

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 465/MP/2019

Coram:

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

Date of Order: 15.07 2023

IN THE MATTER OF:

Petition under Section 79(1)(f) read with Section 79(1)(b) of the Electricity Act, 2003 before this Commission seeking declaration of the events which led to relinquishment by the Petitioner, as force majeure events within the meaning of Clause 9.0 of the BPTA, seeking relinquishment of the LTOA of 96 MW granted to it without any liability thereof, thereby seeking exemption from payment of relinquishment charges as a consequence of the existence of force majeure events, as opposed to the stand taken by PGCIL in its letter dated 09.01.2019.

AND IN THE MATTER OF:

1. Madhya Bharat Power Corporation Limited,
Vanijya Bhawan, 3rd floor,
Near Devendra Nagar Square,
Raipur, Chhattisgarh 492001

.....**Petitioner**

Versus

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

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

2. Central Transmission Utility of India Limited,
Plot No. 2, Sector-29,
Gurgaon- 122001, Haryana

.....Respondent No. 2

Parties Present:

Shri Matrugupta Mishra, Advocate, MBPCL
Shri Samyak Mishra, Advocate, MBPCL
Ms. Ritika Singhal, Advocate, MBPCL
Shri Vignesh Srinivasan, Advocate, MBPCL
Shri P. S. Dutta, MBPCL
Ms. Suparna Srivastava, Advocate, PGCIL
Ms. Asstha Jain, Advocate, CTUIL
Ms. Soumya Singh, Advocate, PGCIL
Shri Tushar Mathur, Advocate, PGCIL
Shri Swapnil Verma, CTUIL
Shri Ranjit Rajput, CTUIL
Shri Anupam Kumar, CTUIL
Shri Abhilash Thakur, CTUIL
Ms. Muskan Agarwal, CTUIL

ORDER

The Petitioner, Madhya Bharat Power Corporation Limited, has filed the instant Petition seeking the declaration of the various events that led to the relinquishment of allotted 96 MW of Long Term Open Access (LTOA/LTA) as 'Force Majeure' events in terms of Clause 9 of the Bulk Power Transmission Agreement dated 24.02.2010 (BPTA), seeking relinquishment of the 96 MW LTOA without any liability as opposed to the stand taken by PGCIL in its letter dated 09.01.2019.

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

a. declare that the Petitioner shall not be liable to pay any amount towards relinquishment charges; pursuant to relinquishment of 96 MW LTOA granted to

the Petitioner for transfer of power from Rongnichu HEP under the BPTA dated 24.02.2010;

- b. direct PGCIL to return the BG 2010391IBGP0024 dated 22.02.2010 furnished by the Petitioner;*
- c. in the interim, pass an order restraining PGCIL from initiating any action against the Petitioner pursuant to relinquishment of 96 MW LTOA granted to the Petitioner for transfer of power from Rongnichu HEP under the BPTA dated 24.02.2010, including but not limited to raising any invoices or bills in furtherance to the notification dated 20.05.2019; and*
- d. to pass such other or further orders as this Hon'ble Commission may deem appropriate.*

Submissions of the Petitioner :

- 3. The Petitioner has mainly submitted as under:
 - a) The Petitioner entered into an Implementation Agreement dated 01.03.2006 with the Government of Sikkim for establishing 96 MW (2x48 MW) Hydro Electric Power Plant in Rongnichu, Sikkim. Thereafter, the Petitioner commenced the development of the Project at the above specified site, in two (2) phases (Phase 1 and Phase 2) of 48 MW each respectively.
 - b) The Petitioner and 6 other IPPs (who planned to set up generating stations in the State of Sikkim) made applications to PGCIL for long-term open access for inter-State transmission of electricity in terms of the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 ('2009 Connectivity Regulations'). The Petitioner applied for LTA for capacity of 96 MW .
 - c) PGCIL, vide a letter dated 26.05.2009 granted LTA, for a period of 25 years from the date of commencement of open access, for 96 MW. Accordingly, a Bulk Power Transmission Agreement dated 24.02.2010/BAPTA was executed between 7 DICs and PGCIL.
 - d) The Petitioner furnished a BG bearing no. 2010391IBGP0024 dated 22.02.2010 of Rs. 4.80 Crores. The said BG was revised from time to time, and is currently valid and subsisting.

- e) Petitioner was connected to Rangpo Pooling Station. The Petitioner proposed to carry power up to Rangpo sub-station of PGCIL through a 220 KV D/C dedicated transmission line with Zebra conductor along with associated line bays.
- f) The Scheduled CODs of Unit 1 and Unit 2 of the Project were tentatively indicated as September 2014 and October 2014, respectively. Since there was no identified buyer of power for which LTA was sought, the Northern Region (NR) and Western Region (WR) were the tentative target regions for supply of 56 MW and 40 MW of power respectively by the Petitioner.
- g) The 2010 Sharing Regulations provided for payment of point of injection charges by long term access customers where the beneficiaries are not identified.
- h) The Project was on track with regards to the completion/ commissioning of both the phases of the Project. However, owing to the following force majeure events, the Petitioner was constrained to relinquish the LTOA in respect of 96 MW of power:
 - i. Two major earthquakes of magnitude of 6.8 and 5.0 hit the Project site, in the years 2011 and 2013, respectively;
 - ii. Flash floods caused damage to the Project and affected the progress thereof;
 - iii. Gorkhaland agitation in the neighboring state of West Bengal, which caused frequent/long road blockades resulting in non-availability of construction material for a considerable period of about three months, which also contributed towards delay in project implementation; and
 - iv. With the geological uncertainties still standing as a detriment in the way of the commissioning of the Petitioner's Project, the scheduled commissioning date in respect to the Petitioner 's Project was revised from time to time.
- i) The Petitioner vide the 5th JCC Meeting held on 21.01.2015, submitted that the scheduled date of commissioning of the Petitioner's Project have been revised to June 2018 for Unit 1 and July 2018 for Unit 2 due to certain force majeure events.
- j) The Petitioner vide letter dated 20.04.2016 to the Energy & Power Dept., Government of Sikkim, prayed for grant of extension of scheduled commercial operation date/COD in respect of its Project till 31.12.2018. In response, the Power

