

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 132/MP/2019

Coram:

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

Date of Order: 17.07.2023

In the matter of:

Petition under Section 79(1)(f) of the Electricity Act, 2003 read with Clause 7.0 of the Bulk Power Purchase Agreement executed between Indian Railways and Bhartiya Rail Bijlee Company Limited dated 16.12.2010 seeking relief on account of Force Majeure events being suffered by the Indian Railways.

And

In the matter of:

Indian Railways

Through the Chief Electricity Distribution Engineer,
East Central Railway
Hajipur, Bihar-844101

... Petitioner

Vs

1. Bhartiya Rail Bijlee Company Limited,

Through its Chief Executive Officer,
Nabinagar Thermal Power Project,
Post- Khaira,
Aurangabad, Bihar-824303

Respondent No -1

2. North Bihar Power Distribution Company Limited,

Through its Managing Director,
Vidyut Bhawan, Bailey Road,
Patna, Bihar-800001

Respondent No -2

3. South Bihar Power Distribution Company Limited,

Through its Managing Director,
Vidyut Bhawan, Bailey Road,
Patna, Bihar-800001

Respondent No -3



Parties Present:

Shri Deep Rao, Advocate, IR
Shri Arjun Agarwal, Advocate, IR
Shri Anand Ganesan, Advocate, BRBCL
Ms. Ritu Apurva, Advocate, BRBCL
Ms. Ashbari, Advocate, BRBCL
Shri Prashant Chaturvedi, BRBCL
Ms. Komal Singh, Advocate, Bihar Utilities
Shri Abhinav Mishra, Advocate, Bihar Utilities
Ms. Nivedita Chauhan, Advocate, Bihar Utilities
Ms. Jagriti Dosi, Advocate, Bihar Utilities
Shri Umang Anand, Bihar Utilities

ORDER

The Petitioner has filed the instant Petition under Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Clause 7.0 of the Bulk Power Purchase Agreement (BPPA) dated 16.12.2010 executed between Indian Railways and Bhartiya Rail Bijlee Company Limited (BRBCL) seeking relief on account of Force Majeure events being suffered by the Indian Railways. The Petitioner has made the following prayers:

“(a) Admit the instant Petition and set aside the invoices raised by BRBCL on the Petitioner from January, 2017 onwards

(b) Direct BRBCL to revise its invoices from January, 2017 onwards to levy tariff proportionate to the quantum of power actually consumed and utilised by the Petitioner from the commissioned units of BRBCL's Project and accordingly refund the excess tariff recovered

(c) Declare that the Petitioner is not liable to BRBCL for any tariff in respect of periods when it was prevented from offtaking and consuming power from the Project due to the Force Majeure events described in the instant Petition and accordingly direct BRBCL to revise its invoices from January, 2017 onwards to reflect only the quantum of power which the Petitioner actually consumed; and

(d) Award the Petitioner applicable interest on the excess tariff to be refunded

(e) Award the Petitioner the costs of the instant Petition; and

(f) Pass any other orders as this Hon'ble Commission may deem fit in the present set of facts and circumstances in the interest of justice.”



Submissions of the Petitioner

2. The Petitioner has mainly submitted as follows:

- (a) Indian Railways operates under the aegis of the Ministry of Railways, Government of India. The Petitioner is a deemed distribution licensee in terms of the third proviso to Section 14 of the Act. All the Railway zones in India, including Eastern Railway, East Central Railway, East Coast Railway, Southern Railway, and South East Central Railway act on behalf of the Railway Board/ MoR.
- (b) The Petitioner utilizes electric traction systems to run a majority of its locomotives. With the objective of procuring power, which is cost-effective and uninterrupted, the MoR entered into a Memorandum of Understanding dated 18.2.2002 (“MoU”) with NTPC. The prime intention behind the said MoU was to jointly promote establishment and operation of power projects for use by the Petitioner at different drawl points across the country.
- (c) MoR, acting on behalf of the President of India, and NTPC entered into a Joint Venture Agreement dated 6.11.2007 (“JV Agreement”). The JV Agreement envisaged the establishment of BRBCL, which would be responsible for the construction and operation of a coal based thermal power plant at Nabinagar, Bihar with a total capacity of 1000 MW, comprising 4 units of 250 MW capacity each.
- (d) The Ministry of Power, vide its communications dated 30.6.2007 and 2.7.2010, allocated 90% of the power generated from the Project to the Petitioner and the remaining 10% power to the State of Bihar. Accordingly, BRBCL was incorporated. The Petitioner, on behalf of the President of India, entered into the BPPA dated 16.12.2010 with BRBCL to procure 90% of the power generated from the Project. The proposal to develop the Project with 1000 MW capacity was approved by the Cabinet Committee for Economic



Affairs (“CCEA”), which was communicated vide MoP’s communication dated 15.02.2007.

- (e) The Petitioner, along with the erstwhile BSEB, applied to CTU (now known as ‘CTUIL vide their applications dated 10.6.2008 and 14.5.2009, for grant of LTA for a total quantum of 1000 MW. The LTA was granted by the CTU vide its intimation dated 24.7.2009. Out of the total quantum of 1000 MW transmission capacity, the Petitioner proposed to utilize 900 MW capacity (355 MW in the Eastern Region, 485 MW in the Western Region and 50 MW in the Northern Region). A detailed tabulation of the quantum of transmission capacity proposed to be utilized in different states has been provided below:

| S. No. | State | Particulars |
|------------------------|-----------------|--------------------|
| Eastern Region | | |
| 1. | Bihar | 50 MW |
| 2. | Jharkhand | 75 MW |
| 3. | West Bengal | 95 MW |
| 4. | Orissa (Odisha) | 60 MW |
| 5. | DVC | 75 MW |
| Western Region | | |
| 6. | Chhattisgarh | 95 MW |
| 7. | Gujarat | 75 MW |
| 8. | Maharashtra | 130 MW |
| 9. | Madhya Pradesh | 185 MW |
| Northern Region | | |
| 10. | Uttar Pradesh | 60 MW |
| | Total | 900 |

- (f) PGCIL entered into a Bulk Power Transmission Agreement dated 8.1.2010 (“BPTA”) with the Petitioner and the erstwhile BSEB.
- (g) The Petitioner’s ability to avail its entire allocated quantum of power from the Project, three conditions were necessarily required to be met. The first condition that was required to be satisfied was that all four Units of the Project are commissioned in time so that the Petitioner is not required to off take power on a limited or piece meal basis. The second condition was the timely



operationalization of LTA by the CTU. As the Petitioner's drawal points are connected to the networks of the various State Transmission Utilities ("STU") across different states, the third condition was the availability of open access over such intra-State networks is also crucial. For the purposes of utilizing the LTA, the third vital condition to be fulfilled was that each of the STUs gave their respective NOCs in a timely manner to the Petitioner's request for utilizing their respective networks to consume power transmitted from the Project. There is no dispute that none of the aforementioned conditions have been met on account of reasons beyond the control of the Petitioner.

- (h) Until 15.1.2017, the Petitioner was forced to procure power from other sources to meet its regular demand. Thereafter, from 15.1.2017 till 26.7.2017, the Petitioner was not able to offtake and consume any power from the Project due to non-operationalization of the LTA by the CTU. Further, from 26.7.2017 to 10.9.2017 only 204.75 MW power was theoretically available to the Petitioner, which theoretically increased to 409.5 MW from 10.9.2017 to 26.2.2019, and further increased to 614.25 MW from 26.2.2019 to till date. Furthermore, even this quantum has not been available to the Petitioner entirely on account of constant fluctuation and revision in its DC by BRBCL and non-grant of NOCs by the various STUs. However, BRBCL has been raising invoices and recovering an arbitrary tariff, comprising of the fixed charges as well as variable charges, from the Petitioner for the entire quantum of power being generated by three commissioned Units from the Project. This is despite the fact that neither has the tariff for the Project ever been determined by this Commission, nor has the dispute regarding the Date of Commercial Operation ("**COD**") of the Project been decided in favour of BRBCL. The Petitioner has been constrained to pay the tariff in accordance with these invoices, which amounts to around Rs. 5.50 per unit. This is severely prejudicial to the Petitioner who has not been able to off-take and consume the power from the Project due to continued existence of Force Majeure events.

