

f) The Petitioner was required to procure access for carrying electricity from the power Station to the Delivery Point within a period of 180 days from the date of agreement. However, due to respondent's failure to provide NoC from SLDC, the petitioner could not apply for open access. Further, on expiry of 90 days as stated in the PPA and there being no intimation from SECR with respect to issuance of NOC, the Petitioner requested for an extension. The Petitioner vide its various letters requested the Respondent No. 1 for extending the CP (condition precedent) fulfillment period. The details are as follows:

<b>JITPL's Request Letter/ Email</b>	<b>SECR-Chhattisgarh Response</b>	<b>Validity to fulfil CP</b>
<b>21.09.2016</b>	<b>14.11.2016</b>	Extended from 05.10.2016 to 03.01.2017
<b>20.12.2016</b>	No Response	
<b>08.03.2017</b>	<b>20.03.2017</b>	Extended from 03.01.2017 to 02.04.2017
<b>21.03.2017</b>	<b>20.06.2017</b>	Extended from 02.04.2017 to 01.07.2017
<b>24.06.2017</b>	<b>31.08.2017</b>	Extended from 01.07.2017 to 29.09.2017
<b>24.10.2017</b>	No response	
<b>14.11.2017</b>	No response	
<b>08.12.2017</b>	No response	
<b>26.12.2017</b>	No response	
<b>15.01.2018</b>	No response	
<b>23.01.2018</b>	No response	
<b>29.01.2018</b>	No response	
<b>04.04.2018</b>	<b>16.05.2018</b>	Extended from 29.09.2017 to 28.03.2018

g) The contract period as per the PPA was three years from the appointed date, which could not be commence due to failure of Respondent No.1 to provide the requisite NOC even after 2 years 4 months after signing of PPA. Also respondent No.1 didn't extend the time line to fulfill the condition precedent beyond 29.09.2017. In terms of the above, the Petitioner invoked Clause 4.4 of the PPA and informed respondent No 1 with copy to Respondent No2 vide letter dated 05.05.2018 that PPA dated 08.04.2016 between the Petitioner and Respondent No.1 is deemed terminated.

h) On a careful reading of the clauses of the PPA, it can be seen that time is the essence of the contract. Due to inability of respondent No.1 to provide the NoC from CSLDC, the petitioner was neither be able to supply the power to them nor it was able to utilize the same elsewhere, which was not in the best interest of the parties or in public interest as the generation capacity remained unutilized resulting in huge losses to the petitioner. The Petitioner suffered a loss of profit due to non-recovery



of its fixed charge from 08.10.2016 till date with respect to the contracted capacity of 70 MW. The loss of profit due to non-recovery of fixed charge is 164.12 Cr till 31.08.2018.

8. The Petition was listed for hearing on 13.9.2018 for admission. During the hearing, the Commission admitted the Petitions and directed the parties to complete the pleadings. The respondents No. 1 and 2 have filed their respective replies vide affidavits dated 11.10.2018 and the Petitioner has also filed its Rejoinders vide affidavits dated 15.11.2018.

9. During the hearing dated 27.2.2019, the Commission observed that Indian Railways is a deemed Licensee under third proviso to Section 14 of Electricity Act, 2003 and directed the Petitioner to implead Indian Railways as party to the Petition and file revised memo of parties and the same has been compiled by the Petitioner on 7.3.2019.

#### **Reply of Respondent No. 1 and 2**

10. The gist of the submissions made by Respondents are as under :

a) In terms of the Bid Documents, the bidders were required to familiarize themselves with all the existing Laws, Rules and Regulations which have implication to the contract to be entered into in pursuance of the Competitive Bidding between the successful bidder and the Respondent. The bidders were fully made aware of the requirements of the Open Access for carrying power from the generating station to the Traction Substation of Respondent No. 1 in the State of Chhattisgarh. The Petitioner and other bidders were fully aware of the need for obtaining such Open Access. The petitioner had participated in the bid and subsequently executed the PPA with open eyes after undertaking independent investigation regarding various aspects, including open access.

b) At the time when the Petitioner participated in the bid initiated by Respondent No.2 through issue of 'Request for Qualification' dated 28.5.2015 and 'Request for Proposal' dated 23.12.2015 and submitted its bid, the terms and conditions subject to which the Open Access shall be allowed both for Inter State Transmission and for Intra State Transmission had been published and was in the knowledge of the Petitioner. In

terms of Article 8 of the PPA, the Petitioner is bound by the Disclaimer, namely, that the Petitioner was required to undertake independent investigation regarding various aspects. It was also acknowledged and accepted by the Petitioner that all risks relating to the project shall be borne by the Petitioner and the Utility, i.e. the Respondents shall not be liable in any manner for such risk or consequences thereof.

c) The Petitioner and the Bidders were also aware of the circumstances under which the CSPDCL/CSPTCL could refuse the Open Access. The bidders were also aware of the dispute pending between the Respondent No.1 and CSPDCL in regard to the claims and counter claims between them and accordingly, there could be issues on the grant of Open Access. It is for this reason that Article 3.1.1 of the PPA provided that the commencement of the Procurement Contract will be only from the date when the Medium Term Open Access or Short Term Open Access is available to the Petitioner. In this regard the provisions of Article 3.1.1 was duly amended in the executed PPA dated 8.4.2016 between the Petitioner and the Respondent No.1 deviating from the clause in the Model PPA circulated at the time of bidding

d) Article 4.4 of the PPA, provides that in the event the Open Access is not available, there could be termination of the agreement. However, Article 4.4 itself makes it clear that there cannot be any claim for compensation by the Petitioner against the Respondents in the event of the Procurement Contract does not commence in terms of Article 3.1.1 of the PPA.

e) The Petitioner is not entitled to any of the claims relating to compensation as claimed by it. The only remedy which is open to the Petitioner is the return of the Bank Guarantee of an amount of Rs 7 crores on a valid termination of the PPA and the Earnest Money Deposit of Rs 10.25 crores also submitted in the form of Bank Guarantee to the Respondents subject to the Petitioner agreeing to accept the same in full and final settlement of all claims of the Petitioner against the Respondents.

f) The Respondents have already returned the Bid Security amount of Rs 10.25 crores. The Performance Bank Guarantee of Rs 7 crores can be returned to the Petitioner against the confirmation by the Petitioner that the same shall be in full and final settlement of any and every claim of the Petitioner against the Respondents.

g) In terms of the provisions of Article 3.1.1 of the PPA, the conditions for commencement of the rights and obligations of the parties under the PPA shall be the date of getting the Medium Term Open Access or Short Term Open Access as provided in the said clause. The said condition for commencement of supply of electricity under the PPA, namely, grant of Medium Term Open Access or Short Term Open Access is independent of the other condition precedents provided under Article 4.1 of the PPA.

h) As per Article 4.1.3 (a) of the PPA, one of the condition precedent required to be satisfied by the Petitioner (Supplier) is the procurement of access to the transmission system required for carrying electricity from the power station to the Delivery Point and the same has to be satisfied by the Petitioner within a period of 180 days from the date of the PPA.

i) The obligation to procure Open Access to the transmission system for carrying the electricity up to the Delivery Point is upon the Petitioner and not the Respondents. Such Delivery Point is the Traction Substations of Respondent No. 1 and accordingly the obligation to obtain Open Access up to the Traction Substations was that of the Petitioner and not the Respondents.

