

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 491/MP/2020

Coram:

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

Date of Order: 30th December, 2022

IN THE MATTER OF:

Petition seeking release of Bank Guarantee issued in favour of Respondent No. 1 owing to frustration of the Long-Term Access Agreement dated 01.11.2012 between the Petitioner No. 1 and Respondent No. 1 in exercise of powers under Regulation 33A of the CERC (Grant of Connectivity, Long-Term Access, And Medium-Term Open Access in Inter-State Transmission and Related Matters) Regulations, 2009, read with Section 79 (1) (c) of the Electricity Act, 2003.

AND IN THE MATTER OF:

M/s Sew Nafra Power Corporation Ltd.
Regd. Office at 6-3-871, Snehalata
Greenland Roads
Begumpet, Hyderabad- 500 016

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

M/s Sew Green Energy Ltd.,
(Earlier known as M/s SEW Energy Ltd.)
Regd. Office: 6-3-871, Snehalata
Greenland Roads
Begumpet, Hyderabad- 500 016

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

Versus

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

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

2. IDBI Bank Ltd.
Andheri Large Corporate Branch,
P.B. No. 370, Hyderabad Main Branch,
Chapel Road, Hyderabad- 500 001

...**Respondent No. 2**

3. Central Transmission Utility of India Limited (CTUIL)
Plot #2, Sector- 29, Gurgaon- 122001

.....Respondent No. 3

Parties Present:

Shri Sushil Verma, Advocate, SNPCL
Shri Gopal Jain, Sr. Advocate, SNPCL
Ms. Namrata Saraogi, Advocate, SNPCL
Ms. Sayan Ray, Advocate, SNPCL
Shri Samrat Sengupta, Advocate, SNPCL
Shri Suparna Srivastava, Advocate, PGCIL
Ms. Soumya Singh, Advocate, PGCIL
Shri Tushar Mathur, PGCIL
Shri Jyoti Prasad, PGCIL
Shri Ashok Pal, PGCIL
Shri Manish Ranjan Keshari, CTUIL
Shri Shyam Sunder Goyal, CTUIL
Shri Swapnil Verma, CTUIL
Shri Siddarth Sharma, CTUIL
Shri Ranjeet Singh Rajput, CTUIL
Ms. Priyanshi Jadiya, CTUIL

ORDER

The Petitioner No.1 , Sew Nafra Power Corporation Ltd, has filed the instant Petition seeking release of Bank Guarantee issued in favour of Respondent No. 1, Power Grid Corporation of India Limited (PGCIL) owing to frustration of the Long Term Access Agreement (LTAA) dated 1.11.2012 executed with PGCIL in exercise of power conferred under Regulation 33A of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access, and Medium-Term Open Access in Inter-State Transmission System and related matters) Regulations, 2009 (hereinafter '2009 Connectivity Regulations').

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

“(a) Release the Bank Guarantee No. 130133IBGP00090 dated 28.03.2013 for a sum of Rs. 4 Crores. issued by the Respondent No. 2 in favour of Respondent No. 1, and

(b) Restrain and injunct the Respondent No. 1 from invoking and/or encashing the aforesaid Bank Guarantee No. 130133IBGP00090 pending adjudication of this Petition, and

(c) Pass any order or such other orders as this Hon’ble Commission may deem fit in the interests of justice.”

Submissions of the Petitioner No. 1:

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

a) The Petitioner No. 2, Sew Green Energy Ltd, executed a Memorandum of Agreement (MoA) dated 14.9.2007 with the Government of Arunachal Pradesh for development of the NAFRA Hydro Electric Project on Build, Own, Operate and Transfer (BOOT) basis. As per the terms of the MoA, Petitioner No. 1, a SPV of Petitioner No. 2, applied to PGCIL for grant of Long-Term Access and consequently entered into a Long-Term Access Agreement (LTAA) on 1.11.2012.

b) In compliance of Clause 1.0 of the LTAA, a Bank Guarantee (BG) of Rs. 4 crores was furnished as performance security for the establishment of a transmission system.

c) However, on account of various reasons beyond the control of the Petitioners, execution work of the Project could not be achieved.

