

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 296/MP/2018

Coram:
Shri P.K. Pujari, Chairperson
Dr. M. K. Iyer, Member

Date of order: 28th of February, 2019

In the matter of

Petition under Section 79 (1) (f) and Section 79 (1) (k) of the Electricity Act, 2003 read with Section 79 (1) (c) of the Electricity Act, 2003 challenging the illegal and unlawful conduct of PGCIL of wrongfully raising invoices for transmission charges upon the Petitioner in a manner inconsistent with applicable regulations and orders of this Commission and seeking directions against PGCIL to comply with its statutory and contractual obligations.

And

In the matter of

Meenakshi Energy Limited
405, Saptagiri Towers, 1-10-75/1/1 to 6,
Begumpet, Secunderabad,
Telangana– 500 016

...Petitioner

Vs.

Power Grid Corporation of India Limited
“Saudamini”, Plot No.2,
Sector-29, Gurgaon,
Haryana- 122001

...Respondent

Parties Present:

Shri Sanjay Sen, Senior Advocate for the Petitioner
Shri Buddy A. Ranganadhan, Advocate for the Petitioner
Shri Avijeet Lala, Advocate for the Petitioner
Shri Nishant Talwar, Advocate for the Petitioner
Ms. Suparna Srivastava, Advocate, PGCIL
Shri Tushar Mathur, Advocate, PGCIL
Ms. Jyoti Prasad, PGCIL
Shri Swapnil Verma, PGCIL

ORDER

The Petitioner, Meenakshi Energy Limited, has filed the present Petition under Section 79 (1) (f) and Section 79 (1) (k) of the Electricity Act, 2003 read with Section 79 (1) (c) of the Electricity Act, 2003 (hereinafter referred to as the 'Act') with the following prayers:

- "(a) Hold and declare that the events set out in paragraphs above and submission made thereunder constitute force majeure events under Clause 9.0 of the Long-Term Access Agreement signed and executed between the Petitioner and Power Grid Corporation of India Limited;
- (b) Hold and declare that Power Grid Corporation of India Limited cannot claim operationalization of the Long-Term Access from 1.10.2017 and 28.3.2018 respectively in view of the facts and circumstances stated in the petition and especially after relinquishment of the Long-Term Access w.e.f. July 2017;
- (c) Hold and declare that Power Grid Corporation of India Limited is not entitled to claim transmission charges on the Petitioner in view of the facts and circumstances stated in the petition and especially after relinquishment of the Long – Term Access w.e.f. July 2017;
- (d) Hold and declare that Power Grid Corporation of India Limited is not entitled to seek opening of Letter of Credit in its favour by the Petitioner in view of the facts and circumstances stated in the petition and especially after relinquishment of the Long – Term Access w.e.f. July 2017;
- (e) Hold and declare the letter dated 30.8.2018 issued by Power Grid Corporation of India Limited is illegal to the extent that it accepts relinquishment of Long -Term Access by the Petitioner from 1.6.2018 as opposed to July 2017;
- (f) Hold and declare that invoices raised by Power Grid Corporation of India Limited dated 7.11.2017, 6.11.2017, 5.12.2017, 5.1.2018, 8.2.2018, 6.3.2018, 6.4.2018, 5.6.2018, 10.1.2018, 15.3.2018, 1.5.2018, and 13.6.2018 including invoices raised subsequently to filing of the present Petition by Power Grid Corporation of India Limited are illegal and non-est in law;
- (g) Quash the invoices raised by Power Grid Corporation of India Limited dated 7.11.2017, 6.11.2017, 5.12.2017, 5.1.2018, 8.2.2018, 6.3.2018, 6.4.2018, 5.6.2018, 10.1.2018, 15.3.2018, and 1.5.2018.;
- (h) Pass appropriate directions restraining Power Grid Corporation of India Limited from taking any coercive steps pursuant to the transmission charges raised by it from time to time;

(i) Allow Petitioner to add/alter or amend any of the grounds herein at a subsequent stage, if necessary."

Background of the Case:

2. The Petitioner is developing a 1000 MW thermal power project near Krishnapatnam Port, District Nellore in the State of Andhra Pradesh in two phases. Phase –I has two units constituting 300 MW and Phase-II has two units of 350 MW each. Two units of Phase-I of the generating station achieved COD in the months of October, 2013 and April, 2014 respectively. Unit-III of the Phase-II has been synchronized with the grid and Unit-IV is in the advance stage of completion.
3. The Petitioner signed and executed a Long Term Access Agreement with PGCIL on 24.2.2010 as further amended on 2.1.2012, for evacuation of power of 910 MW from the generating station. As per the LTA Agreement, the scheduled dates of commercial operation were initially agreed as under:

Unit(s)	Scheduled of Commissioning
I	April 2012
II	June 2012
III	June 2013
IV	September 2013

4. The Petitioner has submitted that even though the Petitioner had initiated the construction and development activities in relation to the generating station in a timely manner, the generating station suffered various eventualities being uncontrollable and beyond its reasonable control which led to the delay in COD of the Phase II of the generating station.

5. The Petitioner filed Petition No.312/MP/2016 with following prayers:

- “(a) Declare that MEPL (MEL) is not required to pay PGCIL any transmission charges until the commissioning of Phase II as the delay in the commissioning of Phase II has occurred on account of force majeure events covered by Clause 9.0 of the BPTAs;
- (b) Direct PGCIL to produce the relevant records that show the extent to which the contracted transmission elements under the BPTAs have been or can be put to alternate use by STA and MT A customers and direct PGCIL to put the contracted transmission elements under the BPTAs to such alternate use;
- (c) Without prejudice to the prayers above, declare that until the commissioning of Phase II, PGCIL is entitled to recover only the bare maintenance expenses or the transmission elements under the BPTAs built and commissioned exclusively for MEPL (MEL), and to the extent that PGCIL is unable to recover the amount necessary to meet the bare maintenance expenses from third party STA, MTA, and other LTA customers;
- (d) Direct PGCIL to reduce the value of the Construction Bank Guarantees held by it in proportion to the capacity of MEPL’s (MEL’s) project which has already been commissioned;
- (e) Quash and set aside PGCIL’s demand for the establishment of a letter of credit (LC) made vide letter dated 01.10.2014 and subsequent communications.”

6. After the order was reserved in the said petition, the Petitioner filed IA 45/2017 seeking to bring on record subsequent events and made the following prayers:

- “(a) Reopen the hearing of the captioned petition;
- (b) Permit the additional evidence to be taken on record.
- (c) Amend the prayer clause in the captioned petition to add the following prayers after prayer (e):
 - “(f) to permit the Petitioner to relinquish the entire quantum of the LTA upon disposal of the captioned petition;
 - (g) to restrain PGCIL from encashing the construction Bank Guarantee furnished by the Petitioner in terms of Clause 6.0 of the BPTA.”

7. The Commission rejected the IA vide order dated 29.6.2018 and directed the main Petition to be listed for hearing. In the meanwhile, the Petitioner filed a Petition (bearing Dy. No. 328/2018). Both Petition No.312/MP/2016 and Petition bearing Dy. No. 328/2018 were listed for hearing. The Commission suggested the Petitioner to withdraw

both Petitions and file a consolidated Petition. Accordingly, the Petitioner has filed the present petition. The Commission vide order dated 11.10.2018 disposed of the Petition No. 312/MP/2016 and Dy. No. 328/2018 and issued notice on the present Petition. PGCIL as the Respondent has filed reply to the Petition. The Commission also heard the learned senior counsel for the Petitioner and the learned counsel for PGCIL.

Submission of the Petitioner

8. The Petitioner has set out the events that led to the delay in commissioning of Phase II of the generating station as under:

- (a) Delay caused due to unreasonable denial/non-acceptance of evacuation and metering scheme of Petitioner's generating station by POSOCO/SLDC.
- (b) Delay due to shortage of sand in the State of Andhra Pradesh
- (c) Delay caused due to receiving the Right of Way over land for Marine Outfall Pipeline for the generating station.
- (d) Delay caused due to Act of God- Cyclone/Unprecedented Rainfall and Storms.
- (e) Conduct of PGCIL with respect to intimation of force majeure event by the Petitioner.
- (f) Facts leading to relinquishment of the LTA rights by the Petitioner prior to the operationalization of LTA by PGCIL.