Details of the Force Majeure events



i. Non-commissioning/ delay in commissioning of the various Units of the Project by BRBCL

- (i) There has been considerable delay by BRBCL in commissioning of the Project. As per the timelines envisaged in the CCEA Approval, the 1st Unit of the Project was to be commissioned by 22.10.2010, and each of the remaining three Units were to be progressively commissioned thereafter at an interval of 6 months each. Commissioning of the various Units of the Project was either achieved after an inordinate delay or have still not been commissioned. While Units I, II, and III of the Project were allegedly commissioned on 15.01.2017, 10.09.2017, and 26.02.2019, respectively, which was after a delay of more than 6-7 years, Unit IV of the Project is yet to be commissioned. BRBCL has claimed this delay to be on account of various Force Majeure events vide its Petition No. 23/GT/2017 and has sought for consequential reliefs. Without prejudice to the submissions made by the Petitioner, who is the contesting Respondent in the said Petition, it is submitted that such a delay by BRBCL in any case is squarely beyond the control of the Petitioner and constitutes a Force Majeure event in terms of the Force Majeure Clause under the BPTA.
- (j) On the date of operationalization of LTA, i.e. 26.7.2017, only Unit I of the Project had been commissioned. Units II and III of the Project were allegedly commissioned on 10.9.2017 and 26.2.2019. BRBCL had claimed the COD of Unit III of the Project from 20.2.2019 which was disputed by the Petitioner. Subsequently, in view of the concerns raised by the Petitioner, a special meeting was held by ERPC on 11.3.2019 to discuss the issues related to the COD of Unit III of the Project, as declared by BRBCL. It was decided in the said meeting that COD of Unit III of the Project shall be accepted from 26.2.2019 only, and any generation prior to 26.2.2019 shall be treated as infirm generation. While the Petitioner has filed a separate Petition, being Petition No. 333/MP/2018 before this Commission, questioning the validity of the COD of various Units of the Project declared by BRBCL, the aforementioned facts demonstrate that BRBCL is not being faithful in its declaration of COD.



- (k) The Petitioner was capable of drawing only 204.75 MW power from the Project from 26.7.2017 to 10.9.2017. Further, from 10.9.2017 onwards, at best only 409.5 MW from the Project was available to the Petitioner until the alleged commissioning of Unit III of the Project. Pursuant to the alleged commissioning of Unit III of the Project on 26.2.2019, the quantum available to the Petitioner has theoretically increased to 614.25 MW.
- (l) The non-commissioning/ delay in commissioning of Units I, II and III and the non-commissioning of Unit IV was unforeseeable and squarely beyond the control of the Petitioner. Therefore, the same constitutes an on-going Force Majeure event in terms of the Force Majeure Clause under the BPTA. This has resulted in additional expenses being borne by the Petitioner for procuring power from other sources and the Petitioner ought to be compensated for such expenditure, which would not have been required but for the delay in commissioning of the Units of BRBCL's Project.

ii. Delay in operationalization of the LTA by the CTU

- (m) In terms of the LTA intimation dated 24.7.2009 issued by the CTU and Clauses 1.(a) and 1.(b) of the BPTA, it was agreed that PGCIL shall build the following transmission assets in order to facilitate the Petitioner's open access:
- a. Dedicated transmission system: Nabinagar-Sasaram 400 KV D/C (twin lapwing conductor)
 - b. Transmission System strengthening: Common strengthening system associated with Tilaiyya Ultra Mega Power Project ("UMPP"), Barh-II Thermal Power Station ("TPS") and the Project:
 - i. Balia-Lucknow 765 kV S/C (2nd)
 - ii. Meerut- Moga 765 kV S/C



- (n) In the 11th Connectivity & LTA meeting for the Eastern Region, it was decided that the two transmission elements for transmission system strengthening were not required to be constructed anymore. This was on account of the delay/deferment of the Tilaiyya UMPP and Barh-II TPS generating stations. It was decided that the power evacuation from the Project could be undertaken through the existing system network. In the same meeting, NTPC updated the schedule of commissioning of the Project with Unit 1 being tentatively commissioned in September 2016. CTU issued a revised LTA intimation dated 15.7.2016 to the beneficiaries, including the Petitioner stating that the existing and planned transmission system shall be sufficient for the evacuation of power from the Project.
- (o) A meeting was held on 9.1.2017 at the offices of the CTU in view of the commissioning of Unit I of the Project from 15.1.2017 and the steps to be taken by the CTU towards operationalization of the LTA. A communication was addressed to the CTU on 12.1.2017 by the Petitioner requesting the CTU to operationalize the LTA to enable the Petitioner to offtake power from Unit I of the Project. Thereafter, another meeting was held with the CTU on 16.1.2017 in which the representatives of the Petitioner, CTU, NTPC participated, to discuss the issue of operationalization of LTA by the CTU.
- (p) In a Special Meeting convened by ERPC on 25.1.2017 which was attended by all the stakeholders, the Petitioner, BRBCL and the CTU regarding scheduling of power from the Project, the non-operationalisation of LTA and the non-issuance of NOCs by the STUs. Despite the agreement arrived at the above mentioned meeting, the CTU failed to operationalize the LTA. BRBCL filed a Petition before this Commission, being Petition No. 24 of 2017, seeking a direction to Eastern Regional Load Despatch Centre (“ERLDC”)/ Eastern Regional Power Committee (“ERPC”) to accept the Declared Capacity (“DC”) as given by BRBCL’s Project. The Petitioner herein was impleaded as Respondent No. 1 in this Petition. It was in this Petition that issues being faced by Petitioner were brought to the fore.



(q) Pursuant to the aforementioned Order, a Special Meeting was convened by ERPC on 11.07.2017 with the representatives of all the stakeholders, CTU and the Petitioner. The MoM dated 14.7.2017 for the said ERPC meeting records that the Petitioner requested the CTU to operationalise the capacity of LTA in accordance with the commissioning schedule of the Project. As and when the new Units are commissioned, the CTU may schedule the remaining quantum of the LTA capacity. Such a request was made for the effective utilization of the existing network's transmission capacity.

(r) After the aforementioned Order and ERPC Special Meeting, CTU operationalised the LTA of 900 MW from 26.7.2017 onwards. This was after a passage of more than 7 years from the intimation of grant of LTA by the CTU. Such a delay on part of the CTU in operationalising the LTA was squarely beyond the control of the Petitioner, which has prevented the Petitioner from off taking power from Unit I of the Project. This is an independent, concurrent Force Majeure event (in addition to the delay in commissioning of the project; and the delay in issuance of NOCs by STUs) in terms of Clause 7 of the BPPA and prevented the Petitioner from off-taking power from 15.01.2017 to 26.7.2017 from the Project.

iii. Delay in/ Non-issuance of NOCs by STUs across different States

A. Kerala

(s) Southern Railway ("SR") acting on behalf of the Petitioner, vide its letter dated 18.4.2017 applied to Chief Engineer (Transmission and System Operation), Load Despatch Centre, Kerala State Electricity Board Limited ("KSEB"), for grant of NOC and in-principle approval for availing power supply from BRBCL through the LTA for 50 MW. Since on the said date, KSEB has not issued any NOC or concurrence to the Petitioner which is an on-going Force Majeure event in terms of BPPA, which has uncontrollably prevented the Petitioner from off-taking and consuming the power from the commissioned Units of the Project upto 50 MW of power generated by the Project from 18.4.2017 onwards.