j) As per Article 6 of the PPA, there is no obligation of Respondents in regard to Open Access except to provide reasonable support and assistance to the Petitioner in procuring necessary approval. Such expectation from the Respondents is not a legal obligation to be fulfilled with any claim for compensation that can be claimed by the Petitioner against the Respondents.

k) It is in the context of the uncertainties of getting open access that Article 3.1.1 of the PPA specifically stated that the Procurement Contract entered into between the Petitioner and Respondent No.1 would commence only from the date of getting Medium Term Open Access or at the option of the Petitioner, the Short Term Open Access and not before. Further, the event of non-grant of Open Access by CSPDCL/CSPTCL for any reason whatsoever has not been either stipulated as a condition precedent to be satisfied by the Respondent under Article 4.1.2 of the PPA or otherwise the obligation on the part of the Respondent under Article 6 of the PPA, while providing the same as an obligation of the Petitioner under Article 4.1.3 and Article 5 of the PPA. There is also no provision in the PPA either under Article 4.2 or otherwise for any damages or

compensation payable by Respondents to the Petitioner on account of delay in the grant of Open Access for carrying power.

l) The Liquidated Damages provided under Article 19.3 also does not cover the payment of any compensation by Respondent to the Petitioner for delay in the grant of Open Access. Article 19.3 deals with the event of termination of the contract by the Petitioner for default on the part of Respondents as specified in Article 19.2.

m) The parties had proceeded on the basis that Open Access may be denied for any reason whatsoever by CSPDCL/CSPTCL and that such Open Access may be denied by the said agencies on grounds such as alleged non-payment of outstanding dues by Respondent No.1 to them. Regulation 5(3) of the Open Access Regulations notified by the Chhattisgarh State Electricity Regulatory Commission provides as under:

***“5. Eligibility for open access***

*(1) .....*

*(2) .....*

*(3) An intra-State user or an applicant having been declared insolvent or bankrupt or having outstanding dues against him of transmission or distribution licensee or fees and charges of SLDC shall not be eligible for open access. The nodal agency shall not grant open access to the intra State user or applicant, who had defaulted in payment of Unscheduled Interchange charges, transmission charges, wheeling charges, reactive energy charges, congestion charges etc.-and fees and other charges of SLDC for a period exceeding one month from the due date of bill.”*

n) The above intention is further made clear from the fact that immediately after the Procurement Contract was signed with the Petitioner, the Petitioner applied for Open Access for conveying power through Inter State Transmission System and Intra State Transmission System of Chhattisgarh from the place of generation to the Traction Substation of Respondent No. 1. The application was filed by the Petitioner on 14.04.2016. The above application was returned by CSPDCL on the ground that there are outstanding dues of Respondent No.1 and, therefore, in terms of the Regulation 5(3) of the Open Access Regulations, the Open Access cannot be granted.

o) The Petitioner had then sought for extension of the period for fulfilling the condition precedent of obtaining Open Access to the Transmission System required for carrying the electricity. Such extension was sought by the Petitioner vide letters

dated 21.09.2016, 20.12.2016, 08.03.2017, 21.03.2017, 24.06.2017, 24.10.2017, 14.11.2017, 08.12.2017, 26.12.2017, 15.01.2018, 23.01.2018, 29.01.2018 and 04.04.2018. In these letters the Petitioner did not raise any issue of default or delay or otherwise any fault on the part of the Respondent or made any allegation that the Respondents had not made known to the Petitioner the existence of any dispute between Respondent No. 1 and CSPDCL/CSPTCL as a result of which the Open Access was not being made available. The Petitioner duly accepted the position that the Open Access was the responsibility of the Petitioner and non-grant of Open Access by CSPDCL/CSPTCL was to be sorted out.

p) The Petitioner did not make any claim against the Respondents on the ground that the Open Access was not available to the Petitioner to commence the Procurement Contract entered into between the parties on account of any default or failure or other reasons attributable to Respondent No. 1 at any time till 5.5.2018, namely, during the period from 08.4.2016 till 5.5.2018 when the Procurement Contract was executed for a period more than two years. The claim made in the letter dated 5.5.2018 and in the petition filed in regard to the allegation of default on the part of Respondent is an afterthought and is an attempt to make unlawful and illegal gain at the cost of the Respondents.

q) The motive of the Petitioner in filing the petition before this Commission now after more than two years of the PPA dated 8.4.2016, even after an attempt was made for seeking Open Access but was not granted by CSPDCL/CSPTCL/SLDC, is clear. The Petitioner as an afterthought is seeking to make unlawful gain by withdrawing from the PPA, as recently the price of the power in the Power Exchange has increased substantially in comparison to the price at which the Petitioner had agreed to sell electricity to the Respondent.

### **Rejoinder of the Petitioner**

11. The Petitioner in its Rejoinder to the reply filed by the Respondents has submitted as under :

a) None of the Respondents informed the Petitioner about any difficulty which might arise in getting open access due to objections from CSPDCL/CSPTCL and that

is why such condition was consciously not stipulated in the PPA. However, Respondent No.1 cannot now absolve themselves from their liability to pay compensation due to their failure to get open access which has subsequently made the Petitioner suffer huge amount of losses. Further, as stated above, since there is breach of representations and the warranties by the Respondent No.1, therefore, in terms of Article 7.2 read with Article 19.2.1(a) of the PPA, the Petitioner is entitled to termination under Article 19.3.2. Apart from the termination payment, the Petitioner is also entitled to compensation under the General Laws of Contract as Respondent No. 1 has not been able to get an NOC issued from CSLDC. All this while, the plant of the Petitioner has been kept stranded because of which the Petitioner has incurred huge losses. The Petitioner is unable to recover the fixed cost of the plant due to the default of respondent No.1, for which it is liable to pay compensation to the petitioner.

b) Respondent No. 1, in its reply, has incorrectly mentioned that the rights and obligations of the parties shall commence from the grant of Medium Term Open Access or Short Term Open Access. The clause 3.1.1 of the PPA clearly says about the commencement of the contract period from the date of getting the Medium Term Open Access. In addition to the above, it is also mentioned that SECR has its own discretion to take power on short term duration on the same terms and condition of this PPA subject to ensuring the reliability of power supply till grant of medium term open access, but the period of contract will be reckoned from the date on getting Medium Term Open Access only.

c) it is evidently clear from clause 4.1.3(e) of the PPA that the open access was to be procured by petitioner within a period of 180 days from the date of signing of PPA and as the respondent No.1 could not get the NoC from CSLDC, the petitioner could not apply and obtain the open access. Respondent No.1, being in a dominant position, could not take advantage of its own wrong to extend this period indefinitely to the disadvantage of the petitioner.

d) The contention of Respondents that the Supply of electricity under the PPA is independent of other conditions precedent provided under Article 4.1 of the PPA is totally misconceived as clause 3.1.1 of the PPA starts only with "subject to and in accordance with the provisions of this agreement, applicable laws and applicable

permits” and therefore supply of electricity under the PPA is not independent of other conditions precedent provided under Article 4.1 of the PPA as stated.

e) The EMD of 10.25 Cr is returned by the Respondent No.2 on 17.09.2018.