d) Government of Arunachal Pradesh vide its termination Notice dated 23.12.2019 terminated the MoA. The termination of the MoA was challenged by the Petitioner No. 1 n before the Hon’ble Gauwhati High Court in WP(C) No. 58 of 2020. The Hon’ble High Court issued an Order of status-quo dated 13.2.2020 in respect of the termination notice. Subsequently, the Hon’ble High Court order vide its Order dated 27.2.2020 vacated the above status-quo order.

e) This Court has, in the past, granted similar reliefs to an aggrieved party in exercise of its powers under Regulation 33A, in its Order dated 07.01.2020 in Petition No. 159/MP/2019 in the matter of *“Toramba Renewable Energy India Pvt. Ltd. vs. PGCIL and Ors.*

Hearing dated 20.8.2020

4. The matter was heard on 20.8.2020 through video conferencing and notices were issued to the Respondents to file their reply. Reply to the Petition has been filed by the Respondent PGCIL, the Petitioner has filed rejoinder to it. During the course of hearing, learned senior counsel for the Petitioners submitted that during the pendency of the present Petition, PGCIL may be restrained from invoking/ encashing the Bank Guarantee furnished by the Petitioners. Respondent, PGCIL submitted that the entire transmission system envisaged for evacuating the power from Hydro Electric Projects located in the Arunachal Pradesh has been de-notified. After hearing the learned senior counsel for the Petitioner, the Commission directed the Respondent, PGCIL not to encash the Bank Guarantee furnished by the Petitioners till the next date of hearing and the Petitioners were directed to keep the Bank Guarantee valid.

The Respondent PGCIL vide ROP for hearing dated 20.8.2020 was directed to submit information regarding *current status of Associated Transmission System identified in LTAA required for transmission of power from the Petitioner's project; and whether Associated Transmission System has been awarded and if so, whether any investment has been made thereon?*

5. The Respondent No.1 vide affidavit dated 14.9.2020 has submitted as under:
- a) "Transmission system for Phase-1 generation projects in Arunachal Pradesh" was reviewed in various Meetings of National Committee on Transmission and Empowered Committee on Transmission conducted by the CEA based upon the progress of the HEPs. Owing to no progress of the HEPs, the Ministry of Power, Government of India vide Gazette S.O.639 (E) dated 1.2.2019 de-notified the ISTS scheme "Transmission system for Phase-I generation projects in Arunachal Pradesh".
 - b) However, considering that the associated transmission system identified for the Petitioners' project has not been taken up for implementation and has subsequently been denotified, this Commission may pass such directions as it may deem fit and appropriate for the treatment of the subject bank guarantee by Respondent No.1.

Submissions of the Respondent No. 1, Power Grid Corporation of India Ltd.

(PGCIL):

6. The Respondent No. 1 has submitted as under:
- a) As per the prayer clause in the present Petition, the Petitioners are only seeking refund of bank guarantee of Rs.4 crore. There is no relief sought with respect to the alleged frustration of the LTA Agreement on account of the stated force majeure events nor have the Petitioners claimed any reliefs qua the relinquishment of LTA rights under the applicable Regulations. As such, the claims of the Petitioners as made in the present Petition are liable to be viewed in the limited context of the prayer for return of the subject bank guarantee and not beyond.
 - b) The reliefs as claimed for by the Petitioners in the present Petition are not admissible. However, considering that the associated transmission system identified for the Petitioners' project has not been taken up for implementation and has subsequently been de-notified, the Commission may pass such directions as it may deem fit and appropriate for the treatment of the subject bank guarantee by Respondent No.1.
 - c) Progress of Nafra HEP was deliberated in various JCC meetings of the North-Eastern Region where the status of the project of the Petitioner No.1 was discussed as under:
 - (i) During the 1st JCC meeting held on 20.12.2018, Petitioner No.1 informed that it had obtained environmental clearance, forest clearance and the requisite land and had made substantial investment in the project. However, the project was stalled to withdrawal of credit facility sanctioned by its lenders and the Petitioner No.2 was also unable to firm-up long-term beneficiaries. It was also informed that under adverse progress, LTA of Petitioner No.1 could be revoked along with liability for payment of relinquishment charges.
 - (ii) During 2nd JCC meeting held on 25.3.2019, Petitioner No.1 maintained its position that the project work was stalled due to fund constraint. The Petitioner No.1 informed that it had requested the Government of Arunachal Pradesh to issue a NoC for extension of validity of the techno-economic clearance issued by the CEA beyond 11.2.2017 and accordingly, requested to grant more time for resuming

the implementation of the project. Respondent No.1 informed that owing to negligible progress of HEPs in the region, establishment of 400/220 kV 7x166 MVA pooling station (GIS) at Dinchang and Dinchang-Rangia/Rowta PP 400 kV D/c line had been de-notified by the CEA in the 3rd Meeting of Empowered Committee on Transmission held on 21.12.2018.