B. West Bengal

| Date of Application to the STU | Quantum of LTA sought | Receipt of consent | Period of delay | Statutory timeline for grant of consent |
|--------------------------------|-----------------------|--------------------|--------------------|---|
| 19.9.2016 | 95 MW | -- | 19.10.2016 onwards | 30 days from the date of receipt of application. (Regulation 10.3(a) of West Bengal Electricity Regulatory Commission (Open Access) Regulations, 2007.) |
| 1.11.2017 | 170 MW | -- | 1.12.2017 onwards | 30 days from the date of receipt of application. (Regulation 10.3(a) of West Bengal Electricity Regulatory Commission (Open Access) Regulations, 2007.) |

- (t) Eastern Railway (“ER”), acting on behalf of the Petitioner, on 19.9.2016, applied for grant of NOC for 95 MW LTA to the West Bengal State Electricity Transmission Company Limited (“WBSETCL. Despite the mandate under Regulation 10.3(a) of West Bengal Electricity Regulatory Commission (Open Access) Regulations, 2007 requiring WBSETCL to communicate its decision within 30 days, WBSETCL kept delaying the issuance of NOC. It was only vide WBSETCL’s NOC dated 21.08.2017 that ER was granted a conditional NOC for 95 MW LTA which is an on-going Force Majeure event in terms of the Force Majeure Clause under the BPPA, which has uncontrollably prevented the Petitioner from off-taking and consuming power to the extent of 95 MW from 15.1.2017 till 1.12.2017 and 170 MW from 1.12.2017 onwards, generated by the Project.
- (u) Considerable delay has also been caused in the issuance of NOC on account of delay in installation of ABT meters, which was within the scope of BRBCL. In this regard, repeated communications were addressed to BRBCL vide letters dated 31.10.2017, 16.11.2017, 12.12.2017, 26.12.2017 and 2.2.2018. In the said communications, it was repeatedly stressed that the delay in grant



of NOC by WBSETCL is getting exacerbated further due to delay in installation by BRBCL.

- (v) Despite the application for grant of LTA having been submitted well in advance, and issuance of repeated reminders from ER to WBSETCL, not only WBSETCL delayed the grant of NOC for more than two and a half years, but it also stretched the period of delay in issuing its NOC by making it contingent upon unreasonable conditions.

C. BIHAR

| Date of Application to the STU | Quantum of LTA sought | Receipt of consent | Period of delay | Statutory timeline for grant of consent |
|--------------------------------|-----------------------|--------------------|---------------------|---|
| 2.7.2013 | 50 MW | 18.5.2018 | 15.1.2017-18.5.2018 | 30 days from the date of receipt of application. [Regulation 13(1)(d) of Bihar Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005.] |

- (w) The Petitioner, vide its application dated 2.7.2013, applied to Bihar State Power Transmission Company Limited (“BSPTCL”) for grant of LTA for 50 MW power. Despite the mandate under Regulation 13(1) (d) of Bihar Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005 to communicate its decision within 30 days, BSPTCL kept delaying the issuance of permission for LTA. BSPTCL cited conduct of system studies as the reason for delay in deciding upon the Petitioner’s LTA application. Subsequently, it was only vide BSPTCL’s NOC dated 18.5.2018 that the Petitioner was granted LTA for 50 MW power. It is clear that the Petitioner’s application had been pending with BSPTCL for more than 5 years, during which Units I and II of the Project were allegedly commissioned on 15.1.2017 and 10.9.2017, respectively. The non-issuance of NOC by BSPTCL is a Force Majeure event in terms of the Force Majeure Clause under the BPPA, which has uncontrollably prevented the Petitioner from off-



taking and consuming power from the Project to the extent of 50 MW from the alleged commissioning of Unit I until 18.05.2018.

D. ODISHA

| Date of Application to the STU | Quantum of LTA sought | Receipt of consent | Period of delay | Statutory timeline for grant of consent |
|--------------------------------|-----------------------|--------------------|--------------------|---|
| 20.9.2016 | 50 MW | -- | 20.10.2016 onwards | 30 days from the date of receipt of application. [Regulation 12(1)(a)(iv) of Odisha Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulation, 2005.] |
| 20.4.2017 | 60 MW | -- | 20.5.2017 onwards | 30 days from the date of receipt of application. [Regulation 12(1)(a)(iv) of Odisha Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulation, 2005.] |

- (x) East Coast Railway (“ECoR”), acting on behalf of the Petitioner, vide its application dated 20.9.2016 applied to STU in Odisha, Odisha Power Transmission Company Limited (“OPTCL”), for grant of LTA and NOC for the quantum of 50 MW power. Pursuant to the discussions with the representatives from the Government of Odisha, another application dated 20.4.2017 for NOC and grant of LTA was submitted to OPTCL for a revised quantum of 60 MW power. Despite the mandate under 12(1)(a)(iv) of Odisha Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulation, 2005 of communicating its decision within 30 days, OPTCL unforeseeably and uncontrollably withheld the issuance of NOC for LTA. Till date, no NOC has been issued by OPTCL despite repeated efforts and communications on part of ECoR which is an on-going Force Majeure event in terms of the Force Majeure Clause under the BPPA.

E. Chhattisgarh



- (y) South East Central Railway (“SECR”), acting on behalf of the Petitioner, vide its application dated 9.01.2017 applied to the STU in Chhattisgarh, Chhattisgarh State Power Transmission Company Limited (“CSPTCL”), for grant of LTA and NOC for 95 MW power. Despite repeated requests and continuous efforts on part of the Petitioner, CSPTCL has not issued the required NOC which is on-going Force Majeure event in terms of the Force Majeure Clause under the BPPA.
- (z) In terms of the Force Majeure Clause under the BPPA, the Petitioner was required to give notice of the force majeure events to BRBCL within a reasonable time. Pertinently, BRBCL has always had material notice of these Force Majeure events.

Reply of Bhartiya Rail Bijlee Company Limited (BRBCL)

3. Respondent No.1 (BRBCL) vide its reply affidavit dated 7.8.2019 has mainly submitted as under:

- (a) Issues of transmission of electricity are to be dealt with by ECR directly with PGCIL and have nothing to do with BRBCL. The sale of electricity is at the bus bar of the generating station.
- (b) It is denied that all four units of the project had to be commissioned at the same time to enable ECR to off take all the electricity together. There is no basis for making such argument since it is unknown to electricity sector that all units of generator would get commissioned at a single date. The various units are commissioned in progressive manner and even the IEGC permits a time of 6 months to be reasonable between commissioning of two units and it is wrong that delay in commissioning of Units under BPPA becomes a force majeure for ECR. BRBCL has filed a detailed Tariff Petition being Petition No. 23/GT/2017 in which all the justification for delay in commissioning of the respective units has been provided along with documentary evidence of the same.



- (c) Had the Petitioner taken appropriate action for scheduling of power after the COD of Unit-I on 15/1/2017, the same could have been feasible under STOA. However, the Petitioner has taken action after the decision of Commission IN Petition No. 24/MP/2017 and the power was scheduled from BRBCL to Maharashtra and DVC.
- (d) Until 15.1.2017, the Petitioner was forced to procure power from other sources to meet its regular demand. Thereafter, from 15.1.2017 till 26.7.2017, the Petitioner was not able to off take and consume any power from the Project due to non-operationalisation of the LTA by the CTU is on account of Petitioner's inaction and has nothing to do with BRBCL. During this period, power was available from BRBCL and other contentions on the issues being faced by ECR with CTU / STUs for getting transmission of power / open access are also not force majeure under the BPPA.
- (e) Article 7 of the BPPA dealing with force majeure does not aid the ECR at all. None of the events being cited by ECR amount to Force Majeure under the BPPA. The BPPA clearly mandates ECR to make arrangement and have transmission agreements for evacuation of electricity from bus-bars of Nabinagar Station and wheeling to its traction sub-stations.
- (f) Mere attendance of the meetings by the representatives of BRBCL does not imply that BRBCL is a party to the issues of LTA operationalization and NOC of States and is covered as force majeure under the BPPA. Therefore, the Petitioner contention that non-operationalization of LTA is an independent, concurrent Force Majeure event (delay in issuance of NOCs by STUs) in terms of Clause 7 of the BPPA is wrong and denied. The delay in/Non-issuance of NOCs by STUs across different States is not something which is governed by BRBCL.