### **Hearing dated 31.10.2019**

12. Petitioner submitted that the Petitioner had entered into medium-term PPAs with the Respondent, Indian Railways for its 9 Divisions located in nine different States for total capacity of 585 MW. Out of these, the Petitioner had terminated the four PPAs due to non-grant of open access by concerned State authority. Accordingly, the instant Petitions have been filed seeking, inter alia, declaration that the PPAs stand terminated by virtue of Article 4.4 of the PPAs, return of Bank Guarantee and compensation to the Petitioner. Learned senior counsel referred the Petition No. 278/MP/2018 and submitted that the Respondent had even filed Petition before the Chhattisgarh State Electricity Regulatory Commission (CSERC) seeking direction to the Chhattisgarh State Power Transmission Co. Ltd. (CSPTCL) and Chhattisgarh State Power Distribution Co. Ltd. (CSPDCL) for issuance of No Objection Certificate for open access. However, since certain amount was due to the Indian Railways and the matter was pending before Arbitral Tribunal, the matter could not be resolved. In such circumstances, the Petitioner had no option but to terminate the PPA.

13. Respondents submitted that as far as the Petition No. 278/MP/2018 is concerned, the Respondent had approached CSERC seeking direction to CSPTCL and CSPDCL for issuance of NOC. However, CSERC did not allow the Petition due to pendency of matter before Arbitral Tribunal. Therefore, the Respondent has agreed to return the Bank Guarantee and the Earnest Money in the instant case subject to the Petitioner agreeing to accept the same in full and to final settlement of all claims. Learned senior counsel submitted that the Petitioner is not entitled for compensation since as per the PPAs, the Petitioner is obligated to apply and obtain the open access. Learned senior counsel submitted that the matter before Arbitral Tribunal has been decided in favour of the Indian Railways and NOC

for open access is expected to be received shortly. Learned senior counsel further submitted that PPAs provide for commencement of supply only after the receipt of open access, and once the open access is granted the PPAs can be implemented and enforced.

14. In response to the Commission's query as to whether the parties intend to operationalize the PPAs after receiving the open access or to terminate the same, learned senior counsels requested the Commission to allow the parties to mutually discuss the issues involved in the Petitions. Request was allowed by the Commission. The Commission directed the Petitioner to convene a meeting with the Respondents to resolve the issues and to file outcome of the meeting, on or before, 6.12.2019.

15. In compliance of the direction given by the Commission vide RoP dated 31.10.2019, the Petitioner vide its affidavit dated 28.11.2019 apprised the Commission that the Petitioner convened the meeting with the Respondent on 19.11.2019 and has placed on record the Minutes of Meeting.

#### **Hearing dated 15.4.2021**

16. Petitioner submitted that pursuant to the direction of the Commission vide Record of Proceedings for the hearing dated 31.10.2019, the Petitioner had convened a meeting with the Respondents on 19.11.2019 to resolve the issues involved in the matters and has filed the minutes of the said meeting. Learned counsel further submitted that as far as Petition No. 278/MP/2018 is concerned, the Respondents have approached the Chhattisgarh State Electricity Regulatory Commission (CSERC) by way of a Petition seeking direction to the State Utilities for issuance of NoC for open access, which is still pending before the CSERC and the Petition is listed for hearing on 7.5.2021. It was further submitted that the Petitioner has extended Bank Guarantee (BG) furnished under the Agreements for Procurement of Power upto 30.9.2021 and that the Petitioner will commence the supply of power upon the receipt of NoC.



17. Respondents submitted the following:

(a) In terms of the minutes of the meeting held on 19.11.2019, it was agreed between the parties that if the power supply is not commenced by 1.4.2020 due to any reason, the PPAs will be considered as deemed terminated without any financial liability on either party and BG will be returned by Railways to the Petitioner. Since the supply of power did not commence by 1.4.2020, PPAs stood terminated w.e.f. 1.4.2020. Thus, the present Petitions ought to be disposed of in light of the above minutes of meeting dated 19.11.2019.

(b) In respect of Petition No. 304/MP/2018, the aforesaid date (1.4.2020) for commencement of power supply was extended till 31.10.2020 in subsequent meeting. Since supply of power did not commence by the said date, the PPA stood terminated in this Petition No. 304/MP/2018 also.

(c) Extension of BG by the Petitioner has been on its own volition and the Respondents did not concur to any further extension. The Respondents are willing to return the BG within a period of three weeks after the directions of the Commission.

18. In rebuttal, the learned counsel for the Petitioner opposed the submissions of the learned counsel for the Respondents as regards termination of the PPAs. It was submitted that there are subsequent communications and other minutes of meetings, which would indicate the contrary position.

19. After hearing the learned counsels for the parties, the Commission directed the Petitioner to file subsequent/ latest minutes of the meetings convened between the parties to resolve the issues involved, on affidavit within two weeks.

### **Submissions of Petitioner**

20. In compliance of the direction given by the Commission vide RoP dated 15.4.2021, the Petitioner vide its affidavit dated 1.6.2021 apprised the Commission as under :

a) The Petitioner convened a meeting with the Respondents on 19.11.2019, wherein the following was agreed with regard to the PPA dated 08.04.2016 executed by SECR, Chhattisgarh with the Petitioner:

*“Railways mentioned that State Power Utilities in Chhattisgarh have agreed to issue NOC, hence both the parties agreed to initiate the process of commencement of power supply as per terms & conditions of Agreement for Procurement of Power (APP) and conclude the process by 31.03.2020. Railways agreed for present tariff with change in law impact as per APP for which the requisite supplementary agreement(s) will be signed before the commencement for power supply. If the power supply is not commenced by 01.04.2020 due to any reason, the APP will be considered as deemed terminated without any financial liability on either party to other with respect to all the conditions of the APP and Bank Guarantee will be returned by Railways to JITPL.”*

b) The petitioner had agreed on the revised deadline for commencement of power supply till 31.03.2020 with a clear understanding and assurance of respondent No.1 that they will get the NOC from State SLDC and non-compliance of this condition was not within the condition of abandoning the PPA and a condition which may result into absolving the parties from any liability under the PPA.

c) Had it been the case of the parties, that even if the Respondent No.1 is not able to get the NOC and still they can get out of the PPA without any financial liability towards compensation, the petitioner would not have agreed to such a condition as the petitioner agreed to extend the timeline only and only with one condition that respondent No.1 shall fulfill its obligation to procure the NOC from the State SLDC and non-compliance of this condition shall not come under the purview of clause “**any reason**” as stated above.

d) Since the agreed condition of the MoM dated 19.11.2019 (i.e. *issuance of NOC*) is not complied by the Respondent No. 1 / SECR and the start of power was based upon that agreed condition, therefore the said MoM has no meaning as on date and is liable to be revisited in the light of the same. The Respondent No.1/SECR further proved its action by not returning the bank guarantee as agreed in the said

MoM. Hence, the said MoM dated 19.11.2019 has no meaning in the eyes of all parties. Therefore, the PPA executed by and between the Petitioner and Respondent No.1/SECR is in-force and valid and accordingly all the terms & conditions of the said PPA are required to be duly complied with by all parties.

e) Since the Respondent No.1/SECR was also aware that MoM dated 19.11.2019 have no meaning now and therefore Respondent no.1/SECR did not return the Bank Guarantee and continued accepting the extension of the Bank Guarantee by the Petitioner/JITPL in accordance with the PPA executed by the parties. Moreover R-1/SECR never objected such extension of Bank Guarantee and also never issued any letter to Petitioner/JITPL referring to the MoM dated 19.11.2019 that the Bank Guarantee is not required to be extended as the agreement has been terminated.