Dept. vide its letter dated 16.06.2016 approved the extension of the commissioning date till 31.12.2018. This makes it abundantly clear that even the Power Deptt., Government of Sikkim appreciated the genuine constraints faced by the Petitioner herein, qua the commissioning of its Project.

- k) In the 14th JCC Meeting held on 20.09.2017, it was also clarified that in terms of certain recent CERC orders and directions, the liability to pay transmission charges shall commence irrespective of opening of the Letter of Credit (LC) and signing of TSA. Further, it was emphasized that in an event there is a default in the aforesaid regard, the CTU i.e. PGCIL has the right to take appropriate action in terms of the applicable CERC Regulations. Further, it was emphatically highlighted that all DICs are duty bound to establish payment security mechanism (LC) as per Regulation 12(8) of the CERC (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 ('2010 Sharing Regulations').
- l) In the 15th JCC Meeting held on 20.12.2017, the representative of the Petitioner highlighted that the work is going on at the site and 90% excavation work has been completed. In the 17th JCC Meeting held on 29.06.2018, the scheduled commissioning of the Project was revised to March 2020 for both the phases. Moreover, the Petitioner also informed about status of project i.e. 20 out of 30 foundations completed, 17 tower erections had been completed, 96% of the tunnel excavation works have also been completed. But the stringing yet to be started.
- m) In order to commission its Project as soon as reasonably possible, the Petitioner entered into a Supply and Service Agreement dated 27.07.2018 with Hyosung T&D Pvt. Ltd. for execution of 220 kV switchyard, 220 kV indoor and outdoor equipment and 220 kV GIS ducts on turnkey basis at the Rangpo Substation. Petitioner opened the requisite Bank Guarantees/BGs in favor of the aforementioned service contractor.
- n) In the 18th JCC Meeting held on 28.09.2018, the Petitioner was informed that the LTA will be made effective with effect from 01.12.2018 subject to commissioning of the 400 kV Teesta III – Kishanganj D/C Line, i.e. the associated transmission system in respect of the LTA granted to the Petitioner. The aforesaid transmission corridor was scheduled to be commissioned by 30.11.2018 as per the 18th JCC

Meeting. Petitioner informed that 25 out of the 30 foundations completed, 19 tower erections had been completed, however, the stringing was yet to be done.

- o) Respondent issued a notice of default dated 11.12.2018 under 16.2.1 of TSA on non-compliance of Clause 3.6 of Billing, Collection and Disbursement (BCD) Procedure under 2010 Sharing Regulations for failing to open the letter of credit. The said notice of default was in accordance with the directions of the CERC in its order dated 08.03.2018 issued in the Petition No. 229/RC/2015.
- p) Respondent vide letter dated 19.12.2018, highlighted that as per the 2010 Sharing Regulations and Clause 3.6.3 of BCD procedure, if a tripartite agreement does not exist, DICs are required to open a confirmed, irrevocable and unconditional letter of credit in favor of CTU for an amount equivalent to 210% of the average of monthly transmission charges which work out to be Rs 5.60 Crore as payment security mechanism. Moreover, the said LC requirement is based on PoC rates for the period between July 2018 to September 2018 and subject to CERC further revision, if any.
- q) In the 19th JCC Meeting held on 20.12.2018, it was recorded that the commissioning schedule of the dedicated transmission line would tentatively be around March 2019. The Petitioner was again informed that LTA will be made effective on commissioning of the 400 kV Teesta III – Kishanganj D/C Line, as informed vide email dated 21.11.2018 by Teesta Valley Power Transmission Ltd. (TPTL), accordingly LTA will be operationalized w.e.f. 01.01.2019. The Petitioner informed the committee that 26 out of the 30 foundations were completed, 21 tower erections were completed and stringing in respect of 6 km out of the total 7.3 km was also completed. It was also conveyed that 42% of the total concrete lining work has been completed.
- r) The Petitioner vide its letter dated 07.01.2019 requested the Energy & Power Dept., Govt. of Sikkim, for the extension of COD of the Project till 31.03.2020 due to various force majeure conditions and/or events. Thereafter, the Petitioner vide its letter dated 07.02.2019 requested the Chief Minister, Government of Sikkim, to extend the scheduled commissioning to 31.06.2020.
- s) The Petitioner vide its letter dated 08.01.2019 to Respondent offered to relinquish the LTA granted to it but it expressed its intention to retain the connectivity granted

to it and the associated bays that have been allocated to it. The Petitioner cited various force majeure events.

