

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 94 OF 2015
&
I.A. NOS. 145 AND 146 OF 2015

Dated: 20th May, 2015

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson.
Hon'ble Shri Rakesh Nath, Technical Member.**

IN THE MATTER OF:

Jindal Power Limited, Tamnar,)
District Raigarh, Chahattigarh-)
496107) ... Appellant

Versus

1. Central Electricity Regulatory)
Commission, 3rd and 4th Floor,)
Chanderlok Building, 36,)
Janpath, New Delhi – 110 001.)
2. Power Grid Corporation of India)
Limited, Corporate Office:)
“Saudamini”, Plot No.2, Sector-)
29, Near IFFCO Chowk,)
Gurgaon-122001, Haryana.)
3. EMCO Energy Limited, IBC)
Knowledge Park 4/1)
Bannerghatta Road)
Bangalore 560 029.)

4. KSK Mahandi Power Co.)
Limited, 8-2/293/82/A/431A,)
Road No.22 Jubilee Hills)
Hyderabad – 500 033.)
5. Bharat Aluminum Co. Limited)
Aluminum Sadan, Core-6,)
Scope Office Complex, Lodhi)
Road, New Delhi-110 003.)
6. Kerala State Electricity Board)
Vydyuthi Bhavan, Pattom,)
Thiruvananthapuram-695 004.)
7. Karnataka Power Transmission)
Corporation Limited, Cauvery)
Bhawan, K.G. Road, Bangalore-)
560 009, Karnataka.)
8. Tamil Nadu Generation and)
Distribution Corporation)
Limited, NPKRR Maaligai, 144,)
Anna Salai, Chennai – 600 002.)
9. PTC India Limited, 2nd Floor,)
NBCC Tower, 15, Bhikaji Cama)
Place, New Delhi – 110 066.)
10. Essar Power M.P. Limited,)
Equinox Business Park, Off:)
Bandra Kurla Complex LBS Marg)
Kurla (West), Mumbai, 400 070)
11. NTPC Vidyut Vyapar Nigam)
Limited, 7th Floor, Core – 3,)
Scope Complex, Lodhi Road,)
New Delhi – 110 003.)

12. D B Power Limited, Office Block)
IA, 5th Floor, Corporate Block,)
DB City Park, DB City, Arera)
Hills, Op.MP Nagar, Zone-I,)
Bhopal.)
13. National Load Despatch Centre)
B-9, Qutab Institutional Area,)
Katwaria Sarai, New Delhi –)
110 016.)
14. Western Regional Load)
Despatch Centre, F-3, M.I.D.C.)
Area, Marol, Andheri (East),)
Mumbai-400 093.)
15. Central Electricity Authority)
Sewa Bhawa, R.K. Pruum, New)
Delhi-110066.)

... Respondents

Counsel for the Appellant (s) : Mr. Joy Basu, Sr. Adv.
Mr. Hemant Singh
Mr. Matrugupta Misra
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for **R-2**

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Mr. Jafar Alam
Ms. Payal Chandra
Mr. Aditya Mathur
Mr. Vishal Binod for **R-3**

Ms. Suparna Srivastava
for **R-6**

Mr. S. Vallinayagam for **R-8**

Mr. Akhil Sibal
Mr. Deepak Khurana
Mr. Vikas Mishra
Mr. Himanshu Sharma
Mr. Vikas Adhia for **R-12**

APPEAL NO. 81 OF 2015

&

I.A. NO. 128 OF 2015

IN THE MATTER OF:

KSK Mahanadi Power Company Ltd.,)
8-2-293/82/A, Road No.22, Jubilee)
Hills, Hyderabad-500 033.) ... Appellant

Versus

1. Central Electricity Regulatory)
Commission, 3rd and 4th Floor,)
Chanderlok Building, 36,)
Janpath, New Delhi – 110 001.)
2. Power Grid Corporation of India)
Limited, B-9, Qutub)
Institutional Area, Katwaria)
Sarai, New Delhi-110 016.)
3. PTC India Limited, 2nd Floor,)
NBCC Tower, 15, Bhikaji Cama)
Place, New Delhi – 110 066.)
4. NTPC Vidyut Vyapar Nigam)
Limited, 7th Floor, Core – 3,)
Scope Complex, Lodhi Road,)
New Delhi – 11003)

5. Jindal Power Limited, Tamnar,)
District Raigarh, Chhattisgarh-)
496 001.)
 6. D.B. Power Limited, 3RD Floor,)
Naman Centre, C-31, G Block,)
Opp Dena Bank, Bandra-Kurl)
Complex, Bandra East, Mumbai)
- 400 051.)
 7. Tamil Nadu Generation and)
Distribution Corporation)
Limited, NPKRR Maaligai, 144,)
Anna Salai, Chennai – 600 002)
 8. Kerala State Electricity Board)
Vydyuthi Bhavan, Pattom,)
Thiruvananthapuram-695 004.)
 9. EMCO Energy Limited, IBC)
Knowledge Park 4/1)
Bannerghatta Road Bangalore.)
-Respondents

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Mr. Hemant Singh for **R-5**

Mr. Akhil Sibal,
Mr. Deepak Khurana
Mr. Vikas Mishra
Mr. Himanshu Sharma
Mr. Vikas Adhia for **R-6**

Mr. S. Vallinayagam for **R-7**

Ms. Suparna Srivastava for
R-8

Mr. C.S. Vaidyanathan,
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Mr. Sitesh Mukherjee

Mr. Jafar Alam

Ms. Payal Chandra

Mr. Aditya Mathur

Mr. Vishal Binod for **R-9**

JUDGMENT

PER HON'BLE SHRI RAKESH NATH – TECHNICAL MEMBER.

1. These two appeals can be disposed of by a common order because they challenge the same order dated 16/2/2015 passed by the Central Electricity Regulatory Commission (“**CERC**”) and also because common questions are involved in them.

2. Jindal Power Limited, the Appellant in Appeal No.94 of 2015 (“**Jindal Power**”) is a generating company which has set up a power plant of 2400 MW capacity at Tamnar, Raigarh, Chhattisgarh. Respondent No.2 is Power Grid Corporation of India Limited, which is the Central Transmission Utility (“**CTU**”)

which owns and manages the Inter-State Transmission System (“**Inter-State Transmission System**” or “**ISTS**”) in India. The other Respondents are various entities which were parties in the proceedings held before Respondent No.1 i.e. the CERC.

3. Jindal Power’s case needs to be shortly stated:

Jindal Power participated in a long term bidding process conducted by Respondent No.8 - Tamil Nadu Generation and Distribution Corporation Limited (“**TANGEDCO**”) for supply of power. Jindal Power emerged as a successful bidder and a Power Purchase Agreement (“**PPA**”) dated 23/8/2013 for a quantum of 400 MW was executed by Jindal Power with TANGEDCO. The said PPA was for a period of 14 years and 8 months starting from 1/2/2014 till 30/9/2028.

4. Pursuant to the execution of the PPA, Jindal Power submitted a copy of PPA to CTU and requested for grant of Long Term Access (“**LTA**”) of 400 MW on 26/8/2013. On receipt of advice from the CTU vide letter dated 22/11/2013, Jindal Power

also made an application to CTU for grant of LTA in the month of November, 2013.

5. According to Jindal Power on 23/9/2013, an agenda note for a Western Region (“**WR**”) - Southern Region (“**SR**”) meeting to be held on 3/10/2013 was circulated by the CTU. All the stakeholders were to participate in the said meeting so as to discuss the preparedness of transmission network and the availability of the generating stations to off-take power. Available Transmission Capacity (“**ATC**”) of the new Solapur-Raichur 2 x 765 KV S/C lines was on the agenda. One line was being commissioned by CTU and the other through Private Sector as a crucial link between WR to SR. The said lines were material to most of the entities, who succeeded in the long term bid process conducted by TANGEDCO for procurement of power on long term basis for a period of 15 years.

6. On 27/9/2013 another letter was issued by the CTU wherein it was stated that the said meeting was to be held on

3/10/2013 regarding determination of ATC of Solapur-Raichur 765 KV lines.

7. CTU issued letter dated 18/11/2013 to the WR-SR constituents, wherein comments were asked from the various stakeholders on the ATC to be made available post commissioning of the Solapur-Raichur 765 KV lines.