#### **Hearing on 14.10.2021**

21. The Petition was listed for hearing on 14.10.2021, however Petitioner sought an adjournment which was allowed.

#### **Hearing dated 23.11.2021**

22. The learned counsel appearing on behalf of the Petitioner sought three weeks' time to place on record certain details/ documents by way of an additional affidavit. The learned counsel for the Petitioner submitted that the Respondents have approached the Chhattisgarh State Electricity Regulatory Commission (CSERC) by way of a Petition No. 44 of 2020 seeking direction to the State Utilities for issuance of NoC for open access which is listed for hearing on 10.12.2021. He further added that the conduct of the Respondents including filing of the aforesaid Petition before CSERC, asking the Petitioner to extend the Bank Guarantee ('BG'), etc. clearly demonstrates that the Agreements for Procurement Power ('PPAs') are alive and not deemed terminated as alleged by the Respondents.

23. The Commission observed that the Respondent, Indian Railways during the course of hearing dated 15.4.2021 had informed the Commission that in terms of the minutes of the meeting held on 19.11.2019, it was agreed between the parties that if the power supply under the PPAs is not commenced by 1.4.2020 due to any reason, the PPAs will be considered as deemed terminated without any financial liability on either party and that since the supply of power did not commence by 1.4.2020, PPAs stood terminated w.e.f. 1.4.2020 and BG will be returned by Railways to the Petitioner. The above submission on behalf of the Respondent, Indian Railways has been reaffirmed by the learned counsel for the Respondent in the present proceedings as well. The Commission further observed that these Petitions are pending since 2018 and the pleadings in the matters are already completed. However, it was on the basis of the request of the parties, opportunities were given to the parties to amicably resolve the issues, which did not lead to any result.

24. In response, learned counsel for the Petitioner and the Respondent, Indian Railways sought permission to file written submissions in the matters.

25. Considering the request of the learned counsels for the Petitioner and the Respondents, the Commission directed the Respondents to file written submissions with copy to the Petitioner who will file its written submissions.

#### **Hearing dated 22.3.2022**

26. During the hearing dated 22.3.2022, the Commission reserved the order. The relevant extracts of RoP dated 22.3.2022 is as under:

*“2. During the course of hearing, the learned counsel for the Petitioner submitted that after hearing the parties, the matters were reserved for order vide Record of Proceedings for the hearing dated 23.11.2021 with direction to the Respondents to file their written submissions by 3.12.2021 and the Petitioner to file its written submissions by 13.12.2021. However, since Respondents failed to file their written submissions within the specified time limit, the Petitioner eventually filed its written submissions on 2.2.2022. The Respondents filed its written submissions only on 21.3.2022. Learned counsel further referred to the written submissions filed in Petition No. 278/MP/2018, mainly submitted as under:*

*(a) Respondents in their written submissions have reiterated that in terms of the Minutes of Meeting (‘MoM’) dated 19.11.2019, the PPAs have been deemed to be terminated without any financial liability on either party. However, the Petitioner has already placed of record the*

*relevant factual development including the extension of Bank Guarantee at the instance of Respondents (post meeting dated 19.11.2019) and legal submissions which clearly evince that MoM dated 19.11.2019 has been rendered infructuous.*

*(b) The entire agreement reached during the meeting dated 19.11.2019 was based on the specific written assurance of the Respondents that they will provide NOC well in time to enable the Petitioner to commence supply w.e.f 1.4.2020. However, when this preliminary condition is not complied even till date, the entire agreement reached during meeting dated 19.11.2019 loses its significance and dispute goes back to the root of the issue i.e. failure of Respondents to fulfil its contractual obligations to arrange NOC to the Petitioner from State Utilities, which was a pre-requisite for availing open access for supply of power.*

*(c) Accordingly, the Respondents are obligated to either (a) perform its contractual obligations under the agreement, or (b) pay compensation to the Petitioner in case of termination of agreement due to their contractual breach/ default of not providing the NOC in time.*

*2. During the course of hearing, the learned counsel for the Petitioner submitted that after hearing the parties, the matters were reserved for order vide Record of Proceedings for the hearing dated 23.11.2021 with direction to the Respondents to file their written submissions by 3.12.2021 and the Petitioner to file its written submissions by 13.12.2021. However, since Respondents failed to file their written submissions within the specified time limit, the Petitioner eventually filed its written submissions on 2.2.2022. The Respondents filed its written submissions only on 21.3.2022. Learned counsel further referred to the written submissions filed in Petition No. 278/MP/2018, mainly submitted as under:*

*(a) Respondents in their written submissions have reiterated that in terms of the Minutes of Meeting ('MoM') dated 19.11.2019, the PPAs have been deemed to be terminated without any financial liability on either party. However, the Petitioner has already placed of record the relevant factual development including the extension of Bank Guarantee at the instance of Respondents (post meeting dated 19.11.2019) and legal submissions which clearly evince that MoM dated 19.11.2019 has been rendered infructuous.*

*(b) The entire agreement reached during the meeting dated 19.11.2019 was based on the specific written assurance of the Respondents that they will provide NOC well in time to enable the Petitioner to commence supply w.e.f 1.4.2020. However, when this preliminary condition is not complied even till date, the entire agreement reached during meeting dated 19.11.2019 loses its significance and dispute goes back to the root of the issue i.e. failure of Respondents to fulfil its contractual obligations to arrange NOC to the Petitioner from State Utilities, which was a pre-requisite for availing open access for supply of power.*

*(c) Accordingly, the Respondents are obligated to either (a) perform its contractual obligations under the agreement, or (b) pay compensation to the Petitioner in case of termination of agreement due to their contractual breach/ default of not providing the NOC in time.*

*(d) In an arrangement where the fulfilment of obligations depends upon the mutual performance of reciprocal promises, a party who fails to perform his own reciprocal promise cannot assert a claim for performance of the other party. Reliance was placed on the judgment of Hon'ble Supreme Court in Sikkim Subba Associates v. State of Sikkim [(2001) 5 SCC 629].*

*(e) It is a settled position of law that a party cannot be permitted to take advantage of its own wrong and try to wriggle out of the contract. In this regard, reliance was placed on judgments of Hon'ble Supreme Court in Nirmala Anand v. Advent Corp. Pvt. Ltd., [(2002) 5 SCC 481], Indore Development Authority v. Manoharlal and Ors. [(2020) 8 SCC 129], and Indore Development Authority and Order v. Shailendra & Ors. [(2018) 3 SCC 412].*

(f) Due to failure of the Respondents to provide NOC to the Petitioner to apply for open access, capacity of the Petitioner's power plant tied-up under the agreement remain stranded and the Petitioner has not been able to recover the fixed cost for such stranded capacity. The Petitioner has furnished the detailed computation of the financial loss suffered by the Petitioner including computation of compensation being sought from the Respondents.

(g) The written submissions filed by the Respondents, despite having been filed after filing of written submissions by the Petitioner, do not deal with the submissions made by the Petitioner.

3. Learned counsel for the Respondents submitted that the Respondents have also filed their written submissions. Learned counsel further submitted as under:

(a) As stated during the hearings held on 15.4.2021 and 23.11.2021, the PPAs have been deemed to be terminated without any financial liability on the either party in terms of the MoM dated 19.11.2019.

(b) In the said minutes, it has been clearly agreed and recorded that the deemed termination of the PPA will take place in case of power flow under the PPA is not commenced by 1.4.2020 'due to any reason'. Admittedly, the power flow under the PPA did not commence by 1.4.2020 and therefore, PPA is deemed to have been terminated without any financial liability on either party regardless of the default on the part of Respondent as alleged by the Petitioner.