Reply of North Bihar & South Bihar power companies (Respondent Nos. 2 & 3)



4. The Respondent No.2 & 3 (NBPDCCL and SBPDCL) vide reply affidavit dated 7.8.2019 have jointly submitted the following:

- a) BRBCL raising invoices and also recovering arbitrary tariff, comprising of fixed charges as well as the variable charges from the Discoms despite the fact that the tariff has not been decided by the Commission. This is a serious issue as raising of the invoices are strictly prohibited under Regulation 79(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (the CBR).
- b) Clause 5.2 of the BPPA provides billing on provisional basis which is illegal as the same is opposed to Regulation 79(1) of the CBR. As per Section 57 of the Indian Contract Act, 1872, the promise related to the provisional payment as contained in Clause 5.2 of the BPPA under the specified conditions of charges of electricity not determined by CERC prior to commencement of COD of such unit, is a void agreement. The acts of Respondent-BRBCL in raising the invoices on Discoms are illegal and accordingly liable to be set aside..
- c) The Petitioner did not complete his promise of putting the entire generating station during the tariff block of 2009-14 and that there has been huge delay in the completion of this generating station. The Respondent, BRBCL has approached this Commission during the tariff period 2014-19 and accordingly it was incumbent on him to revise the BPPA as was also done by the CTU. Accordingly, the Commission may direct the Respondent, BRBCL to revise the BPPA.

Rejoinder dated 9.9.2019

5. The Petitioner vide rejoinder affidavit dated 9.9.2019 to the reply filed by BRBCL has mainly submitted as under:



- a) The delay in operationalization of the LTA by PGCIL and the delay/ non-issuance of NOCs by the respective State STUs are occurrences whose impact is not restricted to a single contract. The direct impact of these occurrences is the Petitioner being rendered incapable of procuring power from BRBCL under the PPA. To the extent that these events have impacted the performance of the Petitioner's obligations under the BPPA, they constitute a Force Majeure event under the BPPA and ought to be considered/ examined on their respective merits.
- b) The Petitioner has filed the instant Petition seeking specific reliefs against BRBCL, but not against the CTU or STUs. Nonetheless, as was submitted by the Petitioner at the time of the hearing in the captioned matter pursuant to which notice was issued, if the Commission directs the Petitioner to add the CTU/STUs as Respondents, the Petitioner will comply with the directions of the Commission.
- c) BRBCL in its reply dated 7.8.2019 has relied upon the Petition No. 145/MP/2013 to contend that the events contemplated by the Petitioner are not a Force Majeure event. A bare perusal of the aforementioned parts of the Order in Petition No. 145/MP/2013 exhibits that the party claiming Force Majeure was aware of the consequence of non-grant of Medium Term Open Access ("MTOA") and the party had the obligation to obtain the MTOA with the full knowledge of the consequences of its failure to obtain MTOA.
- d) The aforementioned findings of the Commission are rendered in a completely different factual scenario and to draw their applicability in the instant Petition is completely fallacious and misconceived. This is on account of the fact that first, MTOA and LTA are two distinct open access products and while the grant of MTOA depends on the availability of the capacity in the existing system, LTA may be granted even if there is no existing capacity and new capacity is required to be added by way of system strengthening or a dedicated transmission line. Therefore, the two products and their underlying



legal principles do not stand at the same footing and cannot be equated. Further, the grant of MTOA was accepted by the Petitioner in the aforementioned order as its liability. In the instant case, the situation is completely different as the LTA was operationalised after much delay despite having been granted. In fact, the Commission has noted the delay caused in the operationalisation of the LTA and had directed the CTU to grant the same.

- e) The LTA was operationalised on 26.7.2017 onwards after a delay of more than 7 years from the intimation of the grant of LTA by the CTU. Additionally, the delay on the part of CTU in operationalising the LTA was squarely beyond the control of the Petitioner, which has prevented the Petitioner from off taking power from Unit I of the Project. Therefore, the delay in the operationalisation of the LTA by the CTU is a Force Majeure event in terms of Clause 7 of the BPPA.
- f) The contention of BRBCL that no event beyond the bus bar can be a Force Majeure event under the BPPA, is misconceived. Any event beyond the control of a party that adversely impacts the discharge of its obligations under a contract is covered by Force Majeure clause under that contract.
- g) In terms of the Force Majeure Clause under the BPPA, the Petitioner was required to give notice of the Force Majeure events to BRBCL within a reasonable time. The Petitioner has substantially complied with the requirement of notice under the Force Majeure event as stipulated under the BPPA through which BRBCL was certainly aware of the Force Majeure events as claimed by the Petitioner. The Petitioner vide its communication dated 17.10.2018, sent a detailed notice to BRBCL. The said notice complied in detail the reasons why the Petitioner was uncontrollably prevented from off-taking and consuming power from the Project. BRBCL, vide its communication dated 3.12.2018, responded to the Petitioner's communication and dismissed all the concerns expressed by the Petitioner.



Hearing dated 28.06.2022

6. During the course of the hearing learned counsel for the Petitioner submitted that at the time of filing of the Petition certain force majeure events including delay in issuance of No Objection Certificate (NOC) by the various State Transmission Utilities were ongoing which prevented the Petitioner from off-taking and consuming the power from the Respondent No.1's Project. However, subsequently such events had come to an end as the Petitioner had re-allocated power to the other States where there was no issue of NOC or the Petitioner was already having the NOC and as such force majeure claims of the Petitioner have now crystallized.

7. Learned counsel for the Respondent No.1, Bhartiya Rail Bijlee Company Limited stated that in view of the subsequent developments, it would be appropriate for the Petitioner to withdraw the present Petition and to file a fresh Petition on the subject matter and the Petitioner may be directed to file an application seeking amendment to the Petition so as to incorporate such subsequent developments and to appropriately mould its prayers.

8. The Petitioner opposed the suggestions and submitted that the Petitioner does not wish to file a fresh Petition by withdrawing the present Petition and added that the Petitioner also is not willing to change the prayers made in the present Petition and only seeks to place on record the subsequent developments.

Submissions by the Petitioner

9. The Petitioner vide affidavit dated 12.7.2022 has submitted as under:

a) In spite of having status of deemed licensee, Indian Railways application dated 17.3.2015 for grant of connectivity before MSETCL was denied. MSETCL insisted on a notification by an Appropriate Commission on the "deemed distribution licensee" status of the Indian Railways.



b) In the meeting convened by ERPC on 12.08.2016 *inter alia* the OPTCL and the WBSETCL raised an objection that Indian Railways had not applied for open access in proper formats. It was agreed that Indian Railways will apply for grant of connectivity, LTA and with requisite NOC in the format specified by OPTCL and WBSETCL.

Odisha

c) On the Petitioner application before OPTCL for grid connectivity, LTA and NOC for open access on 20.9.2016, OPTCL contested the Petitioner's status as a deemed distribution licensee. OPTCL filed a Petition before the OERC, being Case No. 55 of 2017, seeking declaration of East Coast Railways (ECoR) as a deemed distribution licensee and specifying any general or specific licence condition(s) applicable to ECoR and OERC vide its order dated 25.5.2020 hold that Railways is a 'deemed transmission licensee' and not a 'deemed distribution licensee'. Railways has appealed the said Order before APTEL in Appeal No. 114 of 2020, which is pending, tagged with Appeal No. 276 of 2015.

d) In absence of any movement and to mitigate the impact of force majeure, the Railway Board re-allocated the Odisha share of power from BRBCL's plant vide its letter dated 15.10.2018. Due to the delay beyond 30 days' timeline, the Petitioner was thus unforeseeably and uncontrollably prevented from off-taking power between 15.01.2017 and 19.05.2017 to the extent of 50 MW, and between 20.05.2017 and 15.10.2018 to the extent of 60 MW.