8. On 20/12/2013, CTU granted LTA to Jindal Power for 400 MW. As per the PPA dated 23/8/2013 supply of power to TANGEDCO was to commence from 1/2/2014, however on account of severe transmission constraints from New Grid to Southern Grid, CTU was able to grant the said LTA, initially for a partial quantum of 69 MW from 1/6/2014 to 31/7/2014 and, thereafter, for full quantum of 400 MW from 1/8/2014 to 30/9/2028. This full LTA quantum of 400 MW was granted to Jindal Power from 1/8/2014 on the basis of expected readiness of the Solapur-Raichur lines and additional transmission system. The said part LTA was granted from 1/6/2014 to 31/7/2014 by

CTU in line with the principle that an LTA is always subject to the availability of corridor by the CTU. Once additional ATC became available, CTU decided to proportionately allocate the same to the four long term applicants including Jindal Power. Share of Jindal Power was 69 MW.

9. On 13/3/2014 CTU circulated an agenda note for allocation of additional ATC of 150 MW becoming available due to cancellation of a separate MTOA of M/s. Corporate Power Limited. The meeting of WR-SR constituents was scheduled to be held on 28/3/2014. In the said meeting, it was decided to allocate 150 MW on the existing transmission system, out of the total applied quantum of 400 MW, to Jindal Power from 1/5/2014. This 150 MW was allocated to the Appellant on account of the cancellation of MTOA of M/s. Corporate Power Limited. However, during the said meeting, it was discussed that apart from Jindal Power, no other generating station, who had been granted LTA for power supply to TANGEDCO was ready to supply power from 1/5/2014. Hence, the only entity which was

eligible for allocation of proportionate LTA was Jindal Power who was then granted the entire 150 MW. CTU vide its letter dated 28/4/2014 confirmed grant of LTA of 150 MW to Jindal Power from 1/5/2014 till 30/9/2028.

10. Respondent No.6 - Kerala State Electricity Board (“**KSEB**”) filed a petition being Petition No.92/MP/2014 before the CERC alleging wrongful denial of open access.

11. On 8/8/2014 the CERC issued certain directions to the CTU for processing of open access applications. CTU sought certain clarification from the CERC. On 5/9/2014, the necessary clarification was issued.

12. Various entities filed petitions before the CERC with respect to the operationalisation of the Open Access granted by CTU for the applications filed during the month of November, 2013. The CERC thereafter clubbed all the petitions together, including

Petition No.92/MP/2014. All the petitions were heard together and the impugned order was passed. The CERC held as under:

- i) The MTOA applications received during a month will have priority over the LTA applications of the subsequent month.

- ii) Part LTA shall not be granted to LTA applicants where the available transmission capacity is inadequate to accommodate all the LTA applications received during a month and the LTA applicant/user has to wait for allocation even though a lower capacity is available. The said lower capacity would be allocated to MTOA.

Jindal Power is aggrieved by these findings.

13. The Appellant in Appeal No.81 of 2015 is KSK Mahanadi Power Company Limited (“**KSK Mahanadi**”). KSK Mahanadi is a generating company. It has established a 3600 MW generating

station in the State of Chhattisgarh out of which first two units of 600 MW have been commissioned.

14. KSK Mahanadi has entered into a PPA dated 27/11/2013 with TANGEDCO pursuant to a Case-1 competitive bid process. KSK Mahanadi had filed application for grant of necessary LTA for undertaking the contracted supply of 500 MW to TANGEDCO. The application for LTA was filed by KSK Mahanadi in the month of November, 2013. It is the case of KSK Mahanadi that due to the delay in decision on the Long Term Open Access (“**LTOA**”) its generating units have been shut and the supply to TANGEDCO has not been commenced. It is the case of KSK Mahanadi that it had applied in the month of November, 2013 for LTOA in proper format and, therefore, after the due requirements under the provisions of the Open Access Regulations are fulfilled, its application has to be considered along with other LTOA applications received in the month of November, 2013 for grant of open access.

15. According to KSK Mahanadi, the capacity of the transmission line to the SR is limited. Capacity is not available to the full extent at present to accommodate all the applicants for open access. Hence, CTU is required to apply the priority list for the grant of open access. In terms of the order of priority, all applications received during a month are to be treated as having been received simultaneously and the applicants are to be awarded open access. According to KSK Mahanadi if the capacity for which the application for LTOA is applied is more than the available capacity, system study and augmentation needs to be undertaken for grant of LTOA. LTOA being the basis for the system to be created, LTOA applicants have a priority over medium term open access (“**MTOA**”) and short term open access (“**STOA**”), who only operate on the available margins. In case the existing capacity for LTOA is less than the capacity applied for, CTU has been allotting the available capacity on pro-rata basis to the LTOA applicants pending the system augmentation, if any, required.

16. As stated above, in Petition No.92/MP/2014 issues were raised by KSEB before the CERC about wrongful denial of MTOA applied for in May, 2013 and related aspects. On 8/8/2014, the CERC issued direction as regards grant of open access. On 8/9/2014, KSK Mahanadi filed application seeking clarifications to the effect that the MTOA allocations for the applications received during the month of June, 2013 being considered by CTU pursuant to the directions of the CERC was not from the new transmission capacity of 423 MW which was available only from 1/8/2014 and seeking a direction to CTU to consider and dispose of the pending LTA applications in accordance with the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in State Transmission and related matters) Regulation, 2009 (**“the Connectivity Regulations”**) for the said capacity of 423 made available w.e.f. 1/8/2014 and any new capacity made available thereafter, without being affected by MTOA application of KSEB filed in June, 2013. By the impugned order, the CERC disposed of KSK Mahanadi application holding that “there cannot

be any part allocation of transmission capacity for LTOA and LTOA applicant would have to wait for allocation even though lower capacity is available while the said capacity would be allotted to MTOA applicants”.

17. Being aggrieved by this finding, KSK Mahanadi has filed Appeal No.81 of 2015.

18. It is apparent from the gist of both the Appellant’s case that two major issues arise in these appeals. The first issue is regarding priority between an LTA applicant and MTOA applicant while granting open access. The second issue is as to whether part LTA can be granted in the event the available transmission capacity is less than the quantum of all LTA applications filed in a particular month.

19. We have heard Mr. Joy Basu, learned counsel for the Appellant-Jindal Power. We have perused the written submissions. Gist of the submissions is as under:

- (a) As per Regulation 9(2) of the Connectivity Regulations, MTOA is to be granted only if the power flow can be adjusted/accommodated in the existing transmission system or the transmission system under execution. As per the first proviso of Regulation 9(2), no augmentation/system strengthening of transmission network is to be considered for grant of MTOA. As per Regulation 12, augmentation/system strengthening is required only for the purposes of grant of LTA. Thus, the entire transmission network is created for the benefit and use of an LTA customer.
- (b) A fair reading of Regulations 7 and 10(1) indicates that the phrase “first cum first served basis” has to be applied between *inter-se* MTOA applicants and *inter-se* LTA applicants separately. It cannot generally be applied to decide priority between LTA and MTOA applicants. If during the processing of an MTOA application, an

application for LTA has been made, then the said LTA application will be considered and the earlier MTOA application will not get priority.

- (c) Statement of Reasons of the Connectivity Regulations clearly indicates the thinking process of the authority before enacting Connectivity Regulations. Paragraph 15 makes it evident that between MTOA and STOA applications, the priority has to be given to MTOA applications, on account of the longer duration of open access. This principle has to be maintained while deciding priority between LTA and MTOA applications. As per paragraphs 52 to 55, on the question of priority between LTA-MTOA, the CERC had agreed to give priority to LTA applicants over MTOA applicants. While passing the impugned order, the Commission failed to appreciate its own interpretation of the Connectivity Regulations. Regulation 10(1) has to be interpreted keeping in mind the above principles.

- d) The CERC erred in holding that there cannot be any pro-rata allotment of LTA when the available capacity is less than the capacity applied for. There is no such prohibition in the Connectivity Regulations. Such approach will defeat the intent and purpose of Connectivity Regulations.
- e) As per combined reading of Regulations 9 and 12 system augmentation/strengthening is required only for LTA. If the pro-rata capacity to an LTA applicant is denied and the available capacity is then allotted to an MTOA applicant, that will be against the intent of the Connectivity Regulations since it is the LTA applicant who has a vested right in the transmission system.
- f) Regulations 7, 9 and 10 clearly show that an application seeking LTA can never be rejected. In the event the system is already existing or is already under planning then LTA is granted within 120 days, while in the event there is no system planning, then it is required to be done on 30th June

or 31st December and the LTA is granted within a period of 180 days for flow of power from the date when such new transmission system as planned will come up.