(c) As regards the Bank Guarantee ('BG'), since the Commission vide Record of Proceedings for the hearing dated 19.12.2018 had directed the Petitioner to keep the BG alive till the next date of hearing, the Respondents did not return the BG as the Petitions before this Commission was still pending.

(d) The Petitioner is trying to wriggle out of the agreement arrived at between the parties on 19.11.2019 by falsely contending that the MoM had been given a waiver by the parties. Accordingly, the Petitions filed by the Petitioner is liable to be disposed of in terms of the settlement recorded in the MoM dated 19.11.2019. After agreeing to the terms and conditions of MoM dated 19.11.2019, the Petitioner cannot be permitted to resile and re-agitate its original claims made in the Petition.

(e) However, in case the Commission comes to a conclusion that the settlement between the parties is not binding and the Petitioner is entitled to re-agitate its original claims made in the Petition, the Respondents may be permitted to make further submissions.

(f) Though the Respondents have filed their reply on merits, the Petitioner cannot be permitted to wriggle out of the settlement arrived at in terms of MoM dated 19.11.2019. Pertinently, neither the Petitioner nor the Respondents argued the matter on merits. Submission advanced during the course of hearing on 15.4.2021 and 23.11.2021 were in light of MoM dated 19.11.2019 only.

(g) In case the matters are decided on merits based on the original claims made by the Petitioner in the Petitions, the counter claim of the Respondent i.e. right to encash the BG amount as the Petitioner failed to supply the power under the agreement, has to be decided upon.

(h) If the Commission deems fit, the Respondents may be permitted to file their written submissions on merits within a week."

### **Written Submissions of the parties**

27. The Petitioner in its written submission has submitted that Pursuant to the directions of this Commission by RoP for hearing held on 31.10.2019 a meeting was convened on 19.11.2019 between the representatives of JITPL and Indian Railways wherein Indian Railways confirmed that the State Power Utilities in Chhattisgarh have agreed to issue the NOC. Based on such written/agreed assurance of Indian Railways, both the parties agreed to initiate the process for commencement of power supply and conclude the process by 31.03.2020. The entire agreement reached during the meeting dated 19.11.2019 was based on the specific written assurance of Indian Railways that they will provide the NOC well in time to enable JITPL to commence power supply w.e.f. 01.04.2020. Hence, Indian Railways providing NOC was a pre-requisite for commencement of power supply. This preliminary condition has not been complied by Indian Railways till date. Hence, the entire agreement reached during the meeting dated 19.11.2019 loses its significance and the dispute goes back to the root of the issue, i.e., failure of Indian Railways to fulfil its contractual obligation to arrange/provide the NOC to JITPL from the State Utilities of Chhattisgarh. In light of the aforesaid facts, the PPA dated 08.04.2016 stands deemed terminated due to the fault of Indian Railways to provide the NOC. Even Indian Railways in its written submission dated 12.03.2022 has admitted that the PPA is deemed terminated. Hence, the said contention has attained finality. JITPL has suffered huge financial losses on account of capacity of the Power Plant tied-up under the PPA being stranded since 2016 till date and the Petitioner has not been able to recover fixed cost for the installed capacity of 70 MW and consequently failed to service its debt obligation, which entails various adverse financial implications. Accordingly, JITPL is claiming compensation for:-

- a) Fixed Charges for the Contracted Capacity of 70 MW, which has been stranded since 2016 for Indian Railways till date.

b) As per Article 19.3.2 of PPA for an amount equal to fixed charges that would have been due and payable for Normative Availability of the Power Plant for a period of 3 months.

c) Interest/Carrying Cost.

28. The Respondents in their written statement has submitted that pursuant to the direction dated 31.10.2019 of the Commission, the parties met on 19.11.2019 and the issues between the parties were discussed and deliberated and the accordingly a Minutes of Meetings were drawn and duly signed by the parties concerned. During the said meeting it was agreed as under:

*Case Number: 278/MP/2018 (JITPL Vs. South East Central Railway and Anr.)  
Railways mentioned that State Power Utilities in Chhattisgarh have agreed to issue NOC, hence both parties agreed to initiate the process of commencement of power supply as per terms & conditions of Agreement for Procurement of Power (APP) and conclude the process by 31.03.2020. Railways agreed for present tariff with change in law impact as per APP for which the requisite supplementary agreement(s) will be signed before the commencement of power supply. If the power supply is not commenced by 01.04.2020 due to any reason, the APP will be considered as deemed terminated without any financial liability on either party to other with respect to all the conditions of the APP and Bank Guarantee will be returned by Railways to JITPL.*

As per the above, in case the power flow under the PPA does not commence by 01.04.2020, the PPA shall be deemed to have been terminated without any financial liability on either party. The power flow under the PPA could not commence by 01.04.2020 and as such, the PPA dated 08.04.2016 shall be deemed to have terminated without any financial liability on either party.

### **Analysis and Decision**

29. We have considered the submissions of the parties and have perused the documents placed on record. The main issue raised by Petitioner is based on the premise that it was responsibility of respondent to obtain NOC from the SLDC and since respondent did not obtain the same, the Petitioner could not apply for open access for the transaction.



The Respondent has refuted the claim of the petitioner stating that in terms of PPA, there is no legal obligation of respondents in regard to open access except to provide reasonable support and assistance to the petitioner in procuring necessary approval.

30. We have considered the rival submission of the parties. We observe that PPA was signed in April 2016 for a period of 3 years and has since been terminated.

31. We have also perused the provisions of PPA. It is not in dispute that the process for power flow from generating plant of Petitioner to Delivery Point of Respondent No.1 (TSS point in this case) involves two different Transmission networks. Petitioners Generating Station is connected to CTU and Delivery Point of Respondent No.1 is connected to STU network of Chhattisgarh. It has been submitted by the Petitioner that in order to procure access to transmission system, the petitioner was required to submit an application to the CTU along with all necessary documents in accordance with the detailed procedure of Connectivity Regulations 2009, which mandates submission of No Objection Certificate (NoC) from SLDC for use of intra-state transmission network for delivery of power at TSS points. The Petitioner has also averred that the Respondent No. 1 being the intra state entity in this case was obliged to obtain the NOC from SLDC.

32. Petitioner has submitted that as per Format MTOA#3 as issued along with Detailed Procedure under CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (hereinafter "2009 Connectivity Regulations"), the NOC can only be obtained by intra-state entity which is Indian Railways. The petitioner has quoted the title of Format-MTOA-3 as follows:

***"FORMAT-MTOA-3***

*No Objection Certificate of --<<Name of State>>- LDC"*

*<<Format in which NOC is to be given by SLDCs to a State Utility or intra state Entity for submission to CTU>>"*

33. We have perused the provisions of Detailed Procedure under the 2009 Connectivity Regulations quoted as follows:

*“10. APPLICANTS FOR MTOA*

*Application for MTOA can be made by a generating station including a captive generating plant, a consumer, an Electricity Trader or a distribution licensee, a State Government owning some quantum of power (like free power given to the State Government in which the hydro station is located, equity power given to a State for allowing a power station to be set up in the State), who desires to utilize ISTS for Inter state transfer of power, provided the power station from which the power is being sourced or the load, as the case may be, is already connected to the grid, whether the State grid or the inter-State grid, or is likely to get connected to the grid before the intended start date of MTOA. Documentary evidence needs to be submitted for establishing the condition of connectivity...*