A. Delay caused due to Unreasonable denial/ non-acceptance of evacuation and metering scheme of the Petitioner's generating station:

9. The Petitioner has submitted that in consultation with PGCIL, the Petitioner devised a joint/common evacuation system for the purpose of connectivity and granting LTA which included common evacuation system that would service the Petitioner's generating station along with another generation project being developed by Simhapuri Energy Limited (hereinafter referred to as "SEL") for connecting the generating station of the Petitioner and SEL to the pooling sub-station i.e. Nellore Pooling Sub-Station. However, during the 16th Meeting of the Commercial Sub-Committee of the Southern Regional Power Committee (hereinafter referred to as "SRPC") dated 21.6.2011, PGCIL recommended that the metering scheme proposed by the Petitioner as a consequence of the modification of the transmission scheme, be adopted by Southern Regional Load Despatch Centre (hereinafter referred to as "SRLDC"). The Petitioner has submitted that pursuant to the PGCIL's letter dated 15.7.2011 along with the adoption of scheme dated 21.6.2011, the Petitioner proceeded to develop its generating station and the construction of the common evacuation system also progressed significantly. However, on 4.10.2011, Power System Operations Corporation (hereinafter referred to as "POSOCO") informed the Petitioner that the generating station and SEL would be metered as single entity by SRLDC which would require the Petitioner and SEL to establish "coordinating centre" to deal with the issues of scheduling, despatch, metering and energy accounting including for UI purposes by mutual agreement. POSOCO's and SRLDC's decision came as a setback to the Petitioner, as it was technically and practically infeasible for the Petitioner to deal with the issues of scheduling, despatch, metering and accounting for its generating station by mutual agreement with another

independent power producer-SEL on day to day basis for entire life of the generating station. The Petitioner has submitted that it was left with no other option but to initially slow down, and eventually, postpone the construction of Phase-II until the issues pertaining to the Petitioner's transmission scheme and metering arrangement were resolved. The Petitioner filed the Petition No. 205/MP/2011 before this Commission challenging the decision of POSOCO and SRLDC and the Commission vide its order dated 9.10.2012 held that the Petitioner and SEL are required to be metered separately and opened the inter-connection lines between the two generating stations. Aggrieved by the decision of the Commission, the Petitioner filed an Appeal before the Appellate Tribunal for Electricity (APTEL). APTEL vide its judgment dated 1.3.2013 directed that the inter-connection line would remain closed and meters would be installed so that the Petitioner and SEL could be treated as separate and independent from each other for the purpose of scheduling, despatch, metering and accounting including UI purposes. APTEL vide its judgement dated 13.1.2014 set aside the order of the Commission and held that the modified transmission scheme implemented by the Petitioner was in accordance with the Electricity Act, 2003, Grid Code and CEA Metering Regulations and further directed the Commission to devise an appropriate metering arrangement which facilitates independent metering of both the Petitioner and SEL. According to the Petitioner, the intervening period between the POSOCO's letter dated 4.10.2011 till July, 2013, when the construction work could be mobilized again, amounted to force majeure events under the LTA Agreement and therefore, there cannot be any liability towards the payment of transmission charges and to establish payment security mechanism in favour of PGCIL.

B. Delay due to Shortage of Sand in the State of Andhra Pradesh:

10. The Hon'ble Supreme Court vide its judgment dated 27.2.2012 in the case of SLP (C) No. 19628019629 of 2009 (Deepak Kumar Vs. State of Haryana) along with the decision of the Hon'ble High Court of Andhra Pradesh in order dated 21.3.2013 in Writ Petition No. 18822 of 2011 imposed a complete embargo on the sand mining in the State of Andhra Pradesh which affected the sand supplied to the Petitioner's generating station and the consequent stoppage of major civil works scheduled to be completed during such timelines. Subsequently, the Government of Andhra Pradesh vide its Notification dated 13.10.2012 issued New Sand Policy and regularized the same. The non-availability of sand, which was in the nature of force majeure event, affected the construction works of Phase-II during the period from March 2012 to July 2013. The Petitioner has submitted that the delay caused due to non-availability of sand in the State of Andhra Pradesh from March 2012 till July 2013 had also been certified by L&T Sergent & Laundry Limited which was engaged by the lender Rural Electrification Corporation Limited. The Petitioner has submitted that it requested PGCIL vide its letters dated 25.6.2013, 9.8.2013 and 24.7.2014 to revise the commissioning schedule of Unit III and Unit IV of Phase II of the generating station from June 2013 and September 2013 at first to September 2015 and December 2015, and finally to July 2016 and August 2016 respectively. However, PGCIL vide its letters dated 25.9.2013 and 20.8.2014 declined the request of the Petitioner. The Petitioner has submitted that for the period beginning from 2012 to 2015, the Petitioner cannot be held liable for delay in execution of the project and its consequential impact on the obligations under the LTA Agreement executed between the Petitioner and PGCIL.

C. Delays caused due to receiving the Right of Way issue over land for Marine Outfall Pipeline for the generating station:

11. The Petitioner has submitted that on 20.8.2010 and 21.6.2012, the Ministry of Environment and Forest accorded Environmental Clearance and Coastal Regulation Zone (hereinafter referred to as "CRZ") Clearance to the Petitioner. The CRZ Clearance stipulated that the waste water generated from the Phase-I could initially be discharged into the nearby Kandaleru creek. However, as per Clause 5 (Hi) of the CRZ Clearance, once the generating station reached the capacity of 1000 MW, i.e. upon commissioning of Phase-II of the generating station, the waste water from the generating station could only be discharged into Bay of Bengal through marine outfall pipelines. Therefore, in order to construct and operationalize Phase-II of the generating station, it became necessary for the Petitioner to undertake construction of the marine outfall pipelines, otherwise, the CRZ Clearance would have been revoked. The Petitioner has submitted that it proceeded to plan the marine outfall pipelines and prepared the most direct route to lay down the marine outfall pipelines, which passed through Thamminapatnam reserve forest lands. On 29.10.2012 and 10.12.2012, the Petitioner made applications to the Principal Chief Conservator of Forests, Andhra Pradesh and the same was forwarded to the Divisional Forest Officer for the said route along with the permission of Right of Way from the State Government. The Petitioner received ROW permission in the month of January, 2018. Due to inordinate delay by the State agencies, Phase-II of the generating station of the Petitioner was slowed down as it would not have been prudent for the Petitioner to continue the construction of the generating station without finishing in parallel marine outfall pipelines as the Phase-II could not have been made operational without completing such pipeline. The Petitioner has submitted that to the

extent that the consequent delay has been caused due to delay in receiving ROW was not attributable to the Petitioner, it is an event beyond the reasonable control of the Petitioner.

D. Delay caused due to Act of God- Cyclones/ Unprecedented Rainfall and Storms:

12. The Petitioner has submitted that the progress of the construction activities of Phase II of the generating station was delayed for the months of September to November 2013 due to devastating impact of cyclones Phailin, Helen and Lehar respectively. Due to such cyclones, the crucial components of the civil works were completely submerged and damaged and it took approximately 3 months for the Petitioner's contractors to remobilise their construction teams at the project site and resume the construction work. The Petitioner has submitted that in November 2015, the Nellore region experienced tremendous rainfall which led to flooding of the project site. As a result, the construction activity at the project site had to be suspended. The Petitioner has submitted that the occurrence of cyclones and heavy rainfalls amounted to force majeure beyond the control of the Petitioner, exempting it from any liability whatsoever under the LTA Agreement between the Petitioner and PGCIL.

E. Conduct of PGCIL in relation to intimation of force majeure events by the Petitioner

13. The Petitioner has submitted that after assessing the force majeure events, the Petitioner vide its letters dated 9.8.2013, 24.7.2014 and 22.12.2015 intimated PGCIL about the same and requested PGCIL to revise SCOD. The Petitioner has submitted that similar requests were put forth during the 11th, 12th and 13th Joint Co-ordination

Committee meetings held on 21.1.2015, 26.5.2015 and 6.10.2015. The Petitioner has submitted that PGCIL did not at any time dispute the contents of the force majeure intimations. The Petitioner has therefore approached the Commission seeking a declaration that the events were beyond the control of the Petitioner and therefore, as the consequence thereof, relief prayed in the petition be granted.

F. Facts leading to relinquishment of the Long Term Access by the Petitioner prior to the operationalization of LTA

14. The Petitioner submitted that it premised the planning and development of its generating station based on the CEA's Electric Power Survey (EPS). EPS acts as a valuable input which is considered by GENCOs while applying for the LTA. The 18th EPS issued by the CEA reflected significant and promising demand growth on year to year basis beginning from financial year 2012-13 onwards. The entire premise on which the planning and development of the generation station was made by the Petitioner, and also the LTA was applied for by the Petitioner, stands dislodged since there were material deviations in the demand projections made by CEA. Therefore, the distortion in demand projections has led to operational ambiguity for generating companies, who rely heavily on the reports of expert bodies such as CEA while applying for the LTA. The Petitioner has submitted that having assessed the commercial significance of the demand distortions resulting out of faulty CEA projections in the 18th EPS and other facts affecting the progress of the generating station, the Petitioner decided to relinquish the entire quantum of LTA i.e. 910 MW. The Petitioner has submitted that the facts leading to the relinquishment were incorporated in the IA No.45 of 2017 and was communicated to PGCIL on 20.7.2017. The Petitioner has submitted that as per

Regulation 18 of the Connectivity Regulations, the right to relinquish the LTA is a unilateral right which may be exercised by the Petitioner at any stage upon payment of relinquishment charges towards “stranded capacity”. Therefore, after assessing the practical and commercial difficulty which is affecting the progress of the generating station, the Petitioner decided to relinquish the entire LTA quantum i.e. 910 MW. On 25.7.2017, the Petitioner intimated PGCIL about the relinquishment vide IA No.45/2017 in Petition No.312/MP/2015 and subsequently, vide letters dated 2.1.2018, 3.3.2018 and 21.4.2018, the Petitioner reiterated its position and reminded PGCIL about the LTA relinquishment w.e.f. July, 2017. Despite the reminders, PGCIL did not respond to the intimation of relinquishment by the Petitioner. PGCIL, being aware of the LTA relinquishment, neither acknowledged the relinquishment nor made any efforts for utilization of relinquished capacity which is contrary to the Commission’s directions that upon the relinquishment by the customer, the relinquished capacity should be utilized for granting LTA to the pending applications so that the capacity does not remain unutilized. Even after informing PGCIL that the entire LTA quantum is relinquished from July, 2017, PGCIL continued to raise invoices towards the payment of transmission charges upon the Petitioner. However, PGCIL vide letter dated 30.6.2018 accepted the in principle relinquishment of LTA from 1.6.2018 which is wrong and contrary as it should have been acknowledged promptly upon the Petitioner’s intimation.