- g) As per Regulation 18(1) of the Connectivity Regulations an LTA customer can relinquish the LTA quantum for the whole or in part. This relinquishment is also subject to levy of penalty/compensation if there is any stranded transmission capacity which has been created on account of such relinquishment. When an LTA customer, post grant of LTA can partly relinquish the LTA quantum and partly continue to supply power, then it does not stand to reason that an LTA applicant cannot be allocated part LTA quantum until the period the system is ready to provide full LTA quantum. Regulation 25(2) also talks about curtailment and supports the above conclusion.
- h) Clause 24 of the Detailed Procedure also supports the case of the Appellant.

- i) Part MTOA allocation is provided in clause 16.1(9)(a) of the Detailed Procedure. This does not mean that grant of part LTA is prohibited. It is a settled principle of law that the power to grant more has an inherent power to grant less (**Atma Ram v State of Punjab**¹ and **Hari Ram Paras Ram v State of Haryana**²).
- j) Consequence of not allowing part LTA would entitle a MTOA applicant to get priority over the LTA applicant. The same would render Regulation 9(2) of the Connectivity Regulations otiose since MTOA is only to be granted on margins. If the interpretation of the CERC is accepted then an LTA applicant will have to wait till the end of the power flow period of MTOA applicants and the time for completion of the augmentation of the transmission network. This will be to the detriment of Discoms as well as to the end users.

¹ 1995(Supp(1)SCR 748

² AIR 1982 P&H 108

k) Regulation 12 is being wrongly interpreted by Respondent no.3 EMCO because as per Regulation 12 LTA can be granted both under the existing system as well as under the existing planning or system strengthening which is being carried out. This is also in line with Clause 24.1(6)(i)(a) of the Detailed Procedure. Moreover as per Regulation 7, the processing period for an LTA application is 120 days in the event LTA can be granted in the existing system or the existing planning or augmentation being carried out, and 180 days in the event system planning is yet to be considered. Therefore, if the quantum of LTA is more than the ATC, then the quantum of LTA which can be accommodated in the existing network the proportionate quantum of LTA can be granted and the balance quantum is granted post commissioning of the already under construction/planned system augmentation/construction. Reliance placed on draft regulation is misplaced because the rights flow from notified statute/regulations.

- l) The argument of Emco Energy Limited (“**Emco**”) that in Regulations 18 and 25 it is specifically mentioned that part LTA can be made operational, however this has not been deliberately stated in Regulation 12 meaning thereby that part LTA cannot be granted is flawed. The Regulations/statute has to be interpreted keeping in mind the overall intent and scope thereof. So interpreted it is clear that there is a definite tilt in favour of LTA. The interpretation of Emco will result in making an LTA applicant to be treated at margins while a MTOA applicant will get a priority. Such absurd interpretation has to be avoided.
- m) Judgments of the CERC on the issue of priority of LTA over MTOA which have now attained finality are in Petition No.93/MP/2013 and in Petition No.180/2010.
- n) Emco’s argument that as per 3rd proviso of Regulation 10, applications for LTA which require system augmentation

have to be necessarily considered either on 30th June or 31st of December of each year on account of the use of the word 'shall' in the said proviso is flawed. A reading of the said proviso makes it clear that the specific deadline of 30th June or 31st December has been only mentioned for the purposes of planning of transmission system and not for grant.

- o) Detailed Procedure can only implement the parent regulations. It cannot supplant the same. If part MTOA can be granted as clarified in the Detailed Procedure that does not mean that part LTA is prohibited as per the parent regulations.

- p) Emco's argument that in the event part LTA is granted there would be no margin or ATC available for grant of MTOA or STOA is flawed. MTOA and STOA by their very nature function on the margins of transmission system. It is often noted that even though the LTA operationalisation date of a particular generator is nearing, the said generator is not ready to evacuate power on account of delays in its

implementation and as such the LTA quantum booked for the said generator is then offered under MTOA or STOA depending upon the pending applications for such grant of open access.

- q) The stipulation of there being no part allocation of LTA would postpone the supply of electricity to the distribution licensee under a competitive bidding process and on long term basis, even though part capacity can be allocated immediately which, as per the impugned order is only meant for Medium Term and Short Term customers. Hence, the impugned order goes completely contrary to the principles based on which the system is developed and benefits the MTOA customers as against the LTA customers, which LTA customers are the basis for creation of the transmission network.
- r) The Respondent Commission failed to appreciate the fact that the PPAs have been signed on 23rd August, 2013 and

the power plant has been in a position to supply electricity since March,2014. However, the generating units are lying shut due to non-grant of LTOA whereas the system is being used by Short Term and Medium Term customers. Both the consumers in Tamil Nadu and also the generators are suffering on account of non-grant of part LTA. There is no rationale for such decision.

- s) It is pertinent to also mention that by virtue of the impugned order, it is required for the LTOA applicants to also apply for MTOA allocation, to the same delivery point, by predicting the likely dates for full LTOA capacity being available. This, apart from being perverse, would also result in speculation/gaming on the available capacity and artificially high number of applications filed for the same injection point and same drawl point. Surely, this cannot be the intention while framing of either the Electricity Act, 2003 or the Connectivity Regulations.

t) In the circumstances, the appeal deserves to be allowed.

20. We have heard Mr. Sanjay Sen, learned counsel appearing for the Appellant-KSK Mahanadi Power Company Limited. We have carefully perused the written submissions filed by it. Gist of the submissions is as under:

(a) KSK Mahanadi had filed application for LTOA for capacity of 500 MW in the month of November, 2013. The total applicants in November, 2013 are for a capacity of 1208 MW. The ATC as per the Agenda Note issued by CTU is 900 MW from 1/4/2015 and 1197 MW from 1/6/2015. As per the impugned order since 1208 MW is more than 900 MW and 1197 MW, no allocation can be made to LTA Applicants and entire capacity can only be used by MTOA customers.

(b) No LTA applicant had raised the issue of pro-rata allocation before the CERC. Even Emco had contended that LTA should be granted on pro-rata basis to all LTA applicants

- in a six monthly window. The present opposition is only because Emco is November, 2013 MTOA Applicant and will benefit by denial of LTA to November, 2013 LTA Applicants. There is no prohibition in the Regulations for grant of pro-rata allocation for either LTA or MTOA.
- (c) The LTA Applicants of November 2013 have signed Bulk Power Transmission Agreements few years earlier and have furnished necessary Bank guarantees of Rs.5,00,000/- per MW for the purpose. The fresh application was necessary only on account of change in target region from WR to SR. The transmission system is built and developed for LTA customers. The LTA has primary priority in the system and the system is developed and created for LTA. MTOA and STOA are only on margins available, after satisfaction of LTA.
- (d) The National Tariff Policy in Para 7.0 seeks to achieve the following objectives in regard to transmission:

“1. Ensuring optimal development of the transmission network to promote efficient utilization of generation and transmission assets in the country;

2. Attracting the required investments in the transmission sector and providing adequate returns.”

- (e) Investments in transmission sector and creation of assets, is only for LTA. There is no specific grant of LTA provided in the Regulations, nor can there be a denial of open access to LTA. The system is to be used and if necessary created to grant LTA. LTA has vested right over future capacity and system is created/augmented for Long Term users only.
- (f) On the other hand, the Connectivity Regulations specifically prohibit any system creation/augmentation for the purpose of MTOA (Regulation 9(2) Proviso). It is only after fulfilling the LTA Applicants that the MTOA and STOA are to be granted on margins. It is for this purpose that the

- Regulations specifically deal with grant of MTOA, Short Term access, rejection if capacity not available, etc.
- (g) It is also relevant to mention that an LTA Applicant is required to give Rs.10,000/- per MW for Application, Rs.5,00,000/- per MW at the construction stage. Further, any relinquishment requires payment of compensation for a period of 12 years, if not used for 12 years, and a notice of 1 year if used for more than 12 years. In the case of MTOA, the same can be relinquished with a month's notice.
- (h) Power to grant greater right includes power to grant lesser right. (**Atma Ram, Aleman Rama Rao v. Secretary of State of India Council**³).
- (i) It is also a well settled principle that when a right is provided, a party can always limit or waive the right for a lesser right. In the present case, against the full LTA quantum applied for, it is open to the applicants to accept

³ (1914) 1 LW 339 (Mad) (PB) 346

- lower quantum on pro-rata basis till full capacity is available.
- (j) The Regulations also permit relinquishment of LTA, in full or in part. When part relinquishment is provided, there is no basis for holding that part grant is prohibited.
- (k) The CERC permits part-operationalisation of LTA. This supports the Appellant's case. The LTA is a vested right and system is created for LTA. The LTA once applied for is to be operationalised to the extent system is available and the balance operationalisation is postponed till system is developed. However, there cannot be any denial of LTA or primacy to MTOA when LTA is applied for and pending
- (l) Reliance placed on third proviso to Regulation 10(1) is misplaced. It neither provides for nor implies that till such time system is not planned or augmented, LTA cannot be granted.