*11. INFORMATION / DATA TO BE FURNISHED ALONG WITH THE APPLICATION*

*11.1. The information in the application shall be supported by a sworn in affidavit by the applicant as per the format given at FORMAT-MTOA-1.*

*11.2. The application for MTOA shall be made as per the enclosed application format (FORMAT-MTOA-2) and shall include details like quantum of power to be injected at the suppliers point, details of injection & drawl points, time period from and upto which access is required, the source of power, clearance from respective SLDCs for intra state entities etc. and other details as sought in the application format.*

*12. CONCURRENCE FROM SLDC / SLDCS*

*12.1. If a State Utility or an intra state entity is applying for MTOA, concurrence of the concerned State Load Dispatch Centres, both from injection and drawl point SLDCs is to be submitted along with the application in the enclosed format (FORMATMTOA-3).*

*12.2. Where necessary infrastructure required for energy metering and time- block-wise accounting already exists and required transmission capacity in the State network is available, and the applicant has a valid PPA for buying or selling power for the same quantum for which MTOA is sought, then the SLDC shall convey its concurrence to the applicant in writing within 10 (ten) working days of receipt of the application.”*

As per above, an application for MTOA can inter alia be filed by a generator, a trading licensee or a buyer from a specified point of injection to point of drawl along with NOC from SLDC (in case intra-state entity is involved in the transaction).

34. We observe that Format-MTOA-3 provides various aspects of NOC such as maximum MW allowed, State transmission losses and State transmission charges as follows:

“No Objection Certificate of --<<Name of State>>- LDC”

<<Format in which NOC is to be given by SLDCs to a State Utility or intra-state Entity for submission to CTU>>

NOC No. \_\_\_\_\_ Dated. \_\_\_\_\_

1. Name of the SLDC issuing NOC :
2. Region : North / West / South / East / North-East
3. Name of the Entity :
4. Status of Entity (e.g.; State Utility/CPP/IPP/Discom etc.) :
5. Point(s) of Connection :
6. Max. MW ceiling allowed for Injection\* :
7. Max. MW ceiling allowed for Drawal\* :
- (\* SLDCs may specify different MW ceilings for different time blocks, if required.)
8. Validity Period : From : << Date >> To: <<Date >>

9. Transmission losses (besides Regional Transmission losses)

	Whether Applicable or not (Yes/No)	(%) loss
State Transmission losses		
Distribution Licensees losses		
Any other losses		

10. Transmission charges (besides Regional Transmission charges)

	Whether Applicable or not (Yes/No)	Rate (Rs./MWh)
State Transmission losses		
Distribution Licensees losses		
Any other charges		

35. The above said NOC is issued for intra-state entity, however the application for such NOC can be made by any applicant eligible to apply MTOA as per the 2009 Connectivity Regulations such as generator, trading license or buyer. In a number of cases, generator and trading licensee have obtained such NOCs from SLDCs pursuant to MTOA application made by them. In fact, the petitioner itself applied for NOC to Chattisgarh SLDC on

14.4.2016 which was rejected by SLDC due to commercial disputes. Nowhere Chhattisgarh SLDC indicated that Petitioner could not have applied for NOC. The relevant extracts of letter dated 14.4.2016 is as under :

*CE (SLDC).  
State Load Dispatch Centre Chhattisgarh  
Chhattisgarh State Power Transmission Co. Ltd.  
Danganiya,  
Raipur, C.G. 492013, India  
Fax: 0771-2574174*

*Subject: Letter for Issuance of SLDC consent for supply of power from JITPL to South East Central Railway (SECR) at CSPTCL interconnection points*

*Dear Sir,*

*With reference to above cited subject we would like to submit that an Agreement for procurement of Power (APP) has been signed between JITPL and SECR on 08.04.2016 for supply of power under STOA/MTOA*

*We would further like to bring in your kind notice that as per CERC order dated 05.11.2015 under petition no. 197/MP/2015 & ATE order dated 16.12.2015 under Appeal No. 276 of 2015 Indian Railways has been given the status of deemed distribution licensee. Therefore SECR has signed APP with JITPL for supply of power under STOA/MTOA*

*Thus we would like to apply for obtaining the consent of SLDC Chhattisgarh as per attached application as per CERC OA regulations. Also the signed copy of APP, CERC order dated 05.11.2015 & ATE order dated 16.12.2015 have been attached for your ready reference and necessary actions*

*Hence it is kindly requested to issue the consent, so that the power supply can be initiated at the earliest. Please feel free to communicate if any further clarifications are required from our end.”*

36. We also observe that SLDC on 18.4.2017 refused to grant its NoC on account of non-submission of clearances from licensees i.e. CSPDCL and CSPTCL.

37. From the above said discussions, we are of the view that the Regulations nowhere debar the petitioner from obtaining NOC for an intra-state entity with whom it has entered into PPA and willing to avail MTOA for such transaction. It is the buyer, seller and trading licensee (if any) which decides as to who shall obtain open access and NOC as per their mutual Agreement. Now let us peruse the PPA entered into Petitioner and Respondents so as to see the obligation of each party.

(a) Clause 3.1.1 of the PPA provides as follows:

*“3.1 The Procurement Contract*

*3.1.1 Subject to and in accordance with the provisions of this Agreement, Applicable Laws and the Applicable Permits, the Utility hereby awards to the Supplier the procurement contract set forth herein for supply thereof to the Utility (the “Procurement Contract”) for a period of 3 (Three) years commencing for the date of getting the Medium Term Open Access, and the Supplier hereby accepts the Procurement Contract and agrees to implement the same subject to and in accordance with the terms and conditions set forth herein.*

*The Utility at its discretion may take the power on short term duration on the same terms and conditions of this APP subject to ensuring the reliability of power supply during such period till grant of the Medium Term Open Access. The period of contract will be reckoned from the date of getting the Medium Term Open Access and subject to other terms and conditions of this APP. “*

As per above, the contract was to commence from date of getting medium term open access.

(b) Clause 4.1.3 of the PPA provides as follows:

*“4.1.3 The Conditions Precedent required to be satisfied by the Supplier within a period of 90 (ninety) days from the date of this Agreement shall be deemed to have been fulfilled when the Supplier shall have:*

- a. Provided Performance Security to the Utility;*
- b. delivered to the Utility a legal opinion from the legal counsel of the Supplier with respect to the authority of the Supplier to enter into this Agreement and the enforceability of the provisions thereof;*
- c. deposited a certified true copy of this Agreement with the RLDC and SLDC having jurisdiction and obtained a receipt thereof, in accordance with the provisions of Clauses 14.3 and 19.4.1;*
- d. submitted the Capacity Certificate and evidence of the capacity of the Power Station; and*
- e. Procured access to the transmission system required for carrying electricity from the Power Station to the Delivery Point.. \*\* (to be satisfied by the supplier within a period of 180 days from the date of this agreement)*

*Provided that upon request in writing by the Supplier, the Utility may, in its discretion, waive any of the Conditions Precedent set forth in this Clause 4. 1 .3 or grant extension of time, not exceeding 90 (ninety) days, for fulfillment thereof, as the case may be. For the avoidance of doubt, the Utility may, in its sole discretion, grant any waiver hereunder, with such conditions as it may deem fit.*

*\*\* In case of any further delay beyond number of days mentioned above due to delay in obtaining Open Access by the Supplier as per € above, Utility may at its sole discretion grant further extension to the supplier depending upon the merits of the case without any financial liability on part of either party.”*

As per above the responsibility to obtain transmission open access was that of petitioner till the delivery point.