- t) In response to the letter dated 08.01.2019 of the Petitioner, Respondent vide its letter dated 09.01.2019 accepted the request of the Petitioner and relinquished the LTOA of 96 MW granted to Petitioner with immediate effect. The connectivity was retained. It was stated by PGCIL that the Petitioner would be liable to pay the applicable relinquishment charges as may be determined by the Respondent Commission in Petition No. 92/MP/2015. Same was also recorded by way of the minutes for the 20th JCC Meeting held on 25.03.2019.
- u) Respondent did not consider force majeure cited for the purpose of relinquishment and disputed the claim of Petitioner regarding force majeure and stated that “Reasons cited as force majeure cannot be considered for the purpose of relinquishment.”
- v) The petitioner had no reason to participate in the proceedings of Petition No. 92/MP/2015, which was already reserved for a final order. Further, this Commission vide order dated 8.3.2019 disposed off aforementioned petition and held that generators have to pay relinquishment charges upon relinquishment of LTOA allotted to it. The said order is under challenge before the APTEL and is currently pending adjudication.
- w) Energy and Power Deptt., Government of Sikkim vide letter dated 26.03.2019 approved the extension of COD of the Petitioner’s Project until 30.06.2020 subject to the condition that the Petitioner would be liable to pay penalty if it fails to commission its Project within the stipulated time as per the revised COD.
- x) PGCIL imposed relinquishment Charge of INR 21.83 Crores on Petitioner for the stranded capacity of HCPTC – III, vide the notification dated 20.05.2019, titled ‘Determination of Stranded Capacity and Relinquishment Charges in accordance with the directions under Petition No.92/MP/2015 vide order dated 08.03.2019.
- y) Petitioner has also challenged the notification dated 20.05.2019 along with appeal against the order dated 08.03.2019 in Petition No. 92/MP/2015.
- z) In terms of Regulation 15 of the Connectivity Regulations, execution of a long-term contract is required. The rights and liabilities of the parties have to necessarily be determined by the terms of the contract. A consequence of execution of a contract

is that the provisions in the statute, to the extent incorporated in the contract, is controlled by the terms of the contract. It is a settled proposition of law that fundamental rights cannot be waived but statutory rights can be waived. It is in this regard that reference may be made to Supreme Court's Judgment reported in (1979) 1 SCC 619, titled, *Shri Lachoo Mal v Shri Radhe Shyam*.

- aa) In terms of the agreement for long-term access, PGCIL has statutory right to collect transmission charges, but subject to the provisions of the contract/ BPTA.
- bb) Once a contract has been entered into on account of provisions in the statute/ regulations and the principles in the regulations have been incorporated in the contract, it cannot be said that the regulation will operate independent of the contract. Had it not been for an underlying contract, there is no question of payment of transmission charges or relinquishment charges. Since the incident of such charge is on account of a contract executed in terms envisaged under Regulation 15, hence, Regulation 18 would then require to be applied in a manner envisaged by the parties in the contract/ BPTA. It is in this context that Clauses 5 and 9 of the BPTAs become relevant and would control the obligations of the parties.
- cc) The view taken by this Commission in the Aryan Coal and other related matters, qua Clause 9 of the BPTA only provides a temporary amnesty, is currently pending in appeals before the Appellate Tribunal. Since the issue has arisen once again on the interpretation of Clause 9 of the BPTA, it is submitted that this Commission should take an independent view on account of the submissions made in the present batch.
- dd) Force majeure clause cannot be temporary in nature for the reason that the definition of force majeure includes war, rebellion, mutiny, fire, flood, and change in law etc. It is possible that some of these events described in the definition of force majeure creates a permanent disability which then jeopardises the ability of the Petitioner to start operations again. Clause 9 of the BPTA is without any limitation as to the time for which force majeure period can be claimed. If any of the events described aforesaid are permanent in nature, the party who suffers such event can certainly seek discharge of its obligations in a manner as contemplated under Section 56 of the Indian Contract Act, 1872. It is clarified that when there is a force majeure clause in a contract, Section 56 of the Indian Contract Act will not

apply, but this does not mean that the width of the force majeure clause and the ability to seek discharge will be denied if events otherwise contemplated in the clause indeed occur.

- ee) Clause 6 of the long-term access agreement/ BPTA has no application to the present case at all. This is not a case of exit/ abandonment of the project. The project is in the process of getting commissioned. However, the obligation contemplated in Clauses 3 and 5 of the agreement are affected by events contemplated in Clause 9.
- ff) The relinquishment of 96 MW LTOA/ long-term open access qua the Petitioner should not lead to any stranding of transmission capacity. Reference can be made of number of IPPs connected to the transmission licensee, who would utilize the capacity of the PGCIL.

Hearing dated 26.6.2020

- 4. The matter was heard on 23.6.2020 through video conferencing and notices were issued to the Respondents to file their reply. Learned counsel of petitioner submitted that the Petitioner has applied for new LTA of commensurate capacity last week. The Petitioner was directed to submit copy of the fresh LTA application and LTA granted by CTU.

Submissions of the Respondent No. 1:

- 5. The Respondent No. 1 submitted as under:
 - a) The present Petition is not maintainable in law and is liable to be dismissed by this Commission at its threshold.
 - b) Events of force majeure pleaded by the Petitioner have allegedly occurred during the period 2011 to 2013 and thereafter, as per the Petitioner's own admission, construction works of the generating station have been resumed and the Petitioner has been able to complete a substantial part of construction of the generating station, though with inordinate delay (owing to its own acts of omission). This progress of the construction work of the Petitioner's generating station has also been recorded in the various JCC Meetings.