Chhattisgarh

e) In view of ERPC meeting held on 12.8.2016, South East Central Railway ("SECR"), acting on behalf of the Petitioner, vide its application dated 09.01.2017 applied to the STU in Chhattisgarh i.e. CSPTCL, for grant of LTA and NOC for a quantum of 95 MW, CSPTCL has not issued the required NOC till date. In meeting held on 21.9.2017 CSPTCL took a position that since the SECR has outstanding dues, they cannot be granted NOC for open access. The Petitioner has been drawn into proceedings before the CSERC – duly



filed by SECR as Petition No. 59 of 2017 (O.A.) and CSERC vide Order dated 8.8.2018 directed the parties to mutually resolve the technical and commercial issues and to submit a feasible proposal for implementation of open access transaction sought.

f) SECR preferred an Appeal No. 132 of 2019 before the APTEL which was disposed on 23.11.2019. In view of the aforesaid APTEL Order, SECR submitted another application on 13.1.2020 to CSPTCL and CSLDC for grant of MTOA. However, the CSPDCL has not issued NOC for open access till date and raised a new objection regarding status of Indian Railways as deemed licensee – which also stands settled by this Commission. SECR moved the representation before CSERC which was taken up by CSERC as Suo Motu Petition No. 44 of 2020.

g) Apprehending further delay due to the pendency of Suo Motu Petition No. 44 of 2020 before the CSERC and to mitigate the impact of force majeure, the Railway Board re-allocated the Chhattisgarh share of power from BRBCL's plant vide its letter dated 25.6.2020. Due to delay beyond 30 working days' timeline, the Petitioner was unforeseeably and uncontrollably prevented from off-taking power between 21.2.2017 and 25.6.2020. Vide order dated 24.2.2022, CSERC disposed of Suo Motu Petition No. 44 of 2020.

West Bengal

h) On 19.9.2016, Eastern Railway (“ER”) applied (on behalf of the Petitioner) to WBSETCL for grant of NOC for 95 MW LTA. WBSETCL granted a conditional NOC on 21.8.2017. Further on 1.11.2017, ER applied to WBSETCL for grant of NOC for a revised quantum of 170 MW LTA.

i) Due to delay beyond 30 days' timeline, the Petitioner was unforeseeably and uncontrollably prevented from off-taking power to the extent of 90 MW between 15.1.2017 and 30.11.2017 and to the extent of 170 MW between 1.12.2017 and 25.6.2020.

Kerala



j) The Petitioner on 18.4.2017 applied for grant of NOC and in-principle approval for availing connectivity before KSEB. The said NOC has not been granted by KSEB till date.

k) The Petitioner's force majeure claim with respect to non-grant/ belated grant of NOC by various STUs is as under:

| State | Quantum of Connectivity Sought | Statutorily Mandated Timeframe | Application Date | Force Majeure Relief, i.e., Delay Period Claimed |
|--------------|--------------------------------|--------------------------------|------------------|--|
| Odisha | 50 MW | 30 days | 20.9.2016 | 15.1.2017- 19.5.2017 |
| | 60 MW | | 20.4.2017 | 20.5.2017-15.10.2018 |
| Chhattisgarh | 95 MW | 30 working days | 9.1.2017 | 21.2.2017-25.6.2020 |
| West Bengal | 90 MW | 30 days | 19.9.2016 | 15.1.2017- 30.11.2017 |
| | 170 MW | | 1.11.2017 | 1.12.2017-25.6.2020 |
| Bihar | 50 MW | 30 days | 2.7.2013 | 15.1.2017-18.5.2018 |
| Kerala | 50 MW | 60 days | 18.4.2017 | 18.8.2017-ongoing |

Hearing dated 22.09.2022

10. During the course of hearing, the learned counsel for the Petitioner and the Respondent No.1 made their respective submissions in the matter. The learned counsel for the Respondents No. 2 & 3, Bihar Utilities submitted that there has been change in the counsel for the Respondents and prayed for some time to file their replies/submissions in the matter. Accordingly, the parties were permitted to file their reply/written submissions and order was reserved in the matter.

Reply of Respondent, BRBCL

11. BRBCL vide affidavit dated 12.10.2022 mainly has submitted as under:

a) NOC for utilizing State network in a timely manner has been termed as an event within the control of the ECR by the Commission in its Order dated 5.2.2020 in Petition No. 42/MP/2019 filed by Petitioner against CTU which is similar to instant case. The aforesaid order is clear on the aspect that delay due to non-grant of NOC by STUs are not a force majeure. If this is not a force majeure even



qua the CTU, there is no question of the same event being treated as a force majeure qua BRBCL.

b) BRBCL becomes entitled to fixed charges as long as its machines are available and it has arranged adequate fuel. As long as BRBCL declares availability, its entitlement to fixed charges is based on the DC and not on any other aspect.

c) Article 7 i.e. Force Majeure, of the BPPA can only relate to the obligations of power purchase and payment for the same qua BRBCL and ECR. This has nothing to do with the transmission of power or consumption of power by ECR in various States. The BPPA & BPTA signed by ECR with BRBCL and CTU are two independent contracts for generation tariff and transmission tariff respectively and have nothing to do with each other.

d) The above position has also been settled by this Commission in the Order dated 29.06.2017 passed in I.A 20 of 2017 in Petition No. 24/MP/2017. Commission vide Order dated 18.9.2018 disposed off Petition No. 24/MP/2017 and held that it is only the responsibility of ECR to deal with scheduling of power and the DC of BRBCL cannot be withheld on grounds of the scheduling of power being delayed by the STU's/SLDC's.

e) The Commission has also examined the validity of a mirror like force majeure clause in a PPA between NSPCL and DNH Distribution Company Limited in its Order dated 17.9.2018 in Petition No.145/MP/2013. The said Order clearly covers the argument of ECR that the issues of transmission of the electricity or scheduling of electricity can be brought under the scope of force majeure under Article 7 of the BPPA.

Submissions by the Petitioner

12. The Petitioner vide affidavit dated 7.11.2022 has submitted as follows:

a) The following NOCs were granted by the STUs of various States for drawal of power by the Petitioner from BRBCL:

i. BSPTCL issued NOC to the Petitioner for maximum ceiling drawal of an additional 50 MW from BRBCL vide letter dated 22.5.2019.