- (m) In the present case, there has been no augmentation or planning for the November, 2013 LTA Applicants as the system was being created and augmented by the CTU based on its perspective plans. The proviso which requires 6 monthly applications for system planning and augmentation does not even arise or apply in the present case as no system planning took place for the LTA applicants, but the system planning and augmentation was independently undertaken by CTU based on perspective planning.
- (n) The reliance on the Detailed Procedure is also misplaced. There is no prohibition on grant of pro-rata LTA in the Detailed Procedure also. The impugned order in so far as it prohibits part/pro-rata allocation of LTA is incorrect and liable to be set aside.
- (o) In the circumstances, the appeal be allowed.

21. We have heard Ms. Prerna Priyadarshini, learned counsel appearing for the Power Grid Corporation of India Limited/CTU. We have perused the written submissions filed by it. Gist of the submissions is as under:

- (a) Though the Connectivity Regulations do not expressly authorize the grant of part LTA by CTU, the Regulations allow grant of LTA with or without system augmentation based on the likelihood of accommodating power flows in the existing and under construction/ planned transmission system [Regulation 9(1)]. It is in view of the planned transmission system (Raichur - Sholapur line in the instant case), the commissioning of which had been delayed but which was likely to be commissioned soon, that CTU, upon a practical view of things, granted LTA on pro-rata basis amongst the eligible LTA applicants. In any case, there is no prohibition on granting part LTA in the Connectivity Regulations.

- (b) The grant of part LTA and operationalization thereof does not cause any constraints on the transmission system as such. There are no technical reasons which would create any ground for not granting part LTA.
- (c) Efficient, economic and coordinated development of Inter-State Transmission System (ISTS) is envisaged to be associated only with LTA. The scheduling of power from various injection sources to the distribution utilities on long term basis is what provides stability and predictability to the day-to-day operation of the Grid.
- (d) While developing the transmission system, some margins get inherently built up. It is for the efficient utilization of such margins, based on their availability, that MTOA and STOA are granted. No new transmission systems are to be developed for MTOA and STOA (Regulation 9). MTOA and STOA do not contribute to the augmentation or development of transmission system, but are only in the nature of by-products to be availed, if and when margins are available.

- (e) The normal practice for evolution of ISTS followed by CTU is based on following principles:
- (i) The evolved transmission system to meet the reliability standards as per the transmission planning criteria;
 - (ii) Judicious utilisation of Right of Way (RoW);
 - (iii) The evolved system should fit well in the long term perspective;
 - (iv) The evolved system has to be the most favoured alternative techno- economically i.e. it should incur least system losses, least cost etc;
 - (v) Phasing of evolved transmission system to be planned to achieve long term objective.

Therefore, planning and evolution of transmission system which is the statutory function of the CTU is not merely based on or is carried out as and when LTA applications are received by it, but is a continuous process that the CTU undertakes in accordance with the above

principles, in consultation with the Central Electricity Authority (“**Central Electricity Authority**” or “**CEA**”) and based on studies and projections of the CEA and the RPCs. Accordingly, it is submitted that the contention based on 3rd Proviso to Regulation 10 that in all cases where existing system is not sufficient, to grant full LTA, applications are to be bunched together on a six-monthly basis, once in June and once in December, for the purposes of planning and augmentation and processing of these applications, is clearly contrary to the functions of the CTU under Section 38 of the Electricity Act.

- (f) It is in this context that the 3rd Proviso to Regulation 10 and Paragraph 24 of the Detailed Procedure are to be understood. It is submitted that the language of both the regulations and the procedure make it amply clear that bunching of applications is required in cases where planning or augmentation of the system is required so as to develop a coordinated transmission plan in accordance with the perspective transmission plans developed by the

CEA. The said provisions are inapplicable in a situation where the system planning has already been done or augmentation is already commenced or planned in accordance with the perspective transmission plans of the CEA.

- (g) Further, it is submitted that the requirement of bunching LTA applications on a six monthly basis in all circumstances where system augmentation is required is contrary to Regulation 9(1) of the Connectivity Regulations. The CTU while processing the LTA applications is mandated to be guided by the augmentation already planned/ in progress under the plans made by CEA and grant LTA having regard to the capacities that are likely to be added pursuant to these augmentation plans. Hence, the provisions requiring bunching on a six monthly basis are not applicable in all circumstances, much less where system augmentation is already planned or is in progress, as is clear from the Connectivity Regulations.

- (h) It is also relevant to note that the interpretation sought to be given to Regulation 10, Proviso 3 and paragraph 24 of the Detailed Procedure may render the time-frame for processing of applications redundant. Even in case of applications requiring system augmentation, the time specified for processing of applications is 180 days. If the contention that all applications requiring any sort of augmentation are to be bunched at a six-monthly basis is accepted, the specified time-frame to process such applications under Regulation 7 would be rendered otiose.
- (i) None of the generation projects to which the present LTA applications pertain are *per se* new generation projects. In respect of these LTA applications, in effect, what is to be granted now is transmission capacity that is either available or is going to be added in due course, rather than requiring fresh augmentation to be undertaken or planning to be done. The concept of bunching of all applications on a six monthly basis and any directions in respect thereof will result in absurdities, besides leading to unfairness in

the grant of LTA. It will adversely complicate the process of grant of LTA.

- (j) In the circumstances, it is prayed that appropriate directions be given to bring about requisite changes in the Connectivity Regulations.

22. We have heard Mr. Akhil Sibal, learned counsel appearing for the D.B. Power Limited. We have carefully perused the written submissions filed by D.B. Power Limited. Gist of the submissions is as under:

- (a) The finding of the CERC that Connectivity Regulations and Detailed Procedure do not envisage grant of part LTA is fallacious. ISTS is built and augmented for the LTA. MTOA and STOA can be considered only when the resultant power can be accommodated in the margin available in the transmission system after LTA. Priority for grant of LTA cannot be curtailed in any manner.
- (b) Emco's contention that order of the CERC dated

11/10/2013 is not applicable to the present case is incorrect inasmuch as the CERC has recorded that transmission system augmentation is done based on LTA whereas MTOA is granted when the resultant flows can be accommodated in the margin available in the transmission system after LTA. This analysis is apparently on an interpretation of Regulations 9 and 10 of the Connectivity Regulations.

- (c) The CERC has also recorded in that order a finding that STOA is also provided on the margin of the existing transmission system which is based on an interpretation of un-amended Regulation 3 of the Open Access Regulations, 2008. In this regard, it is important to note that amendment in Regulation 3 is only to the effect that MTOA has been given a priority over the STOA and as such the amendment has no effect on the finding of the CERC in the judgment dated 11/10/2013 that transmission system augmentation is done based on LTA whereas MTOA is granted when the resultant power flows can be

accommodated in the margin available in the transmission system after LTA. Additionally, the CERC has also categorically concluded that LTA is provided higher priority over MTOA and STOA. Therefore, the amendment of Regulation 3 of the Open Access Regulations, 2008 to the effect that MTOA shall have priority over STOA and Statement of Reasons cannot mean that LTA and MTOA have equal priority in allocation.