15. The Petitioner has further submitted that despite clear intimation of LTA relinquishment by the Petitioner, PGCIL operationalized the LTA partly on 1.10.2017 by letter dated 29.9.2017 and then in its entirety on 28.3.2018. The transmission network identified for evacuation of power from the Petitioner’s generating station includes 400

kV Nellore PS-Nellore (PG/AP) D/C line and high loading of the Nellore line is a constant concern which has been repeatedly raised in various meetings of OCC, SRPC and Standing Committee on Power System Planning for Southern Region. There is a possibility of evacuation bottleneck at the Nellore Pooling Station due to the restricted power flow through the Nellore line as the system emanating from 400 kV Nellore Pooling Station is inadequate for evacuation of full power from the four thermal power stations i.e. NCC (1320 MW), TPCIL (1320 MW), Simhapuri i.e. SEL (600 MW) and the Petitioner (1000 MW) connected to the pooling station. Therefore, PGCIL could not have legally operationalized any part of LTA of 910 MW granted to the Petitioner. The Petitioner has submitted that it engaged a reputed expert to conduct a power flow study for the transmission system identified for the Petitioner to ascertain transmission constraint in evacuation of power from the generating station of the Petitioner. As per the report of the expert appointed by the Petitioner for Load Flow Study, the transmission system especially the Nellore Pooling Station has not been designed to accommodate power being evacuated from the Petitioner's generation station alongside other generating stations in that area and the grant of LTA to the Petitioner at the Nellore PS is in violation of the N-1 design criteria of the Grid Code as well as CEA Manual on Transmission Planning Criteria. The system emanating from 400 kV Nellore Pooling Station is inadequate for evacuation of full power from the four thermal power stations viz NCC (1320 MW), TPCIL (1320 MW), Simahadari (600 MW) and MEPL (1000 MW) connected to such pooling station. With the existing system only 2500-2700 MW can be evacuated from Nellore PS and around 1000-1200 MW generation would require to be backed down to meet outage of one circuit of Nellore PS-Nellore (PGCIL)

400 kV D/C line (N-1 contingency). Therefore, in such situation, PGCIL could not have legally operationalized any part of the LTA of 910 MW granted to the Petitioner. The Petitioner has submitted that while Nellore PS- Nellore (PGCIL) 400 kV D/C line is designed to evacuate 2500-2700 MW, the total LTA purported to have been operationalized using such system is 3960 MW consisting of NCC (1240 MW), TPCIL (1240 MW), SEL (540 MW), MPCL (940 MW).

16. The Petitioner has submitted that PGCIL has proceeded to claim transmission charges for such network without creating the necessary transmission system or developing a network which cannot be utilised by the Petitioner for the purpose of evacuation of power. The issue of transmission constraint at Nellore Pooling sub-station was also raised by the Petitioner in 22nd SR-JCC meeting held on 28.3.2018 wherein the Petitioner made specific submissions with regard to congestion in the transmission network. However, the same were overlooked while preparing the minutes of the meeting. The Petitioner has submitted that after receiving the letter dated 29.9.2017 intimating the purported operationalization of the LTA w.e.f. 1.10.2017 (partially to the extent of 727 MW out 910 MW), the Petitioner approached PGCIL seeking clarification regarding the same. However, PGCIL continued to raise invoices dated 6.11.2017, 7.11.2017 and 5.12.2017 towards payment of transmission charges. The Petitioner vide its letter dated 2.1.2018 requested PGCIL to withdraw the said invoices. PGCIL vide its letter dated 9.2.2018 refused to withdraw bills of October and November 2017 and informed the Petitioner vide letter dated 23.2.2018 to open the LC for the LTA (727 MW) and make payments of the transmission charges by 1.3.2018, failing which PGCIL would regulate power supply under Connectivity Regulations which was rejected by the

Petitioner vide its letter dated 3.3.2018. PGCIL vide its letter dated 5.3.2018 requested Southern Regional Load Despatch Centre (SRLDC) to regulate power supply of the Petitioner. Aggrieved by the actions of PGCIL and SRLDC, the Petitioner approached the Hon'ble High Court of Andhra Pradesh and Telangana against the curtailment of STOA right of the Petitioner, and the Hon'ble High Court granted interim stay to the Petitioner. Subsequently, the Petitioner received email dated 28.6.2018 from its Banker invoking the Bank Guarantee (BG) furnished by the Petitioner. Consequently, the Petitioner approached Hon'ble High Court of Andhra Pradesh and Telangana and the Hon'ble High Court granted interim stay on the encashment of the BG. The Petitioner has submitted that PGCIL without creating the necessary transmission system for the Petitioner and/or developing a network which cannot be utilised by the Petitioner for the purpose of evacuation of power, has proceeded to claim transmission charges for such network. Therefore, the Petitioner has filed the present Petition seeking appropriate directions/ orders against PGCIL and its arbitrary action of claiming transmission charges from the Petitioner despite relinquishment of LTA.

17. Notice was issued to the respondent, PGCIL to file its reply. Reply to the petition has been filed by PGCIL.

Reply of PGCIL

18. PGCIL, vide its reply dated 16.10.2018, has submitted that the Petitioner was granted LTA of 491 MW LTA in July 2009 based on the application made by PTC Ltd. on behalf of the Petitioner under Open Access Regulations. Subsequently, the Petitioner requested PGCIL to have the LTOA in its own name and made a fresh

application for grant of LTA for 546 MW from the modified installed capacity. Accordingly, LTA of 546 MW was granted to the Petitioner from its proposed 600 MW project and the LTOA granted to PTC from the Petitioner's project was withdrawn and BPTA was signed on 24.2.2010. Subsequently, the Petitioner made another fresh application for grant of LTA of 273 MW for transfer of power from Unit-IV which was granted in December, 2010 and in this regard LTA Agreement was signed on 24.12.2010. In February, 2011, the Petitioner informed that it has reconfigured unit sizes of the generation project from its 1000 MW and accordingly sought LTA of an additional 91 MW. Accordingly, a revised annexure was appended to the BPTA for total grant of 910 MW incorporating the change in LTA quantum as well as changes to the schedules of generation and transmission. PGCIL has submitted that as per the terms of LTA and BPTA, the Petitioner was required to pay transmission charges to PGCIL as per applicable Regulations of the Commission from the SCoD of the Project, irrespective of its actual date of commissioning. Therefore, PGCIL requested the Petitioner to furnish the Bank Guarantee (BG) as per the provisions of the BPTA. Further, PGCIL had no idea about the phasing of the project into Phase-I and Phase-II. PGCIL has further submitted that as per Clause 6 of the BPTA, PGCIL had the right and entitlement to receive transmission charges from the Petitioner (including by way of invocation of BG) for the transmission system to be put in place by it for evacuating power from the generation projects, notwithstanding that the generator failed to construct the generating station/dedicated transmission system or abandon the same or that there was adverse progress of individual generating units assessed during coordination meeting. As per Clause 2 of the BPTA, the liability to pay the transmission

charges commenced as soon as the transmission system of PGCIL was commissioned and SCoD of the project was reached even if the generating unit had not yet actually commissioned. Therefore, the delay caused in commissioning of the generating station cannot be the ground for avoiding payment of transmission charges to the PGCIL.

19. PGCIL has submitted that as per Clause 9 of the BPTA, if the LTTC fails to carry out the terms of the BPTA on account of Force majeure event, then they are not liable for any claim or loss or damage arising out of such failure. PGCIL has further submitted that Article 9 nowhere puts an embargo on the operation of the other provision of BPTA during continuance of force majeure event. Therefore, the provision contained in Article 2 of the BPTA pertaining to payment/ sharing of transmission charges continues to be applicable. PGCIL has further submitted that the Appellate Tribunal for Electricity in its judgment dated 30.4.2015 in Appeal No. 54/2014 (Himachal Sorang Power Limited versus Central Electricity Regulatory Commission) has observed that delay in commissioning of the generating station cannot be ground for avoiding the payment of transmission charges. Further, the Appellate Tribunal in its order dated 7.11.2017 in Appeal No.21/2016 (Maruti Clean Coal & Power Ltd. Vs. Power Grid Corporation of India Ltd. &Ors) reaffirmed that if the claimant fails to restore or recover from the alleged force majeure for unreasonably long time, the claimant cannot be entitled to any benefit on that score.