- ii. MPPTCL issued NOC to the Petitioner for maximum ceiling drawl of 330 MW from BRBCL vide letter dated 3.11.2021.
- iii. UP-STU issued NOC to Northern-Railway-UP for maximum ceiling drawl of 100 MW from BRBCL vide NOC No. 4172/Dir(O)/Railway dated 20.10.2019.
- iv. HVPNL issued NOC to the Petitioner for supply of 15 MW Power from BRBCL, Nabinagar vide NOC No. 33/STU/OA-758 dated 5.3.2019. Subsequently, HVPNL issued another NOC to Northern Railways for maximum ceiling drawl of 40 MW from BRBCL vide NOC No. 202/STU/OA-658/Vol-II dated 22.11.2021.
- v. Punjab State Transmission Corporation Limited (PSTCL) issued NOC to the Petitioner for maximum ceiling drawl of 35 MW from BRBCL vide NOC No. 113 dated 1.7.2019.
- vi. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. (RVPNL) issued NOC to Indian Railways for maximum ceiling drawl of 10 MW vide letter dated 11.06.2019.
- vii. Delhi Transco Limited issued NOC to the Petitioner for LTOA from BRBCL for maximum ceiling drawl of 5 MW vide NOC No. F.DTL/202/Oprns.plg/ Manager (SS&LM)/19-20/SS/F-14/172 dated 23.10.2019. Subsequently, Delhi Transco Ltd. issued another NOC for maximum ceiling drawl of 10 MW from BRBCL vide NOC No. F.DTL/202/Oprns.plg/Manager (SS&LM)/2021-22/F-14/63 dated 17.9.2021.
- viii. Karnataka Power Transmission Corporation Limited (KPTCL) issued NOC to South-Western Railway for availing LTOA facility of 10 MW from BRBCL vide NOC No. B28(a)/70090/17-18 dated 24.02.2020.
- ix. Assam Electricity Grid Corporation Limited (AEGCL) issued NOC to the Petitioner to avail LTOA facility of maximum ceiling drawl of 5 MW from BRBCL vide NOC No. AEGCL/MD/TL-OPEN-ACCESS/2017/Extn.01 dated 21.11.2019.
- x. Maharashtra State Electricity Transmission Company Limited (MSETCL) issued NOC to the Petitioner to avail LTOA facility for the allocation of 120 MW power from BRBCL vide letter dated 19.07.2017.
- xi. SLDC, Damodar Valley Corporation (DVC), Howrah issued NOC to the Petitioner for maximum ceiling drawl of 110 MW from BRBCL vide NOC No. SLDC/NOC/31 dated 29.05.2019.



b) In view of the belated/non-grant of the NOCs by STUs of various other States, the Petitioner also re-allocated its State-wise consumption of power generated by BRBCL.

c) During the hearing of the instant Petition on 22.9.2022, the Commission enquired whether 'permanent' events, such as non-grant of NOCs, can be considered as Force Majeure events under the BPPA. In this regard, the Petitioner is relying on the following judgements of APTEL in which *in alia* held that delay in grant of approvals or clearances by government instrumentalities are considered as Force Majeure events

(i) Judgement dated 19.5.2020 in Appeal No. 266 of 2016, (PEL Power Limited vs. Central Electricity Regulatory Commission & Ors.)

(ii) Judgement dated 12.8.2021 in Appeal No. 38 of 2019, Hirahelli Solar Power Project LLP vs. BESCO & Ors.,

(iii) Judgement dated 4.2.2014 in Appeal No. 123 of 2012, Gujarat Urja Vikas Nigam vs. Gujarat Electricity Regulatory Commission & Ors.,

(iv) Judgement dated 5.7.2021 in Appeal No. 67 of 2021, M/s Solitaire BTN Solar Private Limited vs. TNERC & Ors.

(v) Judgement dated 14.7.2021 in Appeal No. 374 of 2019, SEI Diamond Private Limited vs. Karnataka Electricity Regulatory Commission & Ors. under the PPA.

d) In its Written Submissions dated 12.10.2022, BRBCL has sought to rely on this Commission's Order dated 5.2.2020 in Petition No. 42/MP/2019 filed by the Petitioner against CTU. Pertinently, this Commission vide the said Order has not made any determinative finding on the issue of delay/non-grant of NOCs by STUs constituting a Force Majeure event under the BPPA. The observations of the Commission with regards to the non-grant/delayed grant of NOCs by STUs constitute *obiter dicta* and are not part of the *ratio decidendi* of the Commission's



Order. It is a settled position of law that observations of a court/ quasi-judicial authority that do not relate to any of the legal questions arising in the case are part of the obiter dicta and cannot be considered as part of the ratio decidendi. It is well-settled by the Hon`ble Supreme Court that only the ratio decidendi of a court decision is binding and forms part of authoritative precedent [Girnar Traders vs. State of Maharashtra, (2007) 7 SCC 555]. With regards to this Commission's Order dated 5.2.2020, neither the prayers of the Petitioner nor the legal questions framed by the Commission pertain to the question of non-grant/delay of NOCs by STUs constituting Force Majeure events. The observations are not part of the ratio decidendi and do not bind this Commission while adjudicating the instant Petition.

The contention of BRBCL that the remedy with respect to non-issuance of NOCs may be sought against the SLDCs in the respective State Commissions is misconceived. It is reiterated that in view of the non-issuance of NOCs by various STUs, the Petitioner was not able to off-take power and consume the power from the Project. Therefore, the non-issuance of NOCs by STUs amounts to a Force Majeure event under the BPPA as the event was beyond the control of the Petitioner's control.

e) APTEL has also held that the delay in provision of open access or transmission facilities for reasons solely/ partially attributable to CTU constitutes a Force Majeure event in terms of the Power Purchase Agreement between the generator and the distribution company. In this regard, reference may be had to the APTEL's Judgement dated 18.01.2019 in Appeal No. 279 of 2015, M/s ACB (India) Limited vs. Gujarat Electricity Regulatory Commission & Ors.

f) APTEL's Judgment dated 25.8.2022 in Appeal Nos. 91 of 2020, 145 of 2021 and 327 of 2022, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) vs. Central Electricity Regulatory Commission & Anr. Also upholds this Commission's finding in the underlying Orders, affirming that the non-operationalisation of LTA will amount to Force Majeure under the relevant Power Purchase Agreement.



g) In terms of the Force Majeure clause under the BPPA, the Petitioner was required to give notice of the Force Majeure events to BRBCL within a reasonable time. Furthermore, it is submitted that in Petition No. 24/MP/2017, wherein BRBCL was a Petitioner, directions were issued by this Commission to the CTU to operationalise the LTA. Additionally, BRBCL has attended various meetings such as 11th Connectivity & LTA meeting dated 13.6.2017 for the Eastern Region, along with the CTU and the Petitioner and special meeting convened by Eastern Regional Power Committee dated 25.1.2017 along with representatives from OPTCL, BSPTCL, GRIDCO and WBSEDCL.

h) The Petitioner has substantially complied with the requirement of notice under the Force Majeure event as stipulated under the BPPA through which BRBCL was certainly aware of the Force Majeure events as claimed by the Petitioner.

Analysis and Decision

13. We have considered the submissions of the Petitioner and the Respondents and have perused the facts available on record. The Petitioner has mainly claimed the following events to be Force Majeure under BPPA dated 16.12.2010:

(a) delay of more than 6 years on part of BRBCL in commissioning its thermal generating plant which fundamentally altered the timelines within which it would receive power from the Project;

(b) delay on part of the CTU in operationalizing the LTA from the commissioning of Unit I of the Project till 26.07.2017; and

(c) delay in issuance of No-Objection Certificates (“NOC”) by the various State Transmission Utilities (“STUs”), which unforeseeably and uncontrollably prevented the Petitioner from utilizing its LTA capacity across different States, where Petitioner’s drawl points exist.



In light of the above, the Petitioner has sought that BRBCL be directed to revise its invoices from January, 2017 onwards to levy tariff proportionate to the quantum of power actually consumed and utilized by the Petitioner from the commissioned units of BRBCL's Project and accordingly, refund the excess tariff recovered with interest.

14. The Respondent BRBCL has submitted that issues of transmission of electricity are to be dealt with by ECR directly with PGCIL and have nothing to do with BRBCL. It's sale of electricity is at the bus bar of the generating station. It is denied that all four units of the project have to be commissioned at the same time to enable ECR to off take all the electricity together. NOC for utilizing State network in a timely manner has been termed as an event within the control of the ECR by the Commission in its Order dated 05.02.2020 in Petition No. 42/MP/2019 filed by Petitioner against CTU which is similar to instant case. Article 7 i.e. Force Majeure, of the BPPA can only relate to the obligations of power purchase and payment for the same qua BRBCL and ECR. This has nothing to do with the transmission of power or consumption of power by ECR in various States. The BPPA & BPTA signed by ECR with BRBCL and CTU are two independent contracts for generation tariff and transmission tariff respectively and have nothing to do with each other. Since the above position has also been settled by this Commission in the Order dated 29.06.2017 passed in I.A 20 of 2017 in Petition No. 24/MP/2017, there is no need to deal with the above issue again in the instant Petition.