- (d) Emco had applied for MTOA in November, 2013 and for LTA in December, 2013, whereas DB Power is a November, 2013 LTA Applicant. But for the impugned order holding that grant/allocation of part LTA is not permissible, DB Power being November 2013 LTA Applicant will have priority over MTOA application of Emco and December 2013 LTA application of Emco. If the impugned order is upheld it would accord priority to MTOA which is neither stipulated in Regulations and Detailed Procedure nor supported by any judicial pronouncement.
- (e) Under Regulation 18 of the Connectivity Regulations,

relinquishment of part LTA is permissible. Pursuant to such relinquishment, grant of un-relinquished LTA becomes part grant of LTA. Besides, curtailment of power flow on transmission system is permissible under Regulation 25. It is evident, therefore, that part of already granted capacity can flow through the transmission system and, therefore, there can be no plausible rationale to prohibit granting of part LTA which is nothing but granting part flow through the transmission system.

- (f) The CERC seeks to achieve something indirectly which is not permissible under the Connectivity Regulations and, therefore, contrary to basic tenets of law (**Ram Chandra Singh v. Savitri Devi & Ors.**⁴).
- (g) Emco's reliance on 1st proviso to Regulation 21(1) and paragraph 16.1(a) of the Detailed Procedure is misplaced. Regulation 21(1) relates to time period and not capacity and, therefore, bears no relevance. Paragraph 16.1(a) of the Detailed Procedure envisages reduction in quantum of

⁴ (2014) 12 SCC 713

MTOA because MTOA operates on margins and, therefore, in case adequate margins are not available, lesser quantum would be given. The Connectivity Regulations do not expressly provide for grant of part MTOA. The power to grant part MTOA cannot flow from the Detailed Procedure. Reliance on 3rd proviso to Regulation 10(1) is misplaced. These provisions do not indicate that the grant of LTA cannot be done unless planning/augmentation of the system is not complete. Planning and evolution of transmission system is a statutory function of the CTU which is undertaken in consultation with the CEA and based on CEA's studies and projections as well.

- (h) Direction of the CERC that the available capacity should be allowed to be utilized by MTOA till capacity for LTA is available after system augmentation is contrary to the Connectivity Regulations as it is neither based on the Connectivity Regulations nor on the provisions of the Detailed Procedure. It is pertinent to note that system augmentation is time consuming process and may take

even more time than the duration of MTOA applications.

- (i) Allowing grant of part LTA does not prohibit grant of MTOA. In terms of the CERC order, MTOA application made in the previous month to the LTA application of subsequent month still has priority. Therefore, MTOA and STOA applications will still be processed and the said forms of open access shall be granted. Any fears expressed in this behalf are hypothetical.

- (j) There is an express provision for change in region under fourth proviso of Regulation 12(1) and there are two separate timelines for processing of LTA application under Regulation 7. From the scheme of things, it is clear that Connectivity Regulations do not contemplate grant of LTA only when full quantum is available and that LTA applicant should wait until augmentation of the system. Regulation 7 mandates CTU to process LTA applications within an upper limit of 120 days where augmentation of transmission system is not required whereas the upper limit for processing LTA applications where augmentation

of transmission system is required is 180 days. As such by virtue of the said Regulation, CTU is under a statutory obligation to process and grant LTA within a maximum period of 180 days where total transmission system of open access sought by LTA applicants in a particular month is less than the available transmission capacity and augmentation of transmission system is required for granting total capacity. If the impugned finding of the CERC that grant of part LTA is not permissible is correct and it is held that applications would be processed six monthly, then the mandatory time period of 180 days prescribed under Regulation 7 would be rendered nugatory and meaningless.

- (k) In the circumstances, the impugned order to the extent it holds that part grant of LTA is not permissible is untenable in law and requires to be set aside.

23. We have heard Mr. Vaidyanathan, learned senior counsel appearing for the Emco. We have carefully perused the written submissions filed by Emco. Gist of the submissions is as under:

- (a) The findings recorded in the impugned order that grant of part LTA is not envisaged by the applicable Regulations are well founded.
- (b) Regulation 10(1) of the Connectivity Regulations read with 1st proviso and Rule 24.1.2.i.a) of the Detailed Procedure on the one hand and 3rd proviso of Regulation 10(1) of the Connectivity Regulations read with Rule 24.1.2.i.b) of the Detailed Procedure create two categories of LTA applications –
- (i) LTA applications which can be fully serviced by the existing transmission system at the time at which the LTA is to commence and
- (ii) LTA applications requiring system planning or augmentation, as they cannot be fully serviced by the existing transmission at the time at which the LTA is to commence.

- (c) Regulation 10(1) of the Connectivity Regulations read with Rule 24.1.2.1.a) of the Detailed Procedure stipulates that LTA applications belonging to the first category i.e. LTA applications which can be serviced by the existing transmission system at the time at which the LTA sought is to commence, must be processed on first-come-first-served basis and LTA granted within 120 days of the application (“monthly rule”). In respect of the second category of LTA applications i.e. LTA applications requiring system planning or augmentation as they cannot be fully serviced by the existing transmission system at the time at which the LTA sought is to commence, the 3rd proviso to Regulation 10(1) of the Connectivity Regulations read with Rule 24.1.2.i.b) of the Detailed Procedure stipulates that such LTA applications must be processed on a six monthly basis, on 30th June and 31st December of each year, and granted by the following 31st December and 30th June respectively (“six monthly rule”).

- (d) The Appellants' LTA applications submitted in November, 2013 falls in the second category of LTA applications as the ATC in February, 2014 (Jindal Power) and June, 2014 (KSK Mahanadi) when their LTA was to commence, was not sufficient to service them. Therefore, in accordance with the six monthly rule, the LTA applications of November, 2013 had to be bunched with the LTA applications of December, 2013 and processed together for the grant of LTA, considering all of them at the same relative priority on 31st December 2013. However, the Appellants are seeking the grant of part LTA based on the monthly rule.
- (e) Part allocation of LTA is repugnant to the six monthly rule, and the six monthly rule impliedly prohibits the part allocation of LTA as –
- (i) The six monthly rule defers / prohibits the processing of LTA applications as they are collected and bunched over six months;
 - (ii) Part allocation of LTA would bring into play the

monthly rule even in circumstances of system constraint i.e. the field where the six monthly rule is applicable.

- (f) Allowing part LTA will render otiose the 3rd proviso to Regulation 10(1) of the Connectivity Regulations and Rule 24.1.2.i.b) of the Detailed Procedure, because LTA applications would not need to be processed on a six monthly basis if part LTA can be granted on a monthly basis as and when the LTA applications are submitted.
- (g) While the provisions dealing with MTOA, namely, Regulation 9(2) read with the 1st proviso to Regulation 21(1) of the Connectivity Regulations along with Rule 16.1.a of the Detailed Procedure, contemplate the grant of MTOA on existing transmission system or the transmission system under execution by adjusting the quantum and duration of MTOA so as to fit the MTOA within the existing transmission system; Regulation 9(1) of the Connectivity Regulations contemplates the grant of LTA with due regard to system augmentation. If grant of part LTA is permitted,

the provisions pertaining to grant of part MTOA would be rendered otiose when the existing transmission capacity is inadequate to service the LTA applicants of a particular month.

- (h) Allowing part LTA will render Regulations 9(1) and 10(1) of the Connectivity Regulations repugnant to the Open Access Regulations. Regulation 3(2) of the Open Access Regulations provides that STOA is granted on the surplus transmission capacity available after use of LTA and MTOA customers. Permitting part allocation of LTA will result in utilization of the margins of the transmission system exclusively for LTA, thereby obliterating any scope for STOA.
- (i) The absence of MTOA and STOA will result in an unevenly developed and inefficient electricity market, comprising isolated islands of artificial power surplusage or shortage as purchasers and sellers will be able to have or sell power only for 12 years to 25 years. An interpretation which will obliterate MTOA and STOA ought not to be adopted.

- (j) LTA applicants are not prejudiced in any way by the absence of a facility for the grant of part LTA, as LTOA applicants can avail MTOA and STOA until there is adequate transmission capacity available. It is common industry practice that till LTA is granted, the LTA applicant utilizes MTOA and STOA to convey its electricity. On the other hand, if the grant of part LTA is allowed pro-rata or otherwise, it will wipe out MTOA and STOA based transactions. Granting part LTA will lead to avoidable litigation.
- (k) Applicable regulations are not silent on the processing of LTA applications when there is a shortage of ATC vis-à-vis the LTA demanded. The 3rd proviso to Regulation 10(1) deals with a situation where there is a constraint in the transmission system and the LTA applicants of a given month cannot be serviced at the time their LTA is to commence, necessitating the augmentation of the existing transmission system.