(c) Delivery point is defined in PPA As follows:

*““Delivery Point” means any point in the inter-state/intra-state Grid where the electricity supplied under this Agreement is received by the Utility;”*

Petitioner has submitted that Delivery point is the Traction Substations of SECR-Chattisgarh connected to State Network.

(d) Article 5.1 deals with obligation of the Supplier i.e. the Petitioner. Article 5.1.5 of the PPA provides as under:

*“5.1.5 The Supplier shall, at its own cost and expense, In addition to and not in derogation of its obligations elsewhere set out in this Agreement:*

*(a) Make, or cause to be made, necessary applications to the relevant Government Instrumentalities with such particulars as may be required for obtaining Applicable Permits, and obtain and keep in force and affect such Applicable Permits in conformity with Applicable Laws; Non-grant of Short & Medium term open access shall be mutually decided by The Utility and Supplier;*

*(b) procure, or cause to be procured, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes, know-how and systems used or incorporated into the Power Station;*

.....

As per the above, the Petitioner is under obligation to make application to the relevant government instrumentalities for obtaining applicable permits. It was also agreed between the parties that non-grant of STOA and MTOA shall be mutually decided by the parties.

(e) Article 6.1 of the PPA deals with the obligations of the Utility i.e. Respondent No. 1.

It read as under :

*“6.1 Obligations of the Utility*

*6.1.1 The Utility shall, at its own cost and expense undertake, comply with and perform all its obligations set out in this Agreement or arising hereunder:*

*6.1.2 The Utility agrees to provide support to the Supplier and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and Applicable Laws, the following:*

*(a) upon written request from the Supplier, and subject to the Supplier complying with Applicable Laws, provide reasonable support and assistance to the Supplier in procuring the Applicable Permits required from any Government Instrumentality for operation of the Project; Non-grant of long term open access shall be mutually decided by the Utility and Supplier;*

*(b) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;*

- (c) *support, cooperate with and facilitate the Supplier in the implementation and operation of the Project in accordance with the provisions of this Agreement and Applicable Laws.”*

As per the above provision, upon the written request from the Petitioner, the respondent No.1 is under obligation to provide reasonable support and assistance to the Petitioner in procuring the applicable permits from the state govt. instrumentalities.

We have perused the above quoted provisions of the PPA. The PPA clearly puts the obligation of obtaining open access till Delivery Point (TSS connected to State network) on the Petitioner. The PPA nowhere provides the responsibility to obtain NOC from State on the Respondent.

38. Further we do not agree with Petitioner's argument that respondent being the intra-state entity could only have obtained NOC from SLDC. The NOC could have been obtained by the Petitioner as per the Regulations and was required to do so as per PPA which petitioner failed to do. Hence the case of Petitioner that it could not apply for open access due to failure of Respondent to provide NOC to him is not made out.

39. Further, in terms of directions of the Commission during hearing held on 31.10.2019 Petitioner and respondents held a meeting on 19.11.2019 whereby following has been recorded:

Date: 19.11.2019

**Minutes of the Meeting (MoM) among Indian Railways, REMCL and JITPL**

**Members Present:**

Indian Railways	REMCL	JITPL
Sh. Rajesh Singh, CEDE/NR	Sh. S.K. Saxena, CEO	Sh. R.R. Nair, CEO
Sh. Rajesh Kumar, Dy CEE/TRD/ECR	Sh. Harish Chander, GM	Sh. Neelesh Nema, ED
Sh. R.K. Sahu, Dy CEE/TRD/SECR	Sh. Manish Tiwari, JGM	Sh. Sanjay Mittal, Dir-Power Sales
Sh. Japani Behera, AEE/TRD/ECOR		Sh. Pulak Srivastava, DGM-Power Sales

**Introduction**

REMCL welcomed all participants and briefed about all four cases (Petition Number 278/MP/2018, 303/MP/2018, 304/MP/2018, 339/MP/2018) which are currently sub-judice before Hon'ble CERC. REMCL mentioned that as per the ROP dated 04.11.2019 issued by Hon'ble CERC, this meeting is convened by JITPL.

The following points were discussed in each Case

**Case Number: 278/MP/2018 (JITPL Vs. South East Central Railway and Anr.)**

Railways mentioned that State Power Utilities in Chhattisgarh have agreed to issue NOC, hence both parties agreed to initiate the process of commencement of power supply as per terms & conditions of Agreement for Procurement of Power (APP) and conclude the process by 31.03.2020. Railways agreed for present tariff with change in law impact as per APP for which the requisite supplementary agreement(s) will be signed before the commencement of power supply. If the power supply is not commenced by 01.04.2020 due to any reason, the APP will be considered as deemed terminated without any financial liability on either party to other with respect to all the conditions of the APP and Bank Guarantee will be returned by Railways to JITPL.

**Case Number: 303/MP/2018 (JITPL Vs. Northern Railways Ambala division and Anr.)**

Both parties agreed to initiate the process of commencement of power supply as per terms & conditions of Agreement for Procurement of Power (APP) and conclude the process by 31.03.2020. Railways agreed for present tariff with change in law impact as per APP for which the requisite supplementary agreement(s) will be signed before the commencement of power supply. If the power supply is not commenced by 01.04.2020 due to any reason, the APP will be considered as deemed terminated without any financial liability on either party to other with respect to all the conditions of the APP and Bank Guarantee will be returned by Railways to JITPL.

**Case Number: 304/MP/2018 (JITPL Vs. East Central Railway and Anr.)**

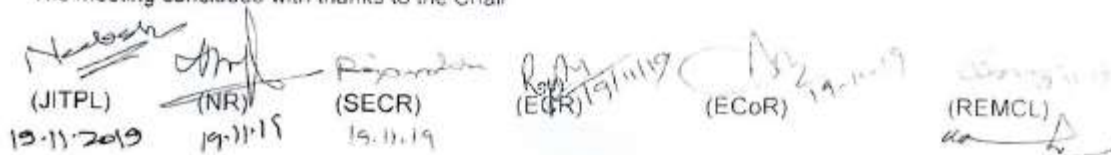
Both parties agreed to terminate the APP for Bihar without any financial liability on either party to other with respect to all the conditions of the APP and the Bank Guarantee will be returned by Railways to JITPL.

**Case Number: 339/MP/2018 (JITPL Vs. East Cost Railways and Anr.)**

Railway mentioned that No-Objection Certificate (NOC) for Orissa is likely to be obtained by 31.3.2020 and requested for extension of the Contract accordingly. JITPL stated that due to uncertainty in obtaining the NOC by Railways they are not agreeable to revive the contract.

Both parties agreed to terminate the APP without any financial liability on either party to other with respect to all the conditions of the APP and Bank Guarantee will be returned by Railways to JITPL.