20. As regards the Petitioner's contention with regard to inadequate capacity in the transmission system, PGCIL has submitted that the issue of high loading on Nellore-Nellore PS section and the high short circuit levels at the existing Nellore substations

were discussed and mitigating measures for the same were deliberated. The interconnection of Nellore PS and Nellore existing was to be kept open under normal operating conditions to address the issues of high loading and short circuit levels, as and when the situation warrants. Therefore, there were no constraints observed in power evacuation for LTA granted to the IPPs in the Krishnapatnam area of Andhra Pradesh. PGCIL has further submitted that in the 14th Meeting of Southern Region constituents regarding Long Term Access and Connectivity Applications held on 16.4.2012, mitigating measures were also deliberated. The matter of high loadings on Nellore PS - Nellore (PG) 400 kV D/C lines under the N-1 conditions was further discussed in the 42nd Standing Committee on Power System Planning in Southern Region held on 27.4.2018 wherein it was decided to bypass Nellore PS - Nellore 400kV D/c (Quad) line and Nellore-Thiruvalam 400kV D/c (Quad) line at Nellore (PG) for making Nellore PS-Thiruvalam 400kV D/c (Quad) line to control loading on Nellore - Nellore PS 400kV lines and control of short circuit levels. This bypassing merely requires minor modifications within the terminating bays at Nellore (PG) and is also the optimum solution under which the Nellore - Nellore PS 400kV lines are also being utilized. Thus, the LTA has been operationalized in accordance with the Commission's Regulations and with the identified transmission system which is adequate for evacuation of the LTA granted to the LTA Customers in Krishnapatnam area of Andhra Pradesh.

21. As regards the various force majeure events relied by the Petitioner, PGCIL has submitted that it was the responsibility of the Project developer to arrange for men and material for the timely development of the Project. The Petitioner should have arranged

for the timely availability of these resources including sand to ensure timely commissioning of the Project. PGCIL (who was developing the associated transmission system in the same area) and the other generation developers including Krishnapatnam AP GENCO (1600 MW), Thermal Powertech (1320 MW) and SEL (600 MW) were able to develop their respective projects in the vicinity of the Petitioner's Project without facing any such issue as is being alleged by the Petitioner. Therefore, the Petitioner's plea of alleged force majeure is liable to be rejected. PGCIL has submitted that the responsibility for obtaining requisite statutory clearances and fulfilment of the associated conditionality were the sole responsibility of the project developer and could not be invoked as force majeure under Clause 9 of the BPTA. Therefore, the alleged *force majeure* event appears to be an afterthought and is liable to be rejected. Further, with regard to cyclones and heavy rainfall severally affecting the project, PGCIL has submitted that the generation project is located in Nellore area which is prone to heavy rainfalls and cyclones and the Petitioner should have been aware of the geographical features of the area where it was developing the project. Therefore, the Petitioner should have taken the remedial actions to suit the project interests. The Petitioner has failed completely on this account and is attempting to use this as a means to evade the liability for payment of transmission charges which are due in terms of the applicable Regulations and the Agreement signed with the PGCIL.

22. PGCIL has submitted that the Petitioner has not served any notice for force majeure within 30 days as stipulated under Clause 9 of the BPTA. PGCIL, vide letters dated 25.9.2013 and 20.8.2014 informed the Petitioner that in accordance with the provisions of the Sharing Regulations and the agreed terms under the BPTA, the

Petitioner is liable to pay the transmission charges for the transmission system forming the subject matter of the BPTA and also open the necessary LC towards the payment security mechanism. PGCIL vide its letter dated 7.12.2015 informed the Petitioner that since the LTA granted to it was to commence shortly, the Petitioner is required to open the LC for Rs.33.76 crore towards the payment security mechanism. However, instead of opening the LC, the Petitioner proceeded to file Petition No.312/MP/2015 seeking a declaration that it was not required to pay any transmission charges to PGCIL till the commissioning of Units-III and IV of its generation project and whose commissioning was stated to be delayed on account of force majeure events. Subsequently, when the order in the petition was reserved, the Petitioner filed an IA for relinquishment of the LTA quantum upon the disposal of the captioned petition. Therefore, there was no relinquishment of LTA and the LTA continued to subsist in its favour with all the attendant liability of payment of transmission charges upon its operationalization.

23. PGCIL, vide letters dated 18/19.2.2016 requested the Petitioner to furnish LC of Rs.42.26 crore towards payment security mechanism. However, the Petitioner refused the same. Accordingly, PGCIL approached the Commission for a direction to the Petitioner to open the necessary LC towards the LTA grant made to it by PGCIL. Subsequently, the Commission vide orders dated 6.7.2017 and 18.7.2017 in Petition No.103/MP/2017 and Petition No.293/MP/2015 respectively, held that LTA should be operationalized and bills should be raised even in the absence of LC and in the event of failure to pay transmission charges, the LTA customers shall be denied STOA. Accordingly, based on the directions of the Commission in various orders for operationalization of LTA in the absence of LC, the LTA of the Petitioner was partly

operationalized w.e.f. 1.10.2017 irrespective of status of LC. Therefore, LTAs have been operationalized in accordance with the Regulations, as amended from time to time and as per directions of the Commission in various Petitions.

24. PGCIL has submitted that PGCIL, vide letters dated 19.1.2018 and 23.2.2018 informed the Petitioner that its total dues towards transmission charges as on date had accumulated to Rs.28 crore out of which, Rs.13 crore had exceeded 60 days and the Petitioner had also not opened the LC for an amount of ₹16.72 crore towards payment security mechanism. The contention of the Petitioner that PGCIL has failed to pay any heed to the communication/intimations of the Petitioner regarding relinquishment of its LTA quantum is factually incorrect and wrong. However, PGCIL vide its letter dated 30.6.2018, accepted the in-principle relinquishment of the entire quantum of LTA of the Petitioner w.e.f. 1.6.2018, based on its prayers in the IA No. 45/2017 in Petition No. 312/MP/2015 and duly informed the Petitioner that his relinquishment of LTA was subject to the outcome of the Petition No.92/MP/2015 and 312/MP/2015 with regard to the date of relinquishment and relinquishment charges or any other related matter. Further, the LTA of the Petitioner had been operationalized (for 727 MW) on 29.9.2017 w.e.f. 1.10.2017 and accordingly, invoices for payment of transmission charges were raised against the Petitioner from the said date as per the BPTA and the applicable Regulations. PGCIL has submitted that since the Petitioner failed to pay the transmission charges, PGCIL was constrained to invoke the provision of the Regulation 4 of the Central Electricity Regulatory Commission (Regulation of Power Supply Regulations), 2014 and issued "Notice for Regulation of Power Supply" together with curtailment of STOA which was also in compliance of the Commission's direction dated

2.9.2015 and 8.3.2018 in Petition No. 142/MP/2012 and Petition No. 229/RC/2015, respectively. Aggrieved by the notice, the Petitioner filed Writ Petitions [bearing Nos.8028/2018 and bearing No.22359/2018] before the Hon'ble Andhra Pradesh High Court based on wrong and incomplete factual matrix by suppressing material facts and misled the Hon'ble Court into granting ex-parte interim reliefs to the extent of restraining PGCIL from encashing the BG and also from regulating the power supply from its project even though caveat was filed by the PGCIL in the Hon'ble High Court. Subsequently, PGCIL approached the Hon'ble Supreme Court by filing Special Leave Petition (Civil) Nos.25502/2018 and D-33061/2018 wherein the Hon'ble Supreme Court vide order dated 1.10.2018 stayed the operation of the interim orders passed by the Hon'ble Andhra Pradesh High Court. In view of the stay on stay orders of the Hon'ble Andhra Pradesh High Court, the Commission may exercise its regulatory/adjudicatory jurisdiction and decide the claims of the Petitioner made in the present petition.