- (l) No provision has been cited to support the contention that LTA applicants have overriding priority over and above MTOA applicants under all circumstances.
- (m) Regulation 3 of the Open Access Regulations was amended on 29/5/2009 to state that LTA and MTOA customers shall have priority over STOA customers for use of the ISTS. In any event, Regulation 3 of the said Regulations deals with customers and not applicants which are two different categories.
- (n) By enacting the six monthly rule, the applicable regulations have impliedly prohibited the grant of part LTA. The 3rd proviso to Regulation 10(1) of the Connectivity Regulations and Rule 24.1.2.i.b) of the Detailed Procedure defer the processing of LTA applications to 30th June and 31st December of each year. If LTA applications cannot be processed (except on a six monthly basis) there is no question of any LTA being granted against them.
- (o) The Connectivity Regulations or the Detailed Procedure do not contemplate processing of LTA applications submitted

while system augmentation based on planning already in place is underway and the LTA applications can be serviced in the future based on the said planned augmentation (even if the LTA so granted commences later than the date of commencement of LTA as applied for). The third category is not contemplated on account of the necessity to modify pre-existent augmentation plans and the lack of certainty on the implementation of such augmentation plans.

- (p) Giving LTA applications' overreaching priority over MTOA applications will be contrary to the fundamental principle of non-discriminatory open access laid down in the Electricity Act, 2003.
- (q) As per the applicable regulations, an LTA applicant is entitled to the grant of LTA when there is adequate transmission capacity available. When transmission capacity available is inadequate, an LTA applicant is entitled to require that available transmission capacity be built for it. However, an LTA applicant is not entitled to claim LTA instantly upon the submission of its application.

(r) Thus, as per the 3rd proviso to Regulation 10(1) of the Connectivity Regulations read with Rule 24.1.2.i.b), CTU is required to augment transmission capacity if the ATC is insufficient to service the LTA applicants of a particular month on a six monthly basis, in accordance with the perspective transmission plans developed by the CEA. The 3rd proviso to Regulation 12(1) of the Connectivity Regulations and Rule 24.1.2.ii. of the Detailed Procedure provide that CTU build transmission lines, if required, in tandem with the construction of the source power plant. Further, Rule 22.7 of the Detailed Procedure specifically allows CTU at least 3 years to carry out the necessary augmentation of the transmission system. Therefore, every generator seeking grant of LTA is well aware that such grant may take upto three years and cannot expect an instantaneous grant of LTA immediately upon application. It is for this reason that LTA applicants must also furnish the source and destination of their power at the time of the application itself.

- (s) Both the Appellants applied for LTA in November, 2013. Therefore, as per the aforesaid provisions, CTU is permitted to take upto 3 years to provide them LTA. It is another matter that in the instant case, CTU is able to provide the Appellants with LTA by October, 2015, well before the said period of 3 years. Moreover, since the new transmission capacity being provided by CTU to the Appellants was not created based on any payments or applications made by the Appellants, the Appellants do not have any rights as claimed, equitable or vested, over the said capacity.
- (t) In fact, the Connectivity Regulations and Detailed Procedure do not accord LTA applications overriding priority over MTOA application under all circumstances. LTA is granted priority as against MTOA applications only when the ATC can service all LTA applications fully. It is undisputed that till date, the ATC on the SR remains insufficient to fully service all LTA applications of November, 2013. In such a scenario when ATC is insufficient for LTA applicants, the

CTU must grant open access to MTOA applicants as against LTA applicants. It is incorrect to say that MTOA is granted on the margins of the transmission system. As is clear from Regulation 9(2) of the Connectivity Regulations, MTOA is granted on the existing transmission system (not on the margins of the existing system as contended by the parties herein; only STOA is granted on the margins of the existing transmission system). The only difference between LTA and MTOA applicants is that the transmission system is not augmented based on MTOA applications. The CTU's assertion that transmission margins (from which alone MTOA is allegedly granted) only appear accidentally or fortuitously, is misconceived. As is borne out by Regulation 3 (2) of the Open Access Regulations, transmission margins also include margins due to in-built spare transmission capacity created to cater to future load growth or generation addition. In the instant case, it is submitted that Emco is entitled to be granted precisely such transmission capacity on its MTOA application, namely, transmission capacity on

the SR created to cater to future load growth or generation addition; even as the November 2013 LTA applicants are not entitled to be granted such capacity on account of the six monthly rule and its accompaniment, the (implied) prohibition on part LTA allocation.

- (u) The Appellants have argued that the power to grant the greater, i.e., full LTA, includes the power to grant the lesser, i.e., part LTA. The Appellants' said argument is misconceived as the Detailed Procedure and the Connectivity Regulations specifically rule out the power to grant the lesser, i.e., part LTA. By virtue of Rule 24.1.2.i.b) of the Detailed Procedure and the 3rd Proviso to Regulation 10 (1) of the Connectivity Regulations, LTA applications cannot be processed (leave alone LTA granted) unless there is sufficient transmission capacity available for the grant of LTA.
- (v) The Appellants have also contended that the applicable rules ought not to be applied with full vigour to the facts of the instant case as the shortfall in ATC is only to the tune of

11 MW and it is impractical for the Appellants (November 2013 LTA applicants) to wait for a long period of time due to such a small shortfall. It is stated that the said contention of the Appellants is plainly false and contrary to the record on the following counts:

- (i) The Appellants need to wait only till October, 2015 for the grant of LTA.
- (ii) The shortfall in ATC is much greater than 11 MW. Even as only 900 MW of transmission capacity was available as of 01/04/2015 and 1197 MW as of 01/06/2014, the LTA applicants alone require 1708 MW [Jindal (400 MW), KSK (500 MW), DB (208 MW), Ind-Barath (500 MW), BALCO (100 MW)].
- (iii) Plus, the MOP has already allocated 693 MW of the said transmission capacity to Telangana, Kerala and Andhra Pradesh, which allocation has been operationalized subject to the decision of KSEB's Petition No.99/ MP/ 2015 by the CERC.

- (w) Permitting part allocation on LTA applications will create an unmanageable administrative problem for CTU and the IPPs, which will have to deal with fluctuating transmission capacity, with the constant allocation and re-allocation of transmission capacity as more transmission capacity comes on line incrementally. During times when the incremental increase of transmission capacity and consequently the part allocation of LTA is too meagre for an LTA applicant to utilize, the LTA applicant will be forced to run its power plant to produce the meagre quantity of power for which it has LTA. The LTA applicant will not be able to refuse the meagre part LTA, or it will have to pay an enormous relinquishment charge.
- (x) The main thrust of Emco's case before the CERC was that its December 2013 LTA application ought to be considered along with the November 2013 LTA applicants by virtue of the 3rd Proviso to Regulation 10 (1) of the Connectivity Regulations and Rule 24.1.2.i.b) of the Detailed Procedure.

Emco's said case before the CERC, is independent of and without prejudice to its case on part LTA. Without prejudice to other submissions, it is submitted herein too, that Emco's December LTA application ought to be considered for the grant of LTA alongside the November 2013 LTA applicants by virtue of the six monthly rule, for the grant of part LTA on a pro rata basis or full LTA when adequate transmission capacity is available in October, 2015.

- (y) In light of the above submissions, it is prayed that this Tribunal may be pleased to dismiss the present appeals, affirm the impugned order and direct CTU to implement the impugned order with immediate effect.