The meeting concluded with thanks to the Chair

  
(JITPL) 19.11.2019  
(NR) 19.11.19  
(SECR) 19.11.19  
(ECR) 19.11.19  
(ECoR) 19.11.19  
(REMCL)



As per above, the PPAs have been deemed to be terminated without any financial liability on either party, in case supply of power does not commence. During Hearing held on 22.3.2022, Petitioner submitted as follows:

*“(a) Respondents in their written submissions have reiterated that in terms of the Minutes of Meeting (‘MoM’) dated 19.11.2019, the PPAs have been deemed to be terminated without any financial liability on either party. However, the Petitioner has already placed of record the relevant factual development including the extension of Bank Guarantee at the instance of Respondents (post meeting dated 19.11.2019) and legal submissions which clearly evince that MoM dated 19.11.2019 has been rendered infructuous.*

*(b) The entire agreement reached during the meeting dated 19.11.2019 was based on the specific written assurance of the Respondents that they will provide NOC well in time to enable the Petitioner to commence supply w.e.f 1.4.2020. However, when this preliminary condition is not complied even till date, the entire agreement reached during meeting dated 19.11.2019 loses its significance and dispute goes back to the root of the issue i.e. failure of Respondents to fulfil its contractual obligations to arrange NOC to the Petitioner from State Utilities, which was a pre-requisite for availing open access for supply of power.*

*(c) Accordingly, the Respondents are obligated to either (a) perform its contractual obligations under the agreement, or (b) pay compensation to the Petitioner in case of termination of agreement due to their contractual breach/ default of not providing the NOC in time.”*

In view of the above, it is observed that Petitioner has alleged that the Respondent expressly agreed to provide NOC to the petitioner vide meeting held on 19.11.2019, however failed to do so and hence the entire agreement reached during meeting dated 19.11.2019 loses its significance and dispute goes back to the root of the issue.

40. The Respondent submitted during hearing held on 22.3.2022 as follows:

*“(a) As stated during the hearings held on 15.4.2021 and 23.11.2021, the PPAs have been deemed to be terminated without any financial liability on the either party in terms of the MoM dated 19.11.2019.*

*(b) In the said minutes, it has been clearly agreed and recorded that the deemed termination of the PPA will take place in case of power flow under the PPA is not commenced by 1.4.2020 ‘due to any reason’. Admittedly, the power flow under the PPA did not commence by 1.4.2020 and therefore, PPA is deemed to have been terminated without any financial liability on either party regardless of the default on the part of Respondent as alleged by the Petitioner.*

*(c) As regards the Bank Guarantee (‘BG’), since the Commission vide Record of Proceedings for the hearing dated 19.12.2018 had directed the Petitioner to keep the BG alive till the next date of hearing, the Respondents did not return the BG as the Petitions before this Commission was still pending.*

*(d) The Petitioner is trying to wriggle out of the agreement arrived at between the parties on 19.11.2019 by falsely contending that the MoM had been given a waiver by the parties. Accordingly, the Petitions filed by the Petitioner is liable to be disposed of in terms of the settlement recorded in the MoM dated 19.11.2019. After agreeing to the terms and conditions of MoM dated 19.11.2019, the Petitioner cannot be permitted to resile and re-agitate its original claims made in the Petition.*

*(e) However, in case the Commission comes to a conclusion that the settlement between the parties is not binding and the Petitioner is entitled to re-agitate its original claims made in the Petition, the Respondents may be permitted to make further submissions....”*

As per the above, the Respondent submitted that it has agreed to the position of termination of PPA without any financial liability on either parties and that BG was kept alive pursuant to directions of the Commission. However, if petitioner wishes to re-agitate its original claims, respondents need to submit written submissions.

41. Subsequent to hearing held on 22.3.2022, both Petitioner and Respondent have filed their written submissions on merits also. We observe that at the outset, it is to be decided whether there is any need of going into merits of the case keeping in view express Agreement between the parties filed on record.

42. We have perused minutes of meeting for meeting held on 19.11.2019 quoted as follows:

“

**Case Number: 278/MP/2018 (JITPL Vs. South East Central Railway and Anr)**

*Railways mentioned that State Power Utilities in Chhattisgarh have agreed to issue NOC; hence both parties agreed to initiate the process of commencement of power supply as per terms & conditions of Agreement for Procurement of Power (APP) and conclude the process by 31.03.2020. Railways agreed for present tariff with change in law impact as per APP for which the requisite supplementary agreement(s) will be signed before the commencement of power supply. If the power supply is not commenced by 01.04.2020 due to any reason, the APP will be considered as deemed terminated without any financial liability on either party to other with respect to all the conditions of the APP and Bank Guarantee will be returned by Railways to JITPL.*

**Case Number, 303/MP/2018 (JITPL VS Northern Railways Ambala division and Anr.)**

*Both parties agreed to initiate the process of commencement of power supply as per terms & conditions of Agreement for Procurement of Power (APP) and conclude the process by 31.03.2020. Railways agreed for present tariff with change in law impact as per APP for which the requisite supplementary agreement(s) will be signed before the commencement of power supply. If the power supply is not commenced by 01.04.2020 due to any reason the APP will be considered as deemed terminated without any financial liability on either party to other with respect to all the conditions of the APP and Bank Guarantee will be returned by Railways to JITPL.*

**Case Number. 304/MP/2018 (JITPL Vs. East Central Railway and Anr.)**

*Both parties agreed to terminate the APP for Bihar without any financial ability on either party to other with respect to all the conditions of the APP and the Bank Guarantee will be returned by Railways to JITPL*

**Case Number: 339/MP/2018 (JITPL Vs. East Cost Railways and Anr.)**

*Railway mentioned that No-Objection Certificate (NOC) for Orissa is likely to be obtained by 31.3.2020 and requested for extension of the Contract accordingly JITPL stated that due to uncertainty in obtaining the NOC by Railways they are not agreeable to revive the contract.*

*Both parties agreed to terminate the APP without any financial ability on either party to other with respect to at the conditions of the APP and Bank Guarantee will be returned by Railways to JITPL*

*The meeting concluded with thanks to the Chair.”*

As per abovesaid minutes, let us see if the Respondent agreed to provide NOC to Petitioner:

<b>S.No.</b>	<b>Petition No.</b>	<b>Discussion in meeting held on 19.11.2019</b>
1.	278/MP/2016	No Agreement to provide NOC by Railways to petitioner
2.	303/MP/2016	No Agreement to provide NOC by Railways to petitioner
3.	304/MP/2016	No Agreement to provide NOC by Railways to petitioner
4.	339/MP/2018	Railways mentioned NOC is likely to be obtained by 31.3.2020, However, JITPL citing uncertainty in obtaining NOC did not agree to revive the contract and both agreed to terminate.

We observe that out of 4 PPAs, only in one PPA Respondent agreed to arrange NOC in case of Orissa, which was not agreed by the Petitioner, Hence, obtaining NOC as a cause of action becomes infructuous for Petition No. 339/MP/2018. For other Petitions, the abovesaid minutes nowhere provides that Respondent shall arrange NOC for Petitioner as contended by Petitioner. Hence the entire argument of petitioner that Respondent agreed to provide NOC to Petitioner during the meeting held on 19.11.2019 is incorrect.

43. The Petitioner re-agitated the case on merits on hearing held on 22.3.2022 citing that NOC was not arranged by the Respondent as agreed by respondent on 19.11.2019. However, the respondent has also denied of any such agreement to provide NOC and after perusal of minutes of meeting held on 19.11.2019, we have already concluded that there is

no such Agreement by the respondent to provide NOC. Hence, keeping in view the Agreement reached between parties in the meeting held on 19.11.2019, there is no reason for the parties to re-agitate the case on merits. As pointed out by the respondent during hearing held on 22.03.2022, we observe that the PPAs have been deemed to be terminated without any financial liability on the either party in terms of the MoM dated 19.11.2019. Accordingly, the respondent is directed to return the Bank Guarantees, if not done already, within a week of issuance of this Order.

44. Petitions No. 278/MP/2018, 303/MP/2018, 304/MP/2018 and 339/MP/2018 are disposed of in terms of the above.

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

Sd/  
**(Arun Goyal)**  
Member

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