Rejoinder of the Petitioner

25. The Petitioner, vide its rejoinder dated 20.10.2018 has reiterated the submissions made in the petition and has further submitted that PGCIL failed to consider that the 910 MW LTA granted vide LTA Agreement has already been relinquished w.e.f. July, 2017. Since, PGCIL partly operationalized the LTA on 1.10.2017 which was fully operationalized on 28.3.2018, considering the relinquishment of whole 910 MW LTA w.e.f. July, 2017, the Petitioner is not required to pay any transmission charges under the LTA Agreement. Therefore, the reply filed by PGCIL is without any merits and same is required to be rejected. With regard to phasing of the project into Phase-I and Phase-II, the Petitioner has submitted that PGCIL was always aware that the four generating

units being developed by the Petitioner were to be commissioned in different periods of time as recorded in both the first and second LTA Agreements. The Petitioner has submitted that in case, the LTA customer faces any *force majeure* event under Clause 9 of the LTA Agreement, the transmission charges for the system strengthening identified for the proposed transfer of power after commissioning of identified transmission system, would not be payable. As per Clause 9 of the LTA Agreement, since the Petitioner is unable to utilize LTA due to force majeure events, it is not required to pay any transmission charges in respect of the same. Article 9 of the LTA Agreement disentitles the PGCIL to lodge any claim for losses, including losses owing to non-payment of transmission charges by Long Term Transmission customer, if such non-payment was owing to force majeure conditions which precluded the Long Term Transmission customer. The Petitioner has submitted that the letter and spirit of Article 9 of the LTA Agreement is to discharge the Petitioner and PGCIL from any contractual liability during the prevalence of force majeure events or their effects. Thus, as Petitioner was unable to utilize LTA due to force majeure events, it is not required to pay transmission charges for the same and PGCIL is not required to provide the Petitioner with LTA during this period. The Petitioner has submitted that Article 2 of the LTA Agreement is in the nature of a penalty clause and is therefore, unenforceable against a generating company which is unable to utilize its LTA owing to its inability to commission its power plant. PGCIL can enforce the said Clause 2 (a) only to the extent that it guarantees the PGCIL the bare maintenance expenses for the contracted transmission elements that have been built exclusively for the Petitioner so that PGCIL does not have to recover such maintenance expense from other users of the contracted

transmission elements. Accordingly, such a generating company ought to have to pay only for the stranded capacity that results from such non-utilization of its LTA.

26. The Petitioner has further submitted that as per Regulation 18 of the Connectivity Regulations, the Petitioner is required to compensate the transmission service provider towards the 'stranded capacity' that will be created upon relinquishment/surrendering of the access rights. In the present case, the transmission system that has been identified for evacuation of power from the Petitioner's Generating Station is by itself overloaded and there is no occasion of any loss to be suffered by the Respondent/transmission service provider on account of relinquishment of the LTA. Therefore, no compensation is payable when the relinquishment of the LTA does not cause any loss to the Respondent on account of stranded transmission capacity. Further, the Commission in Petition No. 92/MP/2015 is yet to determine a methodology for determination of stranded capacity to be compensated on relinquishment of the LTA. Therefore, PGCIL cannot be allowed to proceed to claim any amount towards relinquishment charges from the Petitioner. The Petitioner has submitted that the relinquishment of entire quantum of 910 MW LTA was duly intimated to PGCIL in July, 2017. Therefore, relinquishment of 910 MW LTA w.e.f. 1.6.2018 is arbitrary as the PGCIL failed to acknowledge and respond to the Petitioner's intimation which at later point of time, has been clarified vide various letters dated 2.1.2018 and 21.4.2018.

27. The Petitioner has submitted that the 'regulation of power supply' has been contested/challenged before the Hon'ble High Court of Judicature at Andhra Pradesh under Writ Petition No. 8028 of 2018 and same is pending before the Hon'ble High

Court. Therefore, in view of the fact that this issue is presently *sub judice* before the Hon'ble High Court, the Commission may not entertain submission made by PGCIL in this regard.

Analysis and Decision:

28. The Petitioner is in the process of executing a thermal power plant of 1000 MW in the State of Andhra Pradesh. CTU granted LTA of 491 MW in July 2009 based on the application made by PTC Ltd. on behalf of the Petitioner under the erstwhile 2004 Open Access Regulations. Subsequently, the Petitioner made a fresh application for grant of 546 MW in its own name from a modified installed capacity of 600 MW which was granted by CTU and the LTOA granted to PTC from the Petitioner's project was withdrawn. The Petitioner signed BPTA with CTU on 24.2.2010. Further, the Petitioner made fresh application for grant of 273 MW LTA for transfer of power from Unit-IV which was granted by CTU in December, 2010 and in this regard LTA Agreement was signed on 24.12.2010. In the month of February, 2011, the Petitioner informed the CTU that it has reconfigured unit sizes of the generation project from 2x150+2x300(900 MW) to 2x150+2X350 (1000 MW) and sought LTA of additional 91 MW and indicated unit-wise commissioning schedule for unit 1 to 4 as April 2011, July 2011, June 2012 and September 2012 respectively. Thus the Petitioner was granted LTA of 910 MW with beneficiaries as SR - 550 MW, WR-1 77 MW and NR - 183 MW. The Petitioner has commissioned two units of 150 MW, but two units of 350 MW have not been commissioned so far. The Petitioner has pleaded that it is affected by force majeure and the Phase II (consisting of two units of 350 MW each) of its generating station has not

been commissioned due to a number of events beyond its control and, therefore, in terms of Clause 9 of the BPTA, it is excused from any liability for payment of transmission charges. The Petitioner has further relinquished the entire quantum of LTA and has submitted that since the request for relinquishment was prior to the date of operationalization of LTA, the Petitioner is not liable to pay any transmission charges. PGCIL has submitted that in terms of the BPTA, irrespective of the date of commissioning of the generating station, the Petitioner is liable to pay the transmission charges from the date the LTA was operationalized. PGCIL has further submitted that since the Petitioner failed to pay the transmission charges, the supply of power from the Phase 1 of the generating station under short term was regulated.

29. We have heard the learned senior counsel for the Petitioner and learned counsel for PGCIL at length and perused the documents on record. Based on the pleadings in the petition and submissions during the hearing, the following issues arise for our consideration:

- (a) Whether the events claimed by the Petitioner constitute Force Majeure events under Clause 9 of the BPTA dated 24.2.2010?**
- (b) What is the effective date of relinquishment of the LTA by the Petitioner?**
- (c) Whether the operationalization of LTA by PGCIL was in order?**

Issue No. 1: Whether the events claimed by the Petitioner constitute Force Majeure events under clause 9 of BPTA?

30. The Petitioner has submitted that the following factors have led to delay in commissioning of Phase-II of the generating station:

- (a) Non-acceptance of evacuation and metering scheme of Petitioner's generating station by POSOCO/SRLDC;
- (b) Shortage of sand in the State of Andhra Pradesh;
- (c) Delay in receiving Right of Way under land for marine Outfall pipeline for the Generating Station;
- (d) Act of God- Cyclones/ Unprecedented rainfall and Storms.

31. The Petitioner has contended that the unreasonable stand of POSOCO and SRLDC to treat the Petitioner and Simhapuri's generating station as a single entity for the purpose of scheduling and metering was against the spirit and scheme laid down under the Electricity Act, 2003, Grid Code and Metering Regulations and adversely affected the progress of the generating station of the Petitioner. The Petitioner has submitted that the Commission's direction to the Petitioner to open the inter-connection line amounts to change in law under clause 9 of the LTA Agreement. The Petitioner has contended that the intervening period between the POSOCO letter dated 4.10.2011 till the time when the construction work were mobilized amounts to change in law and force majeure under the LTA Agreement and, therefore, there cannot be any liability towards

the payment of transmission charges and to establish payment security mechanism in favour of PGCIL.

32. The Petitioner has submitted that restriction on the mining of river sand imposed by the Hon`ble Supreme Court, Hon'ble High Court of Andhra Pradesh and the Government of Andhra Pradesh resulted in severe scarcity of sand in the State of Andhra Pradesh and consequently the civil works for Phase-II were considerably delayed. The Petitioner has submitted that regularization of sand supply compelled the Petitioner to re-schedule the construction of Phase-II of the generating station. Therefore, the Petitioner vide its letters dated 25.6.2013, 9.8.2013 and 24.7.2014 requested PGCIL to revise the commissioning schedule for Unit- III and Unit- IV of the generating station from June 2013 and September 2013, at first to September, 2015 and December, 2015 to finally to July, 2016 and August, 2016 respectively. However, PGCIL vide its letter dated 25.9.2013 and 20.8.2014 declined the request made by the Petitioner.

33. The Petitioner has further submitted that marine outfall pipeline was one of the pre-conditions to operationalize Phase-II of the generating station. Since, the route envisaged by the Petitioner was passing through forest land, the Petitioner made application on 29.10.2012 to Principal Chief Conservation of Forest, Andhra Pradesh for seeking permission to Right of Way (RoW). Since, the permission for RoW was received on January, 2018, the Petitioner was constrained to initially slow down, and eventually postpone the commissioning of Phase-II, and the total time period through this force majeure event subsisted from 29.10.2012 to January, 2018.

34. The Petitioner has submitted that progress of the construction activities at Phase II of the generating station was delayed for the months of September to November 2013 due to the devastating impact of cyclones Phailin, Helen and Lehar, respectively and due to such cyclones, crucial components of the civil works were completely submerged and damaged. The Petitioner has submitted that since cyclones and torrential rainfall are “force of nature” and “acts of god” under Article 9 of the LTA Agreement, these fall under force majeure events, which were beyond the control of the Petitioner.