(iii) In 3rd JCC meeting held on 25.6.2019, Petitioner No.1 informed that the techno economic clearance for the project had expired and the CEA was yet to revalidate the same for want of required NoC from the State Government. Petitioner No.1 was once again informed that under adverse progress, its LTA could be revoked along with liability for payment of relinquishment charges.

(iv) During 6th JCC meeting held on 29.6.2020, Petitioner No.1 informed that it approached the Commission by filing the Petition No.491/MP/2020 seeking release of the said bank guarantee.

- d) During the entire period, Petitioner No.1 at no point in time raise the plea of any “force majeure” occurrences as are now being pleaded by it in the present Petition nor did it convey any intention of abandoning the project and/or relinquishing the LTA rights. Instead, the Petitioners chose to directly approach the Commission seeking return of the subject bank guarantee by pleading frustration of the LTA Agreement on the grounds of force majeure occurrences.
- e) Issues between the Petitioners and the Government of Arunachal Pradesh as regards implementation of the Nafra HEP are sub-judice and pending for adjudication before the Hon`ble High Court of Guwahati.
- f) Due to the Termination Notice having been issued by the Government of Arunachal Pradesh, the CEA has declined to renew the techno-economic clearance for the project meaning thereby that the fundamental clearance for project implementation is no longer available with the Petitioners.
- g) Reliance placed by the Petitioners on the Order dated 7.1.2020 in Petition No.159/MP/2019 passed by this Commission is misplaced as the facts the

circumstances of the present case are completely in contrast with the facts of the Petitioners therein.

Rejoinder by the Petitioners:

7. The Petitioners in its rejoinder dated.19.10.2020 have mainly submitted as under:
- a) As per Clause 1.0(d) of the LTA Agreement dated 1.11.2012 executed between parties, the Bank Guarantee of Rs. 4 crore (BG) furnished by the Petitioner's were meant to "security mechanism for the transmission system to be built, owned and operated by ISTS Licensee."
 - b) BG was to serve as a security against the Common Transmission System which was to built, owned, operate and maintained by a third-party ISTS Licensee(s) selected by Respondent No.1 through TBCB process.
 - c) For an ISTS to be operative vis-a-vis power generation entities such as the Petitioners, it is imperative that all the components-that is, a generating station, a transmission line for evacuation of power from the said generating station, and a pooling station for "pooling" of power load-work seamlessly and in tandem. There cannot be one without the other.
 - d) It is inescapably evident from the terms of the BG, read with the relevant clause of the LTA Agreement extracted above, that the BG could only be invoke in the event that (a) Respondent No. 1 had made capital investment in the establishment of ISTS, and (b) the third-party ISTS licensee(s) selected through TBCB had constructed such a Common Transmission System or ISTS as specified in Annexure-3 of the LTA Agreement and (c) the LTC (Long- Term Access Customer), i.e. the Petitioners herein had failed to construct the generating station and the transmission lines (as specified in Annexure- 1 and Annexure-2 of the LTA Agreement).
 - e) Respondent No. 1 has plainly admitted that no third-party ISTS licensee(s) was ever finalised to carry out the work of establishment of the Common Transmission System (in particular, the Dinchang Pooling Station and Associated Transmission lines as per Annexure 3 of the LTA Agreement) at any point of time. In fact, in the 2nd meeting of the National Committee on Transmission (NCT) held on 04.12.2018 it was decided to de-notify the scheme. The Empowered Committee on Transmission (ECT) in its 3rd meeting held on 21.12.2018, concurred with the decision of the NCT that the

entire scheme — “Transmission System for Phase-1 Generation Projects in Arunachal Pradesh” ought to be de-notified and accordingly the Ministry of Power, Government of India vide Gazette S O 639(E) dated 1.2.2019 has de-notified the Transmission System for Phase-1 Generation Projects in Arunachal Pradesh”.