- c) Therefore, Petitioner cannot now be permitted to resort to a force majeure plea and that too based on events stated to have allegedly occurred as far back as in 2011-2013, so as to evade its payment liability under the BPTA entered into with the Respondent.
- d) The present Petition having been filed after seven years of admitted cessation of the alleged force majeure events, is a clear camouflage for the inordinately delayed execution of the generation project is an abuse of the process of this Commission, besides thrusting an unwarranted litigation upon the Respondent.
- e) Contention of the Petitioner that the Respondent's right to claim relinquishment charges based upon exit/surrender/relinquishment of LTA is subject to provisions of BPTA which stands absolved for the Petitioner on account of force majeure event is already stands adjudicated by this Commission vide its orders passed in Petition No. 92/MP/2015; Petition Nos. 137/MP/2016, 246/MP/2016, 11/MP/2017, 164/MP/2017, and Petition No. 55/MP/2015)
- f) Issue as regards liability of payment of relinquishment charges and computation of relinquishment charges has been settled by the Commission in its order dated 8.3.2019 passed in Petition No.92/MP/2015 and is binding on the Petitioner, subject to orders in the pending Appeals.
- g) As regards the interpretation of the force majeure provision under the BPTA is concerned, the Appellate Tribunal in its judgement dated 30.4.2015 in Appeal No.54/2014: Himachal Sorang Power Ltd. Vs. Central Electricity Regulatory Commission & Ors; and judgement dated 7.11.2017 in Appeal No.212/2016: Maruti Clean Coal & Power Ltd. Vs. Powergrid Corporation of India Limited & Anr observed that the force majeure provision in the BPTA applies only to temporary force majeure events which affect the flow of power through ISTS and is not applicable to situations of permanent impossibility leading to frustration of the BPTA.
- h) Petitioner's own admission as regards cessation of the alleged force majeure way back in 2013 precludes it from agitating the same after a lapse of seven years when admittedly the Petitioner is not affected by any force majeure events.

- i) Clause 6 of the Implementation Agreement (IA) contained a provision for force majeure under which the Petitioner could be excused from performance of its obligations under the said IA, upon occurrence of the mutually accepted force majeure events. However, any force majeure accepted by the Government of Sikkim under the IA was limited to the inter-se rights and obligations of the Petitioner qua the Government of Sikkim only and could not be made applicable to the force majeure occurrences, if any, under the BPTA which was a statutory contract under the Connectivity Regulations.
- j) A comprehensive transmission system, under a central scheme funded by Ministry of Power, was planned for implementation by the Respondent together with the Government of Sikkim and Teesta Power Transmission Corporation (TPTL) for evacuation of power from 7 IPPs in the Sikkim. Revised scope of said comprehensive scheme included certain new transmission assets being the Legship pooling station and the 220kV D/c transmission line from Legship pooling station to New Melli sub-station and Teesta-III–Kishanganj 400 kV D/c (quad) line.
- k) In terms of BPTA, the transmission charges were to become payable from the scheduled date of commissioning of the project (i.e. September, 2014 and October, 2014 for its two units) irrespective of its actual date of commissioning. As per clause 5.0 of the BPTA, the Petitioner could relinquish its rights and obligations under the BPTA upon payment of compensation in accordance with the Regulations of this Commission. BPTA had provisions of Regulations 18 of the Connectivity Regulations regarding relinquishment as part of the contractual arrangement.
- l) As per Regulations notified by this Commission and clause 6.0 of the BPTA, Petitioner furnished a bank guarantee dated 22.2.2010 in the sum of Rs.4.80 Crores to the Respondent. The said BG was revised from time to time and is valid and subsisting, till Jan'21.
- m) Clause 9.0 of the BPTA contained a force majeure clause and as per said clause if any of the parties to the BPTA failed to carry out the terms of the BPTA on account of any of the specified force majeure events, then they were not

liable for any claim for loss or damage arising out of such failure. As such, the force majeure clause operated in limited context and not beyond.

- n) Further, events contemplated under the said clause were temporary in nature and that as soon as the force majeure events ceased to exist, the rights and obligations of the parties under the BPTA were to resume. Any permanent impossibility of the performance or frustration of the BPTA was covered under clause 5.0 of the BPTA where under the Petitioner could relinquish its access rights.
- o) Since there was no inter-se obligation agreed to or recorded in the BPTA relating to the construction of the generating station of the Petitioner or any matter other than that relating to transmission of power through the ISTS, any issues arising out of or relating to the same could not be considered under the operation of clause 9.
- p) Progress of development of the generation project of the Petitioner was deliberated in various JCC Meetings held in the Eastern Region from time to time. In the 4th JCC Meeting held on 30.1.2012, Petitioner affirmed to all stakeholders that the scheduled commissioning of the project expected to be achieved as per timeline i.e. May, 2014 and June, 2014. The plea of force majeure pleaded in the present Petition was a mere afterthought so as to avoid the statutory liability of payment of relinquishment.
- q) Thereafter, the Petitioner submitted the status of its generation project vide its letter dated 16.1.2015 wherein, contrary to its earlier representations, the Petitioner stated expected commissioning of the generating station to be July, 2018 without mentioning reason for this delay in the commissioning schedule.
- r) In the 10th JCC Meeting held on 30.9.2016, all stakeholders were informed that all of the assets comprised in the associated transmission system had been commissioned except for Teesta-III– Kishanganj 400 kV D/c (quad) line which was also expected to be commissioned by March, 2017.
- s) Petitioner neither informed the Respondent about the alleged force majeure events being faced by it in project implementation nor intimated its intention at any material time to abandon the project or relinquish the LTA. The only case

throughout had been of delay in project implementation for reasons which were never disclosed in the JCC Meetings.