15. The only issue arise for our consideration now is whether the events claimed by Petitioner are covered under force majeure clause BPPA or not?. We proceed to analyze the events and the provisions of the BPPA in subsequent paragraphs.

16. Clause 7 dealing with force majeure of the BPPA dated 16.12.2010 signed between BRBCL and East Central railways provides as under :

“7.0 FORCE MAJEURE

Neither party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock-out, forces of nature, accident, act of God or any other such reason beyond the control of concerned party. Any party claiming the benefit of this clause shall reasonably satisfy the other party of the existence of such an event and give written notice within a reasonable time to the other party to this effect. Generation/ drawal 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.”

....

As per the above provision, any party claiming benefit of force majeure is required to give written notice to other party within a reasonable time. In the instant case, the Petitioner issued notice for force majeure to BRBCL on 17.10.2018. Further, the Petitioner has referred to various meetings where the representatives of the Petitioner and BRBCL attended the meetings as a notice. The events claimed as force majeure i.e. non-commissioning of units of BRBCL dates back to 2010, non-grant of NOC by States dates back to 2016 and non-operationalisation of LTA dates back to January 2017. We do not agree to Petitioner’s contentions that attending the meetings by BRBCL may be recognised as notice under Clause 7 of BPPA. The Petitioner issued force majeure event notice under Clause 7 of BPPA as late as October 2018 which cannot be considered as ‘reasonable time’. Hence, the basic requirement of claiming the benefit under the Clause 7 of BPPA has not been met.



This is without prejudice to the merits on whether any event claimed by the Petitioner falls under force majeure event or not.

17. Clause 3 dealing with the transmission of electricity beyond bus-bar of station of the BPPA dated 16.12.2010 signed between BRBCL and East Central railways provides as under:

“3.0 TRANSMISSION / WHEELING OF ELECTRICITY

3.1 Power shall be made available by the BRBCL at the busbars of the Station as enunciated under Clause 7.1 of JVA signed on 06.11.2007.

3.2 For wheeling of the power beyond busbar of the Station, Railways shall enter into necessary agreements for utilization of transmission system owned by the Powergrid/ other agency (ies) and the charges for transmission systems shall be paid directly by Railway to such agency (ies).

3.3 The Special Cell shall assist Railways for arriving at proper arrangements for evacuation of power and delivery to load centers of Railways as per Clause 11.4 and Appendix-I of JV Agreement. The structure of the Special Cell shall be as decided by the Board of BRBCL and shall include atleast 2 officers of suitable grade on deputation from Ministry of Railways (as per Clause 11.4 of the JVA). The cost associated with the Railway officers on deputation in Special Cell shall be borne by BRBCL. The associated equipment required for evacuation of power to Railway load centers will be provided by BRBCL and the cost of the same shall be reimbursed by Railways to BRBCL.”

As per the above, the sale of power is at busbar of the BRBCL station and for wheeling of the power beyond busbar of the station, Railways was required to enter into necessary agreements.

18. It is pertinent to note that the issue raised in the instant Petition has already been dealt with in various orders of the Commission in the following Petitions:

(a) The Petitioner herein, Railways had filed Petition No. 42/MP/2019 *inter alia* with following prayers:

“(a) Admit the instant Petition and set aside the invoices raised by PGCIL on the Petitioner from August, 2017 onwards;

(b) Direct PGCIL to revise its invoices from August, 2017 onwards to levy only transmission charges proportionate to the quantum of LTA capacity actually utilised by the Petitioner to draw electricity from the commissioned units of BRBCL’s



generating station and accordingly refund the excess transmission charges recovered...”

(b) The Commission vide Order dated 5.2.2020 in the said Petition No. 42/MP/2019 had observed as follows:

“23. We have considered the submission of the parties. The Petitioner has entered into BPTA dated 8.1.2010 and LTA agreement with PGCIL for evacuation of power from the Project of BRBCL. The Petitioner has also agreed under BPPA entered into with BRBCL to bear the charges for utilisation of transmission system(s) owned by PGCIL/ other transmission licensee for wheeling of the electricity beyond bus-bar of the generating station of BRBCL. As per the BPPA, the primary responsibility towards the payment of transmission charges for the usage of transmission system rests with the Petitioner.

...

26. We observe that even after COD of BRBCL Units, the Petitioner was not able to schedule power from generating units of BRBCL due to non-availability of consent from the States where the drawal points of the Railways are situated. BRBCL had filed Petition No. 24/MP/2017 seeking direction to Eastern Regional Load Despatch Centre (ERLDC)/ Eastern Regional Power Committee (ERPC) to accept the Declared Capacity (DC) as given by Nabinagar Thermal Power Project (NTPP) and to reflect the DC of NTPP in Regional Energy Account. Subsequently, the Petitioner filed I.A No. 20/17 in Petition No. 24/MP/2017. In this case, CTU had not operationalized the LTA due to non-availability of consent at all drawl points and consequently the beneficiaries such as Bihar where the requirement of consent was not there, was also not able to schedule the power from BRBCL. The Commission vide its order dated 29.6.2017 disposed of the aforesaid I.A. and directed the CTU to operationalize the LTA for evacuation of power from Nabinagar Thermal Power Plant and to raise the bills for transmission charges in accordance with the LTA...

....

34. In the instant case the date of operationalization of LTA is 26.7.2017, whereas CoD of the first unit of BRBCL generating station is on 15.1.2017. Therefore, in terms of Regulation 8(8) of CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations 2009 and Regulation 8(5) and 8(6) of Sharing Regulations 2010, in the instant case BRBCL shall be liable to pay transmission charges for the dedicated line till date of start of



its LTA on 26.7.2017. Post 26.7.2017, the annual transmission charges of the transmission line (Nabinagar - Sasaram 400 KV D/C) as determined by the Commission shall be considered in PoC mechanism corresponding only to the unit declared under commercial operation and the proportionate transmission charges for the said dedicated line corresponding to units not declared commercial, shall be recovered from BRBCL till the remaining units are declared under commercial operation...

....

36. The Petitioner has submitted that vide its letter dated 8.8.2017 to CTU, it relinquished 9% out of the total quantum of 900 MW LTA granted to it i.e. 81 MW and PGCIL vide its letter dated 6.9.2017 accepted the Petitioner's request for the relinquishment of 81 MW of LTA. The Petitioner shall be liable to pay LTA charges (for quantum for which LTA persists) in terms of the Sharing Regulations, 2010, corresponding to the unit of BRBCL which has declared COD.

37. As regards delays due to non-grant/ delayed grant of NOC by STUs, we are not inclined to consider the prayer of petitioner since it was the responsibility of Petitioner to arrange such consent."

The Commission in the above order concluded that the Petitioner has agreed under BPPA entered into with BRBCL that the primary responsibility towards the payment of transmission charges for the usage of transmission system rests with the Petitioner and that even after COD of BRBCL Units, the Petitioner was not able to schedule power from generating units of BRBCL due to non-availability of consent from the States where the drawal points of the Railways are situated. The Petitioner had clearly brought out that there has been a delay or non-grant of NOCs by the States due to which it could not utilise the LTA. The prayer on non-grant/ delayed grant of NOC by STUs was not considered stating that it was the responsibility of the Petitioner to arrange such consent.