- f) It would be unconscionable now for the Respondent No. 1 to invoke the Petitioners’ BG when by its own admission, the Common Transmission System detailed in Annexure-3 of the LTA Agreement (against which the BG was submitted as a “security”) did not ever commence or materialise. Alternatively, being a deemed ISTS licensee, the Respondent No. 1 could also have created the necessary Common Transmission System mentioned at Annexure-3 of the LTA Agreement, yet it did not do so.
- g) The Petitioners cannot be faulted for any defaults on its part which led to the frustration of both the MoA executed between the Petitioners and the State Government as well as the LTA Agreement. On the contrary, the Petitioners have bonafidely expended considerable sums in obtaining all necessary statutory clearances (highlighted in Para 13 of the Petition) as mandated under the MoA and the LTA Agreement.
- h) The provisions of Regulation 18 of the 2009 Connectivity Regulations regarding relinquishment of LTA by a Long-Term Customer (“LTC”) are only applicable in a case where LTA has been granted to an LTTC and either the CTU or the ISTS licensee(s) selected by the CTU, through Tariff Based Competitive Bidding, has constructed the Common Transmission System or ISTS (as envisaged under Annexure 3 of the LTAA for example), and the Common Transmission System so established has remained unutilised or under-utilised for some reason and the said LTC wishes to relinquish its LTA.
- i) In cases where the LTA failed to even commence and materialise, or the LTA Agreement was thwarted or frustrated at the very inception, the provisions of Regulation 18 cannot be applied. In the present instance, it is very clear that the term of Long-Term Access would begin only after the Common Transmission System had been established as per Annexure-3 to the LTA Agreement, and since the latter has not effectuated, the Petitioners cannot be said to have been the recipients of LT Access under the LTA Agreement. On this ground alone the LTA Agreement stands frustrated. Moreover, the GOI

has de-notified the Common Transmission System as included at Annexure 3 of the LTA, before commencing the implementation of the same as recommended by the Empowered Committee and as such the Respondent No. 1 has not suffered any losses or injuries.

- j) In such scenarios, the most equitable solution would be for both parties, i.e. the Petitioners and the Respondents to follow the principle of restitution, i.e. the BG is returned to the Petitioners simultaneously with the Petitioners exiting the LTA Agreement. This ought to be particularly applicable in the present case since Respondent No. 1 has not suffered any loss or injury on the Petitioners' account.

Hearing dated 22.08.2022

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

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

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

9. The Petitioner vide affidavit dated 13.9.2022 has submitted that in compliance to the directions passed by the Commission, the authorized representatives of the parties to the instant Petition participated in a joint meeting held through video-conferencing on 2.9.2022. After detailed discussion, the parties herein have reached a mutually acceptable agreement, under which the Respondent No. 1 has agreed to return the Construction Bank Guarantee, being BG No. 130133IBGP00090 dated 28.3.2013 for an amount of Rs. 4.00 crore to the Petitioner, without deduction of any relinquishment charges or any other charges, given the fact that the associated

transmission system never came up on the project site. The detailed discussions and decisions taken during the aforesaid meeting held on 2.9.2022 have been reproduced into a Minutes of Meeting dated 2.9.2022 which is annexed along with the affidavit. Accordingly, the grievance of the Petitioners stands fully redressed, and the Commission may take cognizance of the facts stated in this affidavit and the Minutes of Meeting dated 2.9.2022, and dispose of Petition No. 491/MP/2020 in terms of the same after directing the Respondents to release the said bank guarantee No. 130133IBGP00090 dated 28.3.2013.

10. The Respondent PGCIL vide affidavit dated 14.9.2022 has mainly submitted as follows:

- a. In compliance of the direction of the Commission, the authorized representatives of the parties to the instant Petition (as well as the authorized representative of NERPC and Dirang Energy Pvt. Ltd.) participated in a joint meeting held through video- conference mode on 2.9.2022 in good faith to explore the possibility of a resolution of the pending impasse toward their mutual satisfaction. Accordingly, after detailed discussion, the Respondent No. 1 along with the representatives of the parties present in the meeting came to a consensus that as the ISTS transmission system in question has been de -notified vide MoP, GOI Gazette Notification dated 1.2.2019, it can be recommended to the Commission that the CBG's submitted by SNPCL & M/s DEPL can be returned.