- t) Respondent, vide its letter dated 28.11.2018, informed the Petitioner that with the commissioning of Teesta-III Kishanganj 400 kV D/c (quad) line, the transmission system associated with the generating project of the Petitioner would completely commissioned and its LTA would be operationalized w.e.f. 1.1.2019. In view of the above, Petitioner was requested to open an LC of Rs.5.6 crores towards payment security for monthly transmission charges under its LTA. However, the Petitioner did not open the required LC.
- u) Consequently, Respondent issued a notice of default dated 11.12.2018 to Petitioner in accordance with the directions issued by this Commission in its Order dated 8.3.2018 passed in Petition No.229/RC/2015. Vide the said notice of default, the Petitioner was requested to open the requisite LC within 30 days, failing which the Petitioner was liable for regulatory action against it. In continuation of the said notice of default, the Respondent sent another follow up letter on 19.12.2018 once again requesting the Petitioner to open the requisite LC at the earliest. However, the Petitioner failed to open the requisite LC.
- v) The case of the Petitioner was deliberated in the 19th JCC Meeting held on 20.12.2018 wherein the Petitioner was categorically informed that the LTA would be made effective upon commissioning of the Teesta-III-Kishanganj 400kV D/c (Quad) line which was expected to be commissioned on 31.12.2018.
- w) Petitioner, vide letter dated 8.1.2019 (while retaining the connectivity granted), sought to relinquish its entire LTA of 96 MW by citing the alleged force majeure events.
- x) Thus, for the first time since grant of its LTA, the Petitioner informed the Respondent of the alleged force majeure events faced by it during the period 2011-2013, which force majeure events were inadmissible under the BPTA.
- y) Accordingly, the Respondent, vide its letter dated 9.1.2019, accepted the request of the Petitioner for relinquishment of its entire quantum of LTA and informed the Petitioner of its liability to bear relinquishment charges for the same.

- z) Thereafter, Respondent calculated the relinquishment charges payable by the Petitioner to be Rs.21.83 Cr. In view of the above, bank guarantee of Rs.4.80 crores furnished by the Petitioner under the subject LTA was liable to be adjusted towards payment of relinquishment charges by the Petitioner.
- aa) Petitioner has since then filed Appeal No.413/2019 before the Appellate Tribunal against the Order dated 8.3.2019 passed in Petition No.92/MP/2015 and the determination of relinquishment charges liability thereunder and as such, pending adjudication of the said Appeal, the bank guarantee of Rs.4.80 crores is to be retained by the Respondent and subsequently adjusted towards payment of relinquishment charges subject to the outcome of the said Appeal.
- bb) Petitioner's project is located on Rongichu river in Teesta Valley Region in Sikkim. The geographical information map prepared by the Sikkim State Disaster Management Authority (SSDMA) for Eastern Sikkim, reveals that Rongichu river is considered to be at a 'High Risk' of flash floods. Further, various risk assessment tools such as Hydrological Modelling System (HEC-HMS) Software have been applied in the Teesta Valley region to assess the risk of flash floods. The flash floods being a common phenomenon in the Teesta Valley region and in the State of Sikkim, cannot therefore be regarded as 'unforeseen event' which is the fundamental prerequisite in any claim of force majeure.
- cc) State of Sikkim is vulnerable to earthquakes considering that it falls under the Seismic Zone IV and. Thus, occurrence of earthquakes and the risk associated it can also not be claimed as an 'unforeseen event'. Besides, the earthquakes have been stated to occur in 2011 and 2013 after which the Petitioner has been representing in the JCC Meetings for about six years that it is in the process of implementing the project. A so-called event of force majeure which has occurred seven years back, cannot be permitted to be cited as an unforeseen event beyond the Petitioner's control which has prevented the project implementation.
- dd) As regards the event of Gorkhaland agitations, it is submitted that the political tension in the State of West Bengal over the protests regarding Gorkhaland are also not new. The said protests have been occurring in the region for several

years resulting in affecting business in the area. Therefore, looking at history of protests, the same also cannot be termed as 'unforeseen events'. Moreover, the force majeure occurrence due to Gorkhaland situation has been claimed by the Petitioner to be for only three months and is grossly inadequate in view of the inordinate delay in execution of the project by the Petitioner.

- ee) Having taken a conscious commercial decision of establishing a project in the peculiar surroundings in the State of Sikkim after having exercised due diligence regarding the geo-political situations in the area (as has been represented by it in the IA with the Government of Sikkim), the Petitioner cannot be permitted to claim force majeure on account of the said events.
- ff) Grounds raised by the Petitioner in the present Petition have already been deliberated and examined by this Commission in detail in its Orders dated 8.3.2019 passed in Petition No.92/MP/2015, Order dated 3.3.2020 passed in Petition No.55/MP/2015 and Order dated 5.2.2020 passed in Petition Nos.137/MP/2016, 246/MP/2016, 11/MP/2017 and 164/MP/2017 respectively which are clearly applicable and binding upon the present Petitioner as well.
- gg) Petitioner is liable for payment of relinquishment charges under clause 5.0 of the BPTA read with Regulation 18 of the Connectivity regulations. Respondent has right to retain the bank guarantee of Rs.4.80 crores furnished by the Petitioner under the subject LTA for being adjusted subsequently towards the relinquishment charges payable by the Petitioner, subject to the outcome of pending Appeal No.413/2019 filed by the Petitioner.