35. *Per contra*, the Respondent, PGCIL has submitted that the Petitioner has not served Force Majeure notice to PGCIL as required under clause 9 of the BPTA. The Respondent has further submitted that it was the responsibility of the Project Developer to arrange for men and material for the timely development of the Project, The Petitioner ought to have arranged the timely availability of these resources including sand to ensure timely commissioning of the Project. The Respondent has also submitted that since the responsibility for obtaining requisite statutory clearances and fulfilment of the associated conditionality is the sole responsibility of the project developer, force majeure clause cannot be invoked. The Respondent has submitted that since the generation project is located in Nellore area which is prone to heavy rain falls and cyclones, the Petitioner ought to have been aware of the geographical features of the area where it was developing the Project and should have taken remedial actions to suit the Project interests. Therefore, delay caused due to act of God- cyclones/ unprecedented rainfall and Storms- does not fall under force majeure.

36. According to PGCIL, as per Article 2 of the BPTA, the liability to pay transmission charges to PGCIL arose from the scheduled date of commissioning of the generating units irrespective of the dates of actual commissioning of the generating units, provided that the transmission system is ready and commissioned. The Respondent has submitted that as per Article 9 of the BPTA, if the Petitioner fails to carry out the terms of the BPTA on account of force majeure events, PGCIL is not liable for any claim or loss or damage arising out of such failure. Article 9 of the BPTA nowhere puts an embargo on the operation of the other provisions of the BPTA during continuance of force majeure event. Therefore, the provisions contained in Article 2 of the BPTA pertaining to payment/ sharing of transmission charges continue to be applicable.

37. The Respondent in support of its contention has relied upon the judgment of the Hon'ble Appellate Tribunal for Electricity dated 30.4.2015 in Appeal No. 54/2014 (Himachal Sorang Power Limited versus Central Electricity Regulatory Commission) wherein the Appellate Tribunal has observed that delay in commissioning of the generating station cannot be ground for avoiding the payment of transmission charges. The Respondent has submitted that the Appellate Tribunal in its order dated 7.11.2017 in Appeal No.21/2016 (Maruti Clean Coal & Power Ltd. Vs. Power Grid Corporation of India Ltd. &Ors) re-affirmed that if the claimant fails to restore or recover from the alleged force majeure event for unreasonably long time, the claimant cannot be entitled to any benefit on that score.

38. We have considered the submissions of the Petitioner and the Respondent. The Petitioner has sought declaration that four events mentioned by the Petitioner constitute

force majeure events under Article 9 of the BPTA dated 24.2.2010 entered into between the Petitioner and the Respondent. The Petitioner has claimed the relief from the payment of the transmission charges and opening of LC during the period of force majeure. The Petitioner vide its letters dated 5.3.2013, 24.7.2014 and 22.12.2015 has also requested the Respondent to revise the scheduled date of commissioning of Phase-II of its generating station. Clause 9.0 of the BPTA with regard to Force Majeure events provides as under:

“9.0 The parties shall ensure due compliance with terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accidents, act of God, change in law, and other causes beyond the control of the defaulting party. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice of 30 days to the other party to this effect. Transmission / drawal (sic) of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exists.

The reading of Article 9 of the BPTA reveals that any party claiming benefits under Article 9 of the BPTA is required to satisfy the other party of the existence of force majeure events and is also required to give written notice of 30 days to the other party to this effect. The periods during which the Petitioner claims to have been affected by the Force Majeure are as under:

S. No.	Force Majeure Event	Period of Force Majeure Event	Force majeure Notice
1.	Delay caused due to non-acceptance of evacuation and metering scheme of Petitioner's generating station by POSOCO/SLDC	4.10.2011 - July, 2013	22.12.2015
2.	Delay due to shortage of sand in the State of Andhra Pradesh	March 2012 to July 2013	25.6.2013, 9.8.2013, 24.7.2014 and 22.12.2015

3.	Delay caused due to delay in receiving Right of Way under land for marine Outfall pipeline for the Generating Station	-	22.12.2015
4.	Delay caused due to Act of God- Cyclones/ Unprecedented rainfall & Storms	September to November ,2013 and November, 2015	22.12.2015

39. It is noticed that the Petitioner vide its letters dated 25.6.2013, 9.8.2013 and 24.7.2014 informed the Respondent about the delay in commissioning schedule of Unit –III and IV of the project due to ban in sand mining imposed by the Government of Andhra Pradesh. We further observe that the Petitioner vide its letter dated 22.12.2015 informed the Respondent about all the four Force Majeure events affecting the project. As per Clause 9 of the BPTA, the Petitioner was required to serve notice of 30 days to the other party for the occurrence of each of the force majeure events claimed by the Petitioner. In our view, the Petitioner has complied with the provisions of the Article 9 of BPTA regarding notice, of occurrence of force majeure events.

40. Let us consider whether the events claimed by the Petitioner as force majeure events are covered under Clause 9 of the BPTA. Clause 9 of the BPTA provides that “no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accidents, act of God, change in law, and other causes beyond the control of the defaulting party.” The said clause further states that “transmission/drawal (sic) of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.” The force majeure events claimed by the Petitioner are directed as under:-

(a) The first force majeure event claimed by the Petitioner is that on account of the decision of POSOCO and SRLDC to treat the Petitioner and Simhapuri as a single entity and the Commission's direction to the Petitioner to open the interconnection line that amounts to "change in law". After the interim directions of APTEL dated 1.3.2013 to close the inter-connection line and installation of the meters in such manner so as to treat the Petitioner and SEPL as separate and independent from each other for the purpose of scheduling, despatch, metering and accounting including UI purposes, the Petitioner could start the work in July 2013. The Petitioner has submitted that the intervening period between the POSOCO's letter dated 4.10.2011 till July, 2013, when the construction work could be mobilized again, amounted to force majeure events under the BPTA. In our view, the petitioner has not been able to establish how the issue of metering and scheduling led to slowing down the work on the Phase II of the generation project at such an early stage of project development since LTA was operationalised almost 4 years after the issue was resolved in July 2013.

(b) The second event claimed as force majeure is the restriction on the mining of river sand imposed by order of the Hon'ble Supreme Court and Hon'ble High Court of Andhra Pradesh which delayed the execution of the project from March 2012 to July 2013. The Petitioner has placed on record a copy of the Report on Cost and Time Overrun of the Project submitted by L&T- Sergent & Laundry which was engaged by the Rural Electrification Corporation Limited, the lender of the project. In the said report, it has been stated that Sand Embargo in the state

impacted the overall implementation of the Project from March-2012 to July-2013. However, the following observations have been made:

"The Company evaluated alternative sources of sand however, the alternative solutions were costly & not found adequate and thus pouring of critical foundation works were not adopted."

Thus, though the Petitioner had alternative sources of sand, it did not go for it as it was found costly. From the above, we also find that the report talks about the alternate solution being inadequate, the Petitioner has not placed any documents to prove the inadequacy of sand for its project. It is a settled principle of law that performance of the contract being onerous does not lead to frustration of contract. We also note that the PGCIL has submitted that there are other projects which were executed in the area during the said time despite shortage of sand. Therefore, sand embargo in the State of Andhra Pradesh cannot be held as a force majeure event beyond the control of the Petitioner.

(c) The third force majeure event claimed by the Petitioner was the delay in grant of Government approval for Right of Ways over land to construct marine outfall pipelines to the Bay of Bengal in order to comply with the conditions of the Coastal Regulation Zone clearance dated 21.6.2012 granted by the Ministry of Environment and Forests. The Petitioner has submitted that though it made application to seek right of way land on 29.10.2012 and 10.12.2012, final approval was received in January 2018 and the Petitioner was forced to postpone the commissioning of Phase II till January 2018 due to force majeure condition. The petitioner has not placed on record documents that firmly

establish that it made attempts to get clearance from appropriate authorities in this regard. Claiming force majeure based on merely making an application with concerned authorities, is not tenable. Moreover, it is the responsibility of the Petitioner to arrange the requisite statutory clearances unless it categorically demonstrates that despite its best attempt, the clearance was inordinately delayed.

(d) As regards the delay due to torrential monsoon during 2013 and 2015, the Petitioner was aware that the generation project is located in Nellore area which is prone to heavy rainfalls and cyclones and the Petitioner should have been aware of the geographical features of the area where he was developing the project and accordingly taken remedial measures. In our view, this event claimed by the Petitioner as force majeure event does not stand the test of clause 9 of the BPTA.

41. In view of the above, we are not inclined to grant any relief to the petitioner on account of force majeure.

(b) What is the effective date of relinquishment of the LTA?