Hearing dated 22.12.2022

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

Analysis and Decision

12. We have considered the submissions of the Petitioner and the Respondents. The issue which arise for our consideration is whether Petitioner is entitled for return of Bank Guarantee dated 28.3.2013? The issue hinges around the following facts:-
13. The Petitioners executed a MoA dated 14.9.2007 with the Government of Arunachal Pradesh for development of NAFRA HEP on BOOT basis and entered into a LTAA on 1.11.2012 with the PGCIL to evacuate power from the Project. The Petitioners issued a bank guarantee of Rs.4 crore to Respondent under the LTAA. On account of adverse progress of HEP, Ministry of Power de-notified said transmission scheme vide notification dated 1.2.2019. Government of the Arunachal Pradesh vide its termination notice dated 23.12.2019 terminated the MoA.
14. The Respondent has submitted that the associated transmission system identified for the Petitioners' project has not been taken up for implementation and has subsequently been de-notified .

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

“

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

4. *It was further informed that in the 3rd Meeting of Empowered Committee on Transmission held on 21.12.2018, the entire identified ISTS scheme viz, "Transmission system for Phase-1 generation projects in Arunachal Pradesh" for both the projects was recommended for de-notification on account of adverse progress of both the generation projects, thereafter, Ministry of Power, Govt. of India vide Gazette Notification dated 01.02.2019 de-notified the said transmission scheme. (copy attached at Annexure-III).*
5. *Counsel of both M/s SNPCL and M/s DEPL, mentioned that in Petition No. 127 of 2012, it has been observed by CERC that in case of no progress in the implementation of the transmission system and based on the report of CTU, the subject transmission could not be executed and therefore CTU was directed to refund the bank guarantees associated with LTA.*
6. *It was observed by CTU that aspect of non-implementation of the subject transmission system and return of construction phase bank guarantees associated with LTA bears certain similarities in the present case with that of aforesaid Petition No. 127 of 2012.*
7. *Further, it was also observed that in the context of renewable energy based generators/LTCs also; an Order was passed in Petition No. 159/MP/2020 (Toramba Renewable Energy Private Limited) wherein the return of connectivity bank guarantee (Conn-BG) was related in part to non-expenditure towards implementation of transmission system. However, the said Order had been passed with respect to connectivity bank guarantee (Conn-BG).*
8. *Representative of M/s SNPCL submitted that no transmission system has been taken up for implementation of ISTS as same has been de-notified. Accordingly, he requested to return their CBG of amount Rs. 4Cr. The representative also submitted that their bank guarantee of Rs. 4 Cr is expiring on 20.09.2022, therefore he requested for early resolution of the matter. CTU informed that it shall coordinate for expeditious issuance of the Minutes of Meeting, after which M/s SNPCL may mention the matter for urgency before CERC. However, it was advised that incase M/s SNPCL's petition could not be listed for directions by or before 20.09.2022, it may extend the bank guarantee for a further period of one (1) month or above, to which M/s SNPCL consented.*
9. *Representative from M/s DEPL mentioned that as no LTA system under ISTS was taken up and no investment was made on it, therefore he requested to return their CBG of amount Rs. 8.25 Cr without any penalty.*
10. *NERPC also agreed to the proposal of returning of the CBGs to the respective parties as no expenditure was done for implementation of the transmission system under ISTS.*
11. *, it was observed by consensus of members present on behalf of NERPC, CTU, SNPCL, DEPL, & Anr. that as the ISTS transmission system in question has been de notified vide MoP, Gol Gazette notification dated 01.02.2019, it can be recommended to CERC that in light of the aforesaid discussion, the CBG submitted by M/s SNPCL (INR 4 Cr.) and M/s DEPL (INR 8.25 Cr) can be returned."*

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

16. Keeping in view that transmission system has not been taken up and the consensus emerged in meeting held on 2.9.2022 and the PGCIL is agreeable to return the bank

guarantee, we hereby direct PGCIL/CTUIL to return the Bank Guarantee of Rs 4 crores dated 28.3.2013 to the Petitioner within a week of issuance of this order.

17. Petition No. 491/MP/2020 is disposed of in terms of the above.

(P. K. Singh)
Member

(Arun Goyal)
Member

(I. S. Jha)
Member