Rejoinder of Petitioner

- 6. The Petitioner vide affidavit dated 10.06.2021 has submitted as under:
 - a) Plea of force majeure has been maintained by the petitioner, since the beginning in its representation at the JCC Meetings as the Petitioner did sought for extension of operationalization of LTA on repeated occasions after happening of the said force majeure events.
 - b) Petitioner upon being sure of commissioning of its project has re-applied for grant of 96 MW LTA, which shows that as on date, there is no stranded capacity

on account of Petitioner in the transmission system constructed and operated by Respondent.

- c) Further, observations made in Petition No. 55/MP/2015 by this Commission is relevant when it observes that clause 9 of the BPTA does not visualize the failure to be permanent in nature and covers only situations of temporary nature and has a restrictive application. Even in the present case, the failure is only temporary in nature, which is very much reflective from the execution of new LTA on 17.06.2020 followed by TSA on 17.06.2020. Therefore, as reflected in the relinquishment letter coupled with the deliberations made before various JCC meetings, the relinquishment was temporary and the Petitioner accordingly took up execution of LTA, once the consequential effect of the force majeure events has come to a rest.
- d) Respondent's claim that any force majeure occurrences could only be applicable under the Implementation Agreement and not under the BPTA is fallacious as Clause 9 of the BPTA clearly provides for exceptions in case of force majeure events. As a matter of fact, the acceptance of force majeure event under the IA by the Government of Sikkim has been referred to strengthen the arguments of the Petitioner and also to substantiate the occurrences of the events.
- e) Respondent has failed to take note that a contract is to be read in its entirety. In the instant situation, terms mentioned in Clause 9 of the BPTA explicitly covers the other aspects of the said agreement as well, thereby providing for release from liability for any losses incurred due to force majeure events. Also, the BPTA executed by Petitioner is in accordance with Regulation 15 of Connectivity Regulation and the same bears colour of statutory contract. The conduct of Petitioner does not have any deviation from the Regulation as well as the BPTA.
- f) The existence of force majeure and extinguishment of liability for any claim for any loss or damage arising out of failure to carry out the terms of the agreement is not controlled by the last sentence of Clause 9 of the BPTA. Rather, it is limited to the extent that should the force majeure event come to an end, the transmission/drawl of power should start as soon as possible. Since the force

majeure clause includes war, fire, flood etc., it is possible that some of these events create a long-term disability which jeopardises the ability of the Petitioner to complete/ restart the Project in the committed time.

- g) It is wrong on the part of the Respondent to suggest that there was no inter se obligation agreed to or recorded in the BPTA relating to the construction of the generating station of the Petitioner or any matter other than relating to transmission power through ISTS. What else could have resulted in affecting the generator other than its very ability to commission the plant and generate electricity for evacuation by utilizing the transmission system of the Respondent. Therefore, there is remoteness between the performance of obligation on the part of the Petitioner to do with its ability to evacuate power and make payment towards the same.
- h) Respondent submitted that in the 4th JCC meeting the timeline was May 2014 and June 2014 as the scheduled commissioning of the project. Thus, even in 2012 during the period when it was to be suffering from alleged force majeure events, the Petitioner has represented the implementation of the project was underway. This is the very reason for which the force majeure events are categorized as unforeseen events and the consequential effect are also beyond the contemplation of the parties. The Petitioner has been reasonably taken steps as required under the circumstances, therefore, it is wrong to suggest that the force majeure plea was an afterthought.
- i) The Respondent has made superfluous averments that the State of Sikkim is prone to disasters such as flash floods due to incessant rainfall during monsoon season. Impact of the force majeure events were beyond the anticipation and apprehension of the Petitioner.
- j) Petitioner cannot be held liable to pay any amount towards relinquishment charges primarily for two reasons, firstly, the delay in commissioning of the Project which constrained the Petitioner to relinquish its 96 MW LTA was because of force majeure events which is covered under Clause 9 of the BPTA, secondly, the relinquished quantum of 96 MW LTA has been again granted to the Petitioner thereby creating no stranded capacity in the transmission network of Respondent due to Petitioner.

Hearing dated 27.9.2022

7. The matter was part-heard due to paucity of time. The Commission permitted the Petitioner to place on record the subsequent factual developments on additional affidavit and directed the Respondents to file its response thereon.

Additional affidavit by Petitioner:

8. The Petitioner vide additional affidavit dated 29.10.2022 has submitted the subsequent development with regard to the allocation of LTA, execution of LTA and operationalisation of the LTA as under:
 - (a) Petitioner executed an agreement for LTA without system strengthening with PGCIL on 17.06.2020 with date of grant of 96 MW as 31.01.2021. The Petitioner also executed a Transmission Service Agreement dated 17.06.2020 (TSA) for sharing of transmission charges.
 - (b) The 96 MW LTA, granted to the Petitioner, was operationalized vide CTU letter dated 27.01.2021, with effect from 31.01.2021 to 30.01.2056.
 - (c) The Unit 1 of the Petitioner's Project achieved COD on 26.06.2021 and Unit 2 achieved COD on 30.06.2021.
 - (d) LTA was enhanced to 113 MW and the revised LTA of 113 MW could be operationalized only with effect from 04.07.2021.

Hearing dated 25.11.2022

9. The matter was further heard on 25.11.2022 and the order was reserved.

Analysis and Decision

10. We have considered the submissions of the Petitioner and Respondents and perused all relevant documents on record and the regulations of the Commission and the orders issued by the Commission having bearing on the adjudication of disputes raised in the petition.