42. The Petitioner has submitted that the entire premise on which the planning and development of the generating station was made and the LTA was applied by the Petitioner stands dislodged since there were material deviations in the demand projections made by CEA. Consequently, the Petitioner filed I.A No. 45/2017 in Petition No. 312/MP/2015 seeking permission to relinquish the entire LTA quantum of 910 MW. However, despite clear intimation regarding relinquishment of the entire quantum of LTA

i.e. 910 MW in July 2017 through filing of I.A No. 45/2017, PGCIL refused to pay any heed to such intimation. The Petitioner has also submitted that the Petitioner has been keeping the BG alive in the light of the Commission's direction in 92/MP/2015 and at present the BG is alive till 22.1.2019. However, PGCIL continued to raise invoices towards payment of transmission charges upon the Petitioner. The Petitioner has further submitted that the Petitioner on multiple occasions vide its letters dated 2.1.2018 and 21.4.2018 reiterated the fact of such relinquishment but the Respondent did not respond to the intimation of relinquishment given by the Petitioner. Only response to para 4 of the additional affidavit dated 16.5.2018 in I.A. No. 45/2017, PGCIL vide letter dated 30. 6.2018 informed the Petitioner that "CTU accepts the in principle relinquishment of LTA from 01.06.2018 without prejudice to its rights and contentions in the legal proceedings before the Hon'ble CERC or any other fora".

43. The Respondent has submitted that mere filing of IA seeking amendment in pending proceeding to include permission to relinquish LTA cannot be construed as intimation to the Respondent of relinquishment of LTA in terms of Regulation 18 of the Connectivity Regulations. The Petitioner is required to abide by Regulation 18 of the Connectivity Regulation, failing which, the relinquishment cannot be considered as relinquishment in law. Further, the Petitioner also specifically stated in the prayer clause of the IA that the Petitioner would relinquish the LTA 'upon disposal of the captioned Petition' i.e. Petition No. 312/MP/2015, which implies that there has been no relinquishment of the LTA granted to the Petitioner as on date of filing of IA and even till its rejection and consequently, the said LTA continues to subsist in favour of the Petitioner with liability of payment upon its operationalization. Further, the Respondent

vide its letter dated 30.6.2018, accepted the in-principle relinquishment of the entire LTA quantum of 910 MW w.e.f. 1.6.2018 only when the Petitioner filed an additional affidavit dated 16.5.2018 before the Commission in Petition No.312/MP/2015 and accepted its liability for the payment of relinquishment charges subject to the final decision in petition No.92/MP/2015 and therefore, the Respondent accepted the in-principle relinquishment of LTA of the Petitioner on 30.6.2018 w.e.f. 1.6.2018 as per the applicable Regulation.

44. We have considered the rival contentions of the parties. Regulation 18 of the Connectivity Regulations provides for relinquishment of Access Rights. Regulation 18 reads as under:

"18. Relinquishment of access rights

(1) long-term customer may relinquish the long-term access rights fully or partly before the expiry of the full term of long-term access, by making payment of compensation for stranded capacity as follows: - (1) A Long-term customer who has availed access rights for atleast 12 years

(i) Notice of one (1) year – If such a customer submits an application to the Central Transmission Utility at least 1 (one) year prior to the date from which such customer desires to relinquish the access rights, there shall be no charges.

(ii) Notice of less than one (1) year – If such a customer submits an application to the Central Transmission Utility at any time lesser than a period of 1 (one) year prior to the date from which such customer desires to relinquish the access rights, such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of a notice period of one (1) year.

(b) Long-term customer who has not availed access rights for at least 12 (twelve) years – such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of 12 (twelve) years of access rights:

Provided that such a customer shall submit an application to the Central Transmission Utility at least 1 (one) year prior to the date from which such customer desires to relinquish the access rights;

Provided further that in case a customer submits an application for relinquishment of long-term access rights at any time at a notice period of less than one year, then such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the period falling short of a notice period of one (1) year, in addition to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of 12 (twelve) years of access rights

(2) The discount rate that shall be applicable for computing the net present value as referred to in sub-clause (a) and (b) of clause (1) above shall be the discount rate to be used for bid evaluation in the Commission's Notification issued from time to time in accordance with the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees issued by the Ministry of Power.

(3) The compensation paid by the long-term customer for the stranded transmission capacity shall be used for reducing transmission charges payable by other long-term customers and medium-term customers in the year in which such compensation payment is due in the ratio of transmission charges payable for that year by such long term customers and medium-term customers."

Under the above provisions, a long term customer may relinquish long term access rights fully or partly, before the expiry of full term of long term access, by making payment of compensation for stranded capacity as provided therein. Further, a long term customer has to give a notice of 1 year to the CTU for relinquishment of LTA and where it gives a notice of less than one year, it has to pay an amount equal to 66% of the estimated transmission charges (net present value) for the stranded capacity for the period falling short of a notice period of one year.

45. The Petitioner has not served any notice on the Respondent regarding relinquishment of LTA quantum of 910 MW. The Petitioner has contended that by filing I.A No. 45/2017, the Petitioner had made its intention clear of relinquishing the entire LTA quantum of 910 MW and the same has been reiterated by the Petitioner to the Respondent vide its letters dated 2.1.2018 and 21.4.2018. We now proceed further to look into the contents of I.A No. 45/2017 and the letters dated 2.1.2018 and 21.4.2018

to consider whether the filing of I.A and the letters relied upon by the Petitioner can be considered as Notice of Relinquishment to the Respondent.

46. The Petitioner had made the following prayers in the I.A. No 45/2017:

- “a. Re-open the hearing of the captioned petition;
- b. Permit the additional evidence to be taken on record;
- c. Amend the prayer clause in the captioned petition to add the following prayers after prayer (e):
 - “(f) to permit the Petitioner to relinquish the entire quantum of the LTA upon disposal of the captioned petition;
 - (g) to restrain PGCIL from encashing the construction Bank Guarantee furnished by the Petitioner in terms of Clause 6.0 of the BPTA.”

47. We now proceed further to look into the Petitioner's letter dated 2.1.2018, 3.3.2018 and 21.4.2018 and the Respondent's letter dated 30.6.2018. The relevant extracts of the Petitioner's letter dated 2.1.2018 is extracted as under:

“2. At the outset we deny any liability to pay the invoices amount raised in the above referred invoices and state that the demand for payment of invoices amount is baseless and arbitrary. The invoices in question are accordingly liable to be withdrawn and the demand for payments stated therein dropped with immediate effect.

3. It is pertinent to bring to your kind notice at this very juncture that MEL has vide a petition bearing Number 312/MP/2015, under Section 79 (1) 9 (f) of the Electricity Act, 2003 approached the Hon'ble Central Electricity Regulatory Commission (hereinafter referred to as “CERC) with regard to disputes pertaining to adjudication and payment of transmission charges and other liabilities under two Bulk Power Transmission Agreements dated 24.2.2010 and 24.12.2010 respectively. The said petition after being hearing is reserved for final orders by the Learned CERC vide its order dated 13.07.2017.

4. MEL had in the said petition urged the Learned CERC to declare that, MEL is not required to pay PGCIL any transmission charges until the commissioning of Phase II of its project, which is delayed on account of force majeure conditions, while also seeking a direction to the effect that PGCIL should be directed to recover only bare minimum maintenance expenses for the transmission elements built and commissioned exclusively for MEL. It is further stated that, MEL had in the aforementioned petition filed

an application bearing I.A. no. 45 seeking inter alia permission to relinquish the entire quantum of Long Term Access ("LTA")

48. The relevant extracts of letter dated 3.3.2018 is extracted as under:

"...Subsequent to initiation of the aforementioned proceedings, MEL was constrained to file a further interim application bearing number IA 45/MP/2017 under 312/MP/2015 apprising the Hon'ble CERC of the occurrence of further force majeure events caused to the projects and inter-alia praying for relinquishment of entire LTA quantum with the immediate effect. It is material to state that the copy of the IA was served at your office and as well as to the office of your standing counsel, who appears on your behalf in the proceedings before the Hon'ble CERC. We say that the Advisory for Relinquishment of Long Term Access required unequivocal and clear intimation to PGCIL and as such, MEL had by filing the I.A had unequivocally relinquished the LTA on July 20,2017 which was to your knowledge since then."

49. The relevant extracts of the Petitioner's letter dated 21.4.2018 is as under:

"It has been brought to our notice that PGCIL is refusing to accept our intimation provided in July 2017 regarding Relinquishment of LTA (910 MW) citing that no notice in this regard has been issued by MEL. It is important to highlight that Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium -term Open Access in the inter-State Transmission and related matters) Regulations, 2009('Connectivity Regulation') recognizes the right to relinquish open access as unilateral right, where permission of contracting party i.e. PGCIL is not required. In this regard, where the intention of relinquishment has to be communicated to PGCIL and following information is required to be communicated:

- (a) Nature of the Long- Term Transmission Customer
- (b) Quantum of LTA to be relinquished
- (c) Date from which relinquishment is sought

The above information as desired by PGCIL in its advisory, has been communicated by MEL conclusively vide its I.A 45/2017 in Petition No. 312/MP/2015 in July 2017 i.e. prior to operationalization of the entire LTA in March 2017. The application has been duly served on PGCIL. The LTA should not have been operationalized after such notice of relinquishment as it tantamount to forcibly subjecting MEL to the terms of the LTA, despite its relinquishment."