24. We have heard Ms. Suparna Srivastava, learned counsel appearing for the KSEB. We have perused the written submissions filed by the KSEB. Gist of the submissions is as under:

- (a) The definition of the term 'open access' contained in the Electricity Act indicates that the statutory mandate is the non-discriminatory use of the transmission lines of the CTU as per the Regulations framed by the Appropriate Commission. In that behalf, Section 38 of the Electricity Act also mandates that one of the functions of the CTU is to ensure that its transmission lines are available in a non-discriminatory manner for use by any licensee or generating company through open access on payment of transmission charges. Under Section 10(3), a generating company is enjoined to coordinate with the CTU for transmission of electricity generated by it. In furtherance of the above mandate, the Connectivity Regulations are framed for connectivity and grant of access in the transmission system of the CTU. A Detailed Procedure is notified under the Connectivity Regulations for grant of connectivity of LTA and MTOA in its transmission system. The CERC (Open Access in Inter-State Transmission) Regulations, 2008 gave higher priority to LTA applications. With the notification of

- the Connectivity Regulations, a new category of open access was created namely, 'medium-term access' where use of Inter-State Transmission System is to be for a period exceeding three months' but not exceeding three years.
- (b) The Statement of Reasons dated 30/10/2009 issued by the Commission shows that emphasis has been to plan transmission access in a manner that medium term access can also be accommodated in the margins available in the transmission system. Regulation 10 of the Connectivity Regulations states that applications for LTA and MTOA are to be processed separately and the issue of priority is now restricted only to processing of applications for MTOA received during a month where an application seeking access for longer term is to have priority.
- (c) The word 'open' is not used in the term 'Long Term Access'. However, short term and medium term access is termed as 'short term open access' and 'medium term open access'. Through the Connectivity Regulations, provision is created

- for non-discriminatory access to LTA applicants as well as in the existing system or augmentation thereof. This, however, does not take away the right of non-discriminatory open access to the transmission system of CTU for the licensees and generating companies which is statutorily available for 'open access' applicants, by artificially providing an overriding priority to LTA applicants which does not inherently qualify as 'open access' applicants.
- (d) As per Regulation 9, LTA is to be granted having due regard to augmentation of ISTS and MTOA is to be granted if the resultant power flow can be accommodated in the existing transmission system or the transmission system under execution. No relative priority is provided to LTA over MTOA at the stage of processing applications for grant of access. Instead, the Regulations mandate processing of applications of MTOA and LTA separately.
- (e) A perusal of the separate procedures prescribed for grant of LTA and MTOA shows that while LTA is granted in the

major transfer capability in an upcoming transmission system at the planning stage, the margins available in the transmission system upon commencement of execution of such transmission system are to be utilized for power transactions on medium-term and short-term basis to meet the immediate or interregnum requirements of power supply as also for facilitating transactions in power market. Availability of adequate transmission margins is thus a sine qua non for the exercise of statutory right to open access. The Regulations envisage LTA as different from “open access” and require creation of new transmission systems for accommodation of power flow of LTA applicants. The grant of LTA can therefore not be extended to what is available as margin at each point of time without taking the statutorily mandated recourse to augmenting the transmission system for accommodating the resulting power flows. Such an approach is totally inconsistent with the provisions of the Connectivity Regulations.

- (f) The National Electricity Policy envisages that at least 15% of the transmission capacity is made available for developing competitive power market transactions. Non-discriminatory and regulated access in the transmission system of the CTU through various market development products by various participants in power market is a necessary precondition for discharge of the Commission's statutory mandate for development of power market.
- (g) In the CERC (Grant of Regulatory Approval for execution of Inter-State Transmission Scheme to the Central Transmission Utility) Regulations, 2010, the need for augmentation of transmission system in view of the open access regime and as stipulated in the National Electricity Policy has been recognized.
- (h) The Regulations anticipate the generating companies as well as the CTU to take sufficient advance action for development of adequate ISTS for catering to the entire requirements of the coming up generation capacities as well

as to meet the anticipated needs of the open access mechanism through creation of adequate margins in the ISTS. However, the present controversy shows that instead of taking advance action for augmentation of the ISTS, the margins in the existing system meant for catering the requirements of open access and power market are sought to be completely reserved for LTA, which is not only contrary to the Regulations but is defeating the very purpose of the Regulations. The proposal of granting pro-rata transmission capacity among LTA applicants as and when margins are created in the ISTS system is antithetic to open access regime mandated in the Electricity Act. It follows that the LTA applicants must necessarily wait till adequate systems are planned and executed and in the meantime they can use the existing margins through “open access” mechanism.

- (i) A prudent distribution licensee will not depend on a single source of supply to meet all its requirements and will normally have a basket of supply contracts of varying

duration. As such and in accordance with the guidance provided by the Commission through its Regulations, KSEB has entered into a variety of contracts under LTA, MTOA, STOA and is utilizing power exchanges based on availability. These contracts are in addition to the PPAs with existing and upcoming central generating stations. All these forms of contracts and open access for different durations are essential for optimally meeting the demand of a distribution utility after taking into account the projected Load Generation balance. Similarly all these forms of open access and contracts are required for the generators also for having an optimal portfolio for balancing their varying risks. These contracts for different periods also provide the right price signals to the stakeholders for making suitable business decisions including investment decisions. Such functioning of a dynamic power market is an essential prerequisite for efficient functioning of the power sector as per the scheme of the Electricity Act.

(j) If an application for LTA is held to have priority over MTOA application even in cases where such MTOA application has been received prior to receipt of the LTA application, it will have adverse effect on power market. All market products like collective transactions in the power exchanges, day ahead open access transactions, advance short term open access transactions and medium term open access transactions are bound to have adverse impact. The entire power market operations between New Grid and SR Grid will come to a grinding halt, since the entire margin available will be allocated among the LTA applicants. The transmission system will be completely utilized solely for LTA transactions, which is in complete violation of the provision for non-discriminatory open access set out in the Electricity Act. The appeal in the circumstances deserves to be dismissed.

25. The question whether part LTA can be granted has to be decided having regard to the object of the Electricity Act and the

purport and intent of the various Regulations framed thereunder particularly, the Connectivity Regulations. The statement of Objects and Reasons of the Electricity Act indicates that one of the features of the Electricity Act was to have a Transmission Utility at the Central as well as at the State level which will have the responsibility of ensuring that transmission network is developed in a planned and coordinated manner to meet the requirements of the sector. The preamble of the Electricity Act states that it is an Act to consolidate, *inter alia*, laws relating to generation, transmission, distribution, etc. and generally amongst other things for taking measures conducive to development of electricity industry. We find that the relevant Regulations framed under the Electricity Act are intended, *inter alia*, to develop efficient Inter-State and Intra-State Transmission System.

26. We are concerned here with ISTS. CTU plays a pivotal role in transmission of electricity through ISTS. As per Section 38 of the Electricity Act, CTU's functions *inter alia* are to undertake

transmission of electricity through ISTS and to discharge all functions of planning and coordination relating to ISTS with State Transmission Utilities, Central Government, State Governments, generating companies, Regional Power Committees, Licensees, etc. It has to ensure development of an efficient, coordinated and economical system of inter-State Transmission lines for smooth flow of electricity from generating stations to the load centers. It has to provide non-discriminatory open access to its transmission system for use by any licensee or generating company etc. on payment of the transmission charges. Under Section 73 of the Electricity Act, the CEA has to *inter alia* form short term and perspective plans for development of the electricity system and coordinate the activities of the planning agencies for optimal utilization of resources to subserve the interests of the national economy and to provide reliable and affordable electricity for all consumers. Under Section 3(4) of the Electricity Act, the CEA has to prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in 5 years.

27. The National Electricity Policy notified under Section 3 of the Electricity Act provides for development of transmission system. Clause 5.3 relates to transmission. The policy provides that CTUs and STUs have responsibility of network planning and development based on National Electricity Plan in coordination with all concerned agencies. The policy states that network expansion should be planned and implemented keeping in view the anticipated transmission needs that would be incident on the system in open access regime. Prior agreement with the beneficiaries would not be pre-condition for network expansion. The policy further states that CTU/STU should undertake network expansion after identifying the requirements in consultation with stakeholders. Clauses 5.3, 5.3.1 and 5.3.2 need to be quoted.

“5.3 TRANSMISSION

5.3.1 The Transmission System requires adequate and timely investments and also efficient and

coordinated action to develop a robust and integrated power system for the country.

5.3.2 Keeping in view the massive increase planned in generation and also for development of power market, there is need for adequately augmenting transmission capacity. While planning new generation capacities, requirement of associated transmission capacity would need to be worked out simultaneously in order to avoid mismatch between generation capacity and transmission facilities. The policy emphasizes the following to meet the above objective:

- The Central Government would facilitate the continued development of the National Grid for providing adequate infrastructure for inter-state transmission of power and to ensure that underutilized generation capacity is facilitated to generate electricity for its transmission from surplus regions to deficit regions.*
- The Central Transmission Utility (CTU) and State Transmission Utility (STU) have the key responsibility of network planning and development based on the National Electricity Plan in coordination with all concerned agencies as provided in the Act. The CTU is responsible for the national and regional transmission system planning and development. The STU is responsible for planning and development of the intra-state transmission system. The CTU would need to coordinate with the STUs for achievement of the shared objective of eliminating transmission constraints in cost effective manner.*
- Network expansion should be planned and implemented keeping in view the anticipated*

transmission needs that would be incident on the system in the open access regime. Prior agreement with the beneficiaries would not be a pre-condition for network expansion. CTU/STU should undertake network expansion after identifying the requirements in consultation with stakeholders and taking up the execution after due regulatory approvals.