11. Petitioner has submitted that it planned to set up a 96 MW (2x48) Hydro Electric Power Plant in Rongnichu, Sikkim. PGCIL, vide letter dated 26.05.2009 granted LTA, for a period of 25 years from the date of commencement of open access, for 96 MW. Petitioner executed BPTA dated 24.02.2010 between 7 DICs and PGCIL. Petitioner furnished a BG dated 22.02.2010 of Rs. 4.80 Crores to PGCIL. The scheduled dates of commissioning of Unit 1 and Unit 2 of the Project were tentatively September, 2014 and October, 2014, respectively. PGCIL vide its letter dated 28.11.2018, informed the Petitioner that its LTA would be operationalized w.e.f. 1.1.2019 and requested Petitioner to open an LC of Rs.5.6 crores towards payment security for monthly transmission charges under its LTA. Petitioner vide its letter dated 08.01.2019 to Respondent offered to relinquish the LTA granted to it, which was accepted by Respondent vide its letter dated 09.01.2019 with immediate effect. Subsequently PGCIL calculated relinquishment charges of Rs 21.83 Crore on the Petitioner in terms of Order dated 8.3.2019 in Petition No. 92/MP/2015.

12. Petitioner has submitted that it was constrained to relinquish the LTOA due to force majeure events viz. two major earthquakes of magnitude of 6.8 and 5.0 that hit the Project site in the years 2011 and 2013 respectively; flash floods caused damage to the Project; Gorkhaland agitation in the neighboring state of West Bengal, which caused frequent/long road blockades resulting in non-availability of construction material for a considerable period of about three months, and geological uncertainties as a detriment in the way of the

commissioning of the Petitioner's Project. The Petitioner has sought that it be relieved from payment of relinquishment charges.

13. Respondent PGCIL has submitted that Petitioner cannot now be permitted to resort to a force majeure plea based on events stated to have allegedly occurred as far back as in 2011-2013, so as to evade its payment liability under the BPTA. Petitioner neither informed the Respondent about the alleged force majeure events being faced by it in project implementation nor intimated its intention at any material time to abandon the project or relinquish the LTA. Petitioner, vide letter dated 8.1.2019 sought to relinquish its entire LTA of 96 MW by citing the alleged force majeure events which was the first time since grant of its LTA, the Petitioner informed the Respondent of the alleged force majeure events faced by it during the period 2011-2013. The flash floods being a common phenomenon in the Teesta Valley region and in the State of Sikkim, cannot be regarded as 'unforeseen event' which is the fundamental prerequisite in any claim of force majeure. State of Sikkim is vulnerable to earthquakes considering that it falls under the Seismic Zone IV and. Thus, occurrence of earthquakes and the risk associated it can also not be claimed as an 'unforeseen event'. Further political tension in the State of West Bengal over the protests regarding Gorkhaland are also not new. Further the interpretation of the force majeure provision under the BPTA is concerned, the Appellate Tribunal for Electricity in its judgement dated 30.4.2015 in Appeal No.54/2014: Himachal Sorang Power Ltd. Vs. Central Electricity Regulatory Commission & Ors; and judgement dated 7.11.2017 in Appeal No.212/2016: Maruti Clean Coal & Power Ltd. Vs.

Powergrid Corporation of India Limited & Anr observed that the force majeure provision in the BPTA applies only to temporary force majeure events which affect the flow of power through ISTS and is not applicable to situations of permanent impossibility leading to frustration of the BPTA.

14. Subsequent to relinquishment, Petitioner reapplied for LTA for 96 MW which was operationalised on 31.1.2021. Petitioner later enhanced it to 113 MW which has been operationalised from 4.7.2021. The Unit 1 of the Petitioner's Project achieved COD on 26.06.2021 and Unit 2 achieved COD on 30.06.2021.

15. We have considered the submissions of Petitioner and Respondents. The only issue which arises for our consideration is whether the case of the Petitioner is covered under force majeure in terms of clause 9 of the BPTA and if any relief is admissible to the Petitioner in terms of its prayers in the Petition?

16. Let us peruse the BPTA under which petitioner is seeking relief on account of alleged force majeure events. Clause 9 of the BPTA dated 24.2.2010 is quoted hereunder:

"9.0 The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any 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 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 above, any party claiming benefit of this clause is required to give written notice of 30 days to the other party to this effect.

17. We observe that the Petitioner has not issued any notice to the Respondent PGCIL. The Petitioner had referred to various JCC meetings where it was updating its status of project to petitioner and the letter dated 20.4.2016 to Energy & Power Dept., Government of Sikkim (Power Dept.). We observe that petitioner has claimed some of the force majeure events which date back to 2011-2013. There is a categorical requirement to issue notice of force majeure under Clause 9 of BPTA which petitioner has failed to issue. Hence the basic requirement of claiming any benefit of Clause 9 does not arise in absence of notice of force majeure. Updating the status in JCC or issuing letter to Sikkim Govt. cannot be counted as notice of force majeure under Clause 9 of BPTA.

18. We also observe that Petitioner has not submitted as to the period for which a particular force majeure event started and when it got over. None of the reasons of alleged force majeure event such as earthquakes or Gorkhaland agitation or flash floods or geographical uncertainties are being accompanied by documentary proof as to how such events affected the petitioner.