50. In all these letters, the Petitioner has been insisting on CTU to accept that the LTA stands relinquished from the date of filing of the I.A. No. 45/2017. Subsequently, the Petitioner vide affidavit dated 16.5.2018 undertook to bear the relinquishment

charges as may be determined by the Commission in Petition No. 92/MP/2015 and served a copy of the affidavit on CTU. Para 4 of the affidavit is extracted as under:-

"4. Clearly, the Petitioner has conveyed its intention to relinquish the entire LTA. Such relinquishment of LTA was done in terms of Regulation 18 of the CERC Grant of Connectivity and Long Term Access Regulations ("Connectivity Regulations"). On such relinquishment, the Petitioner would be liable for payments of relinquishment charges, if any, subject to a final decision in Petition No. 92/MP/2015 presently pending before this Hon'ble Commission. Without prejudice to the aforesaid, the present affidavit conclusively demonstrates that in fact there is no stranded capacity for which relinquishment charges can be imposed in the present case. The LTA is not capable of being operationalized owing to congestion at the Nellore Pooling Station."

Thereafter, CTU vide its letter dated 30.8.2018 accepted the date of relinquishment as 1.6.2018 as under:

"This is with reference to the above letter at (i) & (ii) wherein MEL is claiming relinquishment of entire LTA of 910 MW, MEL vide letter at (iii) has also stated that it had submitted the information as per the POWERGRID advisory in the IA 45/2017 in Petition No. 312/MP/2015 in July 2017. Further in the additional affidavit dated 16.05.2108 in above IA, MEL has stated that in para 4 that "on such relinquishment the petitioner (MEL) would be liable for payment of relinquishment charges, if any, subject to final decision in Petition No. 92/MP/2015 presently pending before the Hon'ble Commission. It is admitted case of MEL that no direction have yet been passed by the Hon'ble Commission in the above interim Application and the matter is sub- judice.

In this regard, it is to mention that Hon'ble CERC has observed in number of its Orders (more particularly in Order dated 27.02.2018 in Petition No. 167/MP/2017) (Adhunik Power and Natural Resources Limited vs. POWERGRID & Anr.) and Order dated 31.10.2017 in Petition No. 69/MP/2014 (Aryan MP Power Generation Pvt. Ltd. V POWERGRID & Anr) that 'Connectivity Regulations do not envisage any exemption from payment of compensation in case of relinquishment of LTA on any ground.

In view of the above, CTU accepts the in-principle relinquishment of LTA from 01.06.2018 without prejudice to its rights and contentions in the legal proceedings before Hon'ble CERC or any other fora. However, this relinquishment shall be subject to the outcome of the Petition No. 92/MP/2015 and 312/MP/2015 with regard to the date of relinquishment and relinquishment charges or any other related matter."

51. Since the Petitioner has made its intention clear to relinquish to LTA from the date of filing of the IA which is 20.7.2017, we consider the same as the date for

relinquishment of LTA subject to the liability that may arise on the basis of the decision in Petition No. 92/MP/2015.

(c) Whether the LTA operationalization was in order?

52. The Petitioner has submitted that despite clear intimation of relinquishment of LTA to the extent of 910 MW by the Petitioner, PGCIL went ahead to declare the operationalization of the LTA (readiness of the identified transmission system) partly on 1.10.2017 and then in its entirety on 28.3.2018. PGCIL informed the Petitioner on 23.2.2018 to open the LC for the LTA (727 MW) and make payments of the transmission charges by 1.3.2018. The Petitioner has further submitted that it has come to the knowledge of the Petitioner that there is an on-going discussion with regard to high loading of 400 kV Nellore PS- Nellore (PG/AP) D/C Lines violating the N-1 security. As per the terms of the LTA Agreement, the transmission network identified for evacuation of power from the Petitioner's Generating Station to Northern Region, Western Region and Southern Region (hereinafter referred to individually as "**NR**", "**WR**" and "**SR**") also includes 400kV Nellore PS- Nellore (PG/AP) D/C Lines. LTA could not have been operationalized in reality and/ or within the precincts of the extant regulatory framework.

53. The Respondent has submitted that the matter of high loadings on Nellore PS- Nellore (PG) 400kV D/c lines under the N-1 conditions was discussed in the 41st Standing Committee Meeting on Power System Planning in the Southern Region held on 22.9.2017 wherein, Respondent informed that that the Nellore PS-Nellore (PG) 400kV D/c lines had to be opened to control short circuit level of Nellore sub-station.

The Respondent further recommended to open both the lines and informed that the 765 kV Nellore PS-Kurnool D/c lines and the 400 kV Nellore-Kurnool D/c lines were sufficient for power evacuation from Nellore complex. When the matter was further discussed in the 42nd Standing Committee Meeting on Power System Planning in the Southern Region held on 27.4.2018, it was decided to bypass Nellore PS-Nellore 400kV D/c (Quad) line and Nellore-Thiruvalam 400kV D/c (Quad) line at Nellore (PG) for making Nellore PS-Thiruvalam 400kV D/c (Quad) line to control loading on Nellore-Nellore PS 400kV lines and control of short circuit levels. This bypassing merely required minor modifications within the terminating bays at Nellore (PG) and was also the optimum solution under which the Nellore-Nellore PS 400kV lines were also being utilized. Thus, the LTA has been operationalized in accordance with the CERC Regulations and with the identified transmission system which is adequate for evacuation of the LTA granted to the LTA Customers in Krishnapatnam area of Andhra Pradesh. Consequent to the operationalization of its LTA, the Petitioner became bound and obliged under the Regulations read with the BPTAs to pay transmission charges to the Respondent and also open the required LC for the same. The Respondent has further submitted that the Petitioner had not opened the LC for an amount of Rs.16.72 crore towards payment security mechanism.

54. In our view, the high loading at Nellore (PS) – Nellore (PG) 400 kV D/C line cannot be a reason for non-operationalization of LTA. CTU has taken necessary action to resolve the issue of high line loading. In any case, once the LTA is granted, it is the responsibility of CTU to make available the transmission capacity for evacuation of power from the generating station of the LTA customer. It is not the case of the

Petitioner that despite operationalization of LTA, CTU has not made available the transmission capacity for evacuation commensurate within the LTA quantum. Hence, the condition of the Petitioner that CTU could not have planned to evacuate the power from its generating station on account of the constraint of the transmission lines is rejected.

55. As, we have already held that LTA has been relinquished with effect from 20.7.2017, the operationalisation of the LTA for 727 MW w.e.f. 1.10.2017 and the balance 183 MW w.e.f. 28.3.2018 is not in order. As a corollary, the Respondent is not entitled to seek opening of letter of credit in this regard.

56. In the light of the above discussion, the prayers of the Petitioner are disposed of as under:

(a) With regard to the first prayer seeking a declaration that the Petitioner is affected by various force majeure events, we are of the view that the events do not qualify as force majeure in terms of Clause 9 of the BPTA. Accordingly, the prayer of the Petitioner is rejected.

(b) In the second and third prayers, the Petitioner has sought declaration that Power Grid Corporation of India Limited is not entitled to claim transmission charges on the Petitioner after relinquishment of the Long-Term Access w.e.f. July 2017. We have observed that the LTA granted to the Petitioner stands relinquished w.e.f. 20.7.2017. Therefore, the Petitioner is not liable to pay the transmission charges with effect from the date of operationalization of the LTA. However, the liability of

the Petitioner for payment of relinquishment charges from the date of relinquishment shall be in accordance with the order in 92/MP/2015.

- (c) In the fourth prayer, the Petitioner has sought declaration that Power Grid Corporation of India Limited is not entitled to seek opening of Letter of Credit in its favour by the Petitioner in view of the facts and circumstances stated in the petition and especially after relinquishment of the Long Term Access w.e.f. July 2017. We are of the view that since the Petitioner has relinquished 910 MW of LTA w.e.f. 20.7.2017, the Petitioner is not required to open the LC.
- (d) The Petitioner in its fifth prayer has sought that the letter dated 30.8.2018 issued by Power Grid Corporation of India Limited should be declared as illegal to the extent that it accepts relinquishment of Long -Term Access by the Petitioner from 1.6.2018 as opposed to July 2017. As we have decided the date of relinquishment as 20.7.2017, we set aside the letter of PGCIL dated 30.8.2018.
- (e) The Petitioner in its sixth and seventh prayers has sought quashing of invoices raised by PGCIL through letters dated 7.11.2017, 6.11.2017, 5.12.2017, 5.1.2018, 8.2.2018, 6.3.2018, 6.4.2018, 5.6.2018, 10.1.2018, 15.3.2018, and 1.5.2018. We have already observed that the LTA stands relinquished from 20.7.2017 and therefore, the Petitioner shall not be liable to pay the transmission charges for these invoices. However, the petitioner shall be liable to pay the relinquishment charges with effect from 20.7.2017 in accordance with the decision in Petition No. 92/MP/2015.

57. The Petition No. 296/MP/2018 is disposed of in terms of the above.

sd/-
(Dr. M. K. Iyer)
Member

sd/-
(P.K. Pujari)
Chairperson