(c) The Petitioner had filed Petition No. 333/MP/2018 disputing the COD of Units of BRBCL. The Commission while disposing of the Petition, vide Order dated 15.12.2021 had observed as under:

" 47. It is observed that BRBCL has provided valid explanations for low DC post-COD of Unit-II. Low DC post-COD of Unit-II has been attributed to low coal receipts, shut down of one unit due to low coal stock and RSD of one unit due to



low schedule. Low coal receipt during the periods of low DC is visible from the coal receipt data. A table indicating the percentage coal receipt against the allocated coal from CIL based on CEA Monthly Coal Report has been submitted by BRBCL

48. Further, BRBCL has submitted that coal shortage was a regular phenomenon for almost all thermal power stations in country including NTPC's thermal power plants. BRBCL has further submitted that in view of acute coal shortage situation, its main promoter, NTPC, had also approached CIL and its subsidiaries for supply of coal to BRBCL for mitigating coal shortage.

49. BRBCL has also submitted that it has sent numerous emails to the Petitioner/ ERLDC asking them to give the optimum schedule to the units so that at least the technical minimum can be maintained by the units. Few representative emails written by BRBCL to the ERLDC/ the Petitioner during the relevant period have also been provided by BRBCL.

50. In the instant case, CEO, BRBCL has certified that the auxiliaries and BOP equipment are completed and Board of Directors has approved the same. We note that there is also a nominee Director of Railways on the Board of BRBCL. The Commission does not find any documents on record showing objections or reservations raised by the nominee Director of Railways on the Board of BRBCL on the issue of COD of units, while approving the same in the Board.

51. In view of above deliberations, it is held that the auxiliaries and Balance of Plant equipment capable of supporting the commissioned units were in service at the time of respective CODs of the units.

52. The issue is answered accordingly.”

The Commission in the above order held that the COD of Units of BRBCL are in order.

(d) Vide Order dated 29.06.2017 in Petition No. 24/MP/2017 alongwith I.A. No. 20 of 2017 in Commission held as follows:

“26. The main hurdle for scheduling of power from the first unit of BRBCL is the non-availability of consent from the States where the drawal points of the Railways are situated. It is the responsibility of CTU to operationalize the LTA. According to CTU, the evacuation link from BRBCL, namely, Nabinagar-Sasaram 400 kV D/c Line was commissioned on 1.7.2012. No system strengthening has been carried out by CTU for scheduling of power from Nabinagar TPP and the existing and planned transmission system would be used. There is a BPPA between BRBCL and Indian Railways and PPA between BRBCL and Bihar. Therefore, all requirements of operationalization LTA have been met. Accordingly, we direct the CTU to operationalize the LTA for evacuation of power from Nabinagar Thermal Power Plant and raise the bills for transmission charges in accordance with the LTA. Since Indian Railways has intimated the percentage of allocation between different drawal points, ERPC/ERLDC should accept the DC by BRBCL. For drawal of power, it is the responsibility of Indian Railways to facilitate scheduling of power by the respective SLDCs where the State network is used for drawal of power from



Nabinagar TPP. 27. In the light of our decision in para 26 above, we direct ERPC to convene a meeting of CTU, ERLDC, Indian Railways, BRBCL and Constituent States and sort out the outstanding issues in connection with scheduling of power from Nabinagar TPP and report to the Commission by 17.7.2017.”

Further vide Order dated 18.9.2018 in Petition No. 24/MP/2017, it was held as follows:

“4. During the course of hearing, learned counsel for the Petitioner submitted that the Commission has already issued the direction in the interim order dated 29.6.2016. Pursuant to the issue of the order, LTA has been operationalized and ERLDC/ERPC have been accepting DC given by the Petitioner. Learned counsel submitted that the Petition may be disposed of in terms of the direction in order dated 29.6.2017. Learned counsel for CTU submitted that as per the Commission’s direction, CTU has already operationalized the 1000 MW LTA of BRBCL.

4. *Considering the above submissions of the learned counsels for the parties, we are of the view that after implementation of our order dated 29.6.2017, the prayers of the Petition no more survive and accordingly, the Petition No. 24/MP/2017 stand disposed of.”*

As per above, the issue of NOC was brought to fore as the reason for non-scheduling of power from BRBCL. CTU was directed to operationalize the LTA and ERLDC/ERPC was directed to accept the DC and pursuant to the issue of the order dated 29.6.2017, LTA was operationalized and ERLDC/ERPC was accepting DC given by the Petitioner.

19. The Petitioner has contended some events as force majeure, which have been discussed in following paragraphs:

Non-commissioning of all units of BRBCL / delayed commissioning of units of BRBCL:

- (a) Petitioner has stated that as per the timelines envisaged in the CCEA Approval, the 1st Unit of the Project was to be commissioned by 22.10.2010, and each of the remaining three Units were to be progressively commissioned thereafter at an interval of 6 months each. Further Units I, II, and III of the Project were allegedly commissioned on 15.01.2017, 10.09.2017, and 26.02.2019 respectively, which was after a delay of more than 6-7 years. Unit



IV of the Project was yet to be commissioned. To offtake power, all four Units of the Project were to be commissioned in time so that the Petitioner was not required to off take power in a limited or piece meal basis.

We observe that the BPPA provides definition of “Date of Commercial Operation” as follows:

“Date of Commercial Operation’ or ‘COD’ in relation to a unit means the date declared by BRBCL after demonstrating the Maximum Continuous Rating (MCR) or Installed Capacity (IC) through a successful trial run after notice to the Bulk Power Customer(s) and in relation to the generating station, the date of commercial operation means the date of commercial operation of the last unit of the Station.”

As per above, unit-wise COD was allowed. BPPA nowhere provides any timeline by when BRBCL must have declared COD of units or that COD of all units should be declared together. Further, the tariff for any unit becomes applicable only after it’s declared COD. The cost implication of period of delay of units prior to COD has already been dealt in Petition No. 23/GT/2017 and shall be dealt in the tariff petitions. Since no date has been provided in the BPPA for declaration of COD and its consequential implications, the event of delay in declaration of COD cannot be termed as force majeure event.

Delay in/ Non-issuance of NOCs by STUs across different States

(b) We observe that issue of non-issuance of NOC by STUs, due to which LTA was not operationalised by CTU and DC was not accepted by ERLDC, was brought to notice of the Commission in Petition No. 24/MP/2017. Both the issues were settled in Petition No. 24/MP/2017. Further vide Order dated 5.2.2020 in Petition No. 42/MP/2019, it was observed that it was the responsibility of Petitioner to arrange such consents/ NOCs from STUs. Since it was responsibility of Petitioner as per the BPPA to arrange for transmission beyond busbar of generating station, arranging the consent from states was responsibility of the Petitioner. The matter of delay in grant of NOC and the consequential liability has already been decided in earlier Petitions. Therefore, the relief sought are barred by principles of *res judicata*. Further, the Petitioner has placed on record the timelines provided in the State Regulations for grant of consent. Therefore, the Petitioner ought to have



approached the State Commission for non-compliance of its Regulations. Evidently, the Petitioner has approached only some of the State Commissions. Accordingly, the failure to receive consent from STU cannot be considered an event beyond the control of the Petitioner.

Delay in operationalization of the LTA by the CTU

(c) The issue of delay in operationalisation of LTA by CTU has been dealt with in Petition No. 42/MP/2019. Since it was responsibility of the Petitioner as per the BPPA to arrange for transmission beyond busbar of the generating station, the Petitioner had obtained the LTA which was not operationalised by CTU due to non-availability of NOC. The LTA was operationalised consequent to our directions in Petition No. 24/MP/2017. However, the petitioner was not able to avail power from BRBCL due to non-issuance of NOC by States. Keeping in view that it was the responsibility of Petitioner as per the BPPA to arrange for transmission/drawl beyond busbar of generating station and the issues pertaining to LTA operationalisation by CTU having been settled vide our orders in Petition No. 42/MP/2019 and Petition No. 24/MP/2017, the same issue cannot be reagitated in this petition as force majeure and is governed by *res judicata*.

20. In light of above discussions, the prayers of the petitioner are rejected and the instant Petition No. 132/MP/2019 stands disposed of in terms of the above.

sd/-
(P. K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I. S. Jha)
Member