19. Further, Hon'ble APTEL vide Order dated 30.04.2015 in Appeal No. 54 of 2014 has noted as follows:

"21. Now we are to decide whether the learned Central Commission failed to consider the impact of the force majeure event on the appellant's project and to allow reasonable time to mitigate the effects of the force majeure and restore work on site. We have quoted above the force majeure clause of the BPTA. The said clause 13 dealing with force majeure requires that the party claiming the benefit of the force majeure event shall satisfy the other party of the existence of such an event and give a written notice within a reasonable time to the other party to this effect and transmission and drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or cease to exist.

22. As mentioned above, the appellant did not give the required notice under clause 13 regarding force majeure event fulfilling the requirements of the said clause, within a reasonable time and the appellant did not satisfy the respondent no.2-Power Grid about

the existence of the alleged force majeure event. The notice/ communication dated 07.07.2011 sent by the appellant to the respondent no.2- Power Grid simply states that the open access is to commence from the date when Karcham Wangtoo-Abdullapur Line (KWA) is ready and commissioned. The said communication cannot be said to be a notice in sufficient compliance of the provisions of clause 13 dealing with force majeure provided under the BPTA. When there are specific provisions to be complied with for the applicability of force majeure events, the said requirements cannot be legally ignored or exempted on the strength of some case law. The Hon'ble Supreme Court in Dhanraj Gobindram's case (supra) observed that force majeure includes any event over which the performing party has no control. In the case in hand, no legal notice fulfilling the requirements of clause 13 had been given by the appellant to the respondent no.2 in order to get the benefit of such force majeure and it failed to satisfy the respondent no.2 about the existence of such force majeure event. If the grounds leading to the delay in commissioning of the appellant's power plant are to be considered, no material to substantiate the said grounds has been placed by the appellant on record either before the Central Commission or before this Appellate Tribunal. The only ground pressed during arguments in the Appeal by the appellant is regarding sufficient geological surprises affecting major works, for which no notice fulfilling the requirements provided under clause 13 of the BPTA had been given. The learned Central Commission, in the impugned order, has given detailed and cogent reasons for not agreeing to the report prepared by Lahmeyer International Private Limited (Expert). We have quoted the said reasons in para 15.1 of this judgment. We find no force in the appellant's contention that the learned Central Commission did not cite sufficient or material reasons for disagreeing with the expert's report. We are further unable to agree to the contention of the appellant that the learned Central Commission failed to consider that the effects of the force majeure events, that occurred before 01.04.2012, had not ceased to operate. We agree to the finding recorded by the Central Commission in the impugned order because clause 13 dealing with force majeure clearly provides that the transmission/ drawl 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 said clause does not provide that the effect of force majeure to continue till the appellant is restored to its original position if there was no force majeure. If the appellant fails to restore or recover from the alleged force majeure for unreasonably long time, it cannot be held entitled to any benefit on that score.

....

26. We have carefully and deeply perused the aforementioned letters sent by the appellant only to find that there is no mention of the existence of the occurrence or existence of any geological surprise or force majeure event. Thus, we hold that no notice, informing occurrence or existence of any force majeure event as required by clause 13 of the BPTA entered into between the parties, had ever been given by the appellant to the respondent no.2 Power Grid by fulfilling the requirements of the provisions mentioned in clause 13. The appellant was bound to give a notice in writing within reasonable time to respondent no.2 informing it of the existence of force majeure event but such a notice had never been given. There is no compliance of the provisions of Clause 13 dealing with force majeure under the said BPTA entered into between the appellant and the respondent No.2-Power Grid.

.....

33. We hold that the learned Central Commission has considered the factum of force majeure event in letter and spirit by going through the communications sent by the appellant to the respondent no.2-Power Grid and correctly found that during the period

there was no force majeure event. The notice of force majeure as required by the provisions of clause 13 dealing with force majeure under BPTA cannot be said to be a correct and legal notice because in the said communication we do not find any mention of the occurrence of existence of any force majeure event and no effort was made by the appellant to satisfy the opposite party, namely, the respondent no.2. The Central Commission has not erred in holding that the appellant did not comply with the requirements of the BPTA in effectively invoking the force majeure clause to seek amendment of the BPTA for the commencement of the open access.”

As per above, Hon'ble APTEL upheld that clause dealing with force majeure clearly provides that the transmission/ drawl 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. Further, Hon'ble APTEL has observed that If the force majeure is not restored or recovered for unreasonably long time, no benefit can be given under BPTA on that score.

20. In the instant case, once the Petitioner sought to relinquish its LTA under the BPTA, it is a case of permanent exit from such BPTA against payment of transmission charges, for which no relief is admissible under Clause 9 of BPTA as is evident from the Hon'ble APTEL's Order dated 30.04.2015 in Appeal No. 54 of 2014 discussed above.

21. We observe that all the reliefs sought by the petitioner hinge around the declaration of force majeure events and petitioner has failed to substantiate its claim for the same. Petitioner did not issue any notice under BPTA and has not submitted any documents or evidence as to how the alleged events affected the petitioner. Thus, there is nothing on record to satisfy the requirement of Clause 9 of BPTA that *“any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event”*. Keeping in view the Petitioner's

failure to satisfy the requirements of Clause 9 of BPTA and Hon'ble APTEL's Order dated 30.04.2015 in Appeal No. 54 of 2014, the Petitioner's prayers have no legs to stand. Accordingly, all the prayers of petitioner are rejected.

22. The Petition no. 465/MP/2019 is disposed of in terms of the above.

sd/-
(P. K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I. S. Jha)
Member