- *Structured information dissemination and disclosure procedures should be developed by the CTU and STUs to ensure that all stakeholders are aware of the status of generation and transmission projects and plans. These should form a part of the overall planning procedures.*
- *The State Regulatory Commissions who have not yet notified the grid code under the Electricity Act 2003 should notify the same not later than September 2005.”*

28. We also need to have a look at Clause 7.0 of the National Tariff Policy. It reads thus:

“7.0 TRANSMISSION

The transmission system in the country consists of the regional networks, the inter-regional connections that carry electricity across the five regions, and the State networks. The national transmission network in India is presently under development. Development of the State networks has not been uniform and capacity in such networks needs to be augmented. These networks will play an important role in intra-State power flows and

also in the regional and national flows. The tariff policy, insofar as transmission is concerned, seeks to achieve the following objectives:

- 1. Ensuring optimal development of the transmission network to promote efficient utilization of generation and transmission assets in the country;*
- 2. Attracting the required investments in the transmission sector and providing adequate returns.”*

29. The Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 notified by the CERC provides a planning code for inter-State transmission. It describes Planning Philosophy under Clause 3.4 as under:

- a) CEA would formulate perspective transmission plan for inter-State transmission system as well as intra-State transmission system. These perspective transmission plans would be continuously updated to take care of revisions in load projections and generation scenarios considering seasonal and time of the day variations.
- b) CTU should carry out planning process from time to time as per the requirement for identification of inter-State

- transmission system including transmission system associated with generation projects and regional and inter-regional system strengthening schemes which shall fit in with the perspective plan developed by CEA.
- c) In addition to inter-State transmission system, the CTU shall plan from time to time, system strengthening schemes, need of which may arise to overcome the constraints in power transfer and to improve the overall performance of the grid. The inter-State transmission proposals would be discussed, reviewed and finalized in the meetings of Regional Standing Committees for Transmission Planning constituted by CEA in consultation with all concerned and action taken by CTU on the basis of agreements signed with the beneficiaries. In case of associated transmission system, where agreements could not be reached in respect of system strengthening schemes, the CTU may approach CERC for regulatory approval in accordance with (Grant of Regulatory Approval for execution

of inter-State Transmission Schemes to CTU) Regulations 2010.

30. In the light of above, CEA has to form perspective plans for development of electricity system and prepare a National Electricity Plan. CTU has to do planning and coordination relating to ISTS and undertake expansion of the ISTS based National Electricity Plan. These plans may require review from time to time depending on the changes in generation and load configuration. Augmentation to the planned transmission system may be necessary in view of applications of LTA. However, every LTA application may not require augmentation of the existing and the planned system. It must be remembered that planning and evolution of transmission system which is a statutory function of the CTU is a continuous process that the CTU undertakes in consultation with the CEA and is based on perspective planning and studies of the CEA as well. At the planning stage complete position about Power Purchase Agreement of proposed power projects is not known. The system

studies for planning ISTS are carried out for different conditions of generation and load with a view to meeting the demand with desired reliability and security. However, associated transmission system for evacuation of power from a power project where the beneficiaries are known at the planning stage is planned accordingly.

31. The CERC under Section 79(1)(c) has to regulate inter-State transmission of electricity. The CERC has framed the Connectivity Regulation for that purpose.

32. 'Open Access' is defined under Section 2(47) of the Electricity Act to mean the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission.

33. LTA is defined in the Connectivity Regulations as the right to use the inter-State Transmission System for a period exceeding 12 years but not exceeding 25 years.

34. MTOA is defined in the Connectivity Regulations as the right to use the Inter-State Transmission System for a period exceeding 3 months but not exceeding 3 years.

35. STOA is stated to have the same meaning which is ascribed to it in the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008. The said Regulations define STOA to mean open access for a period upto one month at one time.

36. It is now necessary to quote Regulation 9 of the Connectivity Regulations. So far as it is relevant, it reads thus:

“9 Criteria for granting long-term access or medium-term open access.

(1) Before awarding long-term access, the Central Transmission Utility shall have due regard to the

augmentation of inter-State transmission system proposed under the plans made by the Central Electricity Authority.

- (2) *Medium-term open access shall be granted if the resultant power flow can be accommodated in the existing transmission system or the transmission system under execution:*

Provided that no augmentation shall be carried out to the transmission system for the sole purpose of granting medium-term open access.”

37. Regulation 9 makes it clear that while awarding LTA, CTU must have regard to the augmentation of Inter-State Transmission System proposed under the plans, but the MTOA shall be granted if the resultant power flow can be accommodated in the existing transmission system or the transmission system under execution. The 1st proviso to Regulation 9 is important. It says that no augmentation shall be carried out to the transmission system for the sole purpose of granting MTOA. It is the statutory obligation of CTU to provide LTA. However, MTOA is to be provided subject to the condition that it can be accommodated on the system. Thus, if the existing transmission system and that planned/under execution is

adequate to permit LTA sought by an Applicant the entire quantum of LTA is to be allowed. The question that would arise is whether it can be allowed in part in case the existing system can permit part LTA or the LTA applicant will have to wait for commencement of LTA till the full LTA capacity can be permitted? To answer this question we may have to examine remaining part of Connectivity Regulations and the procedure for grant of LTA/MTOA. However, it is clear that from the date full LTA capacity can be accommodated on the existing and planned/under execution transmission system, the LTA applicant will have precedence over MTOA applicant of the same month if MTOA period is overlapping over the LTA period. If after grant of LTA, the requirement of MTOA applicant, to the extent margin available on the system, can be permitted. Thus, grant of MTOA is dependent on possibility of adjusting residuary power flow after accommodating LTA in full.

38. Regulation 10 specifies the relative priority. The relevant part of Regulation 10 is reproduced below :

“10. Relative priority

- (1) Applications for long-term access or medium-term open access shall be processed on first-come-first-served basis separately for each of the aforesaid types of access:*

Provided that applications received during a month shall be construed to have arrived concurrently;

Provided further that while processing applications for medium-term open access received during a month, the application seeking access for a longer term shall have higher priority;

Provided also that in the case of applications, for long-term access requiring planning or augmentation of transmissions system, such planning or augmentation, as the case may be, shall be considered on 30th of June and 31st of December in each year in order to develop a coordinated transmission plan, in accordance with the perspective transmission plans developed by the Central Electricity Authority under section 73 of the Act;”

39. Thus, the applications for LTA and MTOA have to be processed separately. While processing application for MTOA, the application seeking access for larger duration shall have higher priority. The third proviso to Regulation 10(1) states that in case LTA application requires planning or augmentation of

transmission system, such planning or augmentation may be considered on 30th June and 31st December in each year. This means that if the existing transmission system and that planned/under execution is not adequate to accommodate the LTA requirement and new transmission system has to be identified for permitting full LTA quantum then such planning will be considered twice in a year i.e. on 30th June and 31st December. Thus, the LTA applications where new transmission system is required to be identified will have to wait for grant of LTA till the study for system augmentation over and above that planned/under execution system is carried out.

40. It would be relevant here to refer to the Statement of Objects and Reasons dated 30.10.2009 in the matter of the Connectivity Regulations. Regulation 10 of the draft Regulation on which comments were sought from the stakeholders provided that application for LTA shall have higher priority than for the MTOA. CTU during the hearing had suggested that LTA and MTOA are two different products and are processed separately,

the issue of inter-se priority may be difficult to implement. CERC agreed with the suggestions of CTU and modified Regulation 10 to provide that LTA and MTOA applications shall be processed separately.

41. Regulation 12 specifies application for LTA. Regulation 12(1) provides that the application shall give the name of entity proposed to be supplied power. However, the first proviso to Regulation provides that in case quantum of power has not been firmed up in respect of person to whom electricity is to be supplied then the LTA applicant shall indicate the quantum of power along with name of the region(s) where electricity is proposed to be supplied. The 4th proviso provides that where any material change in location of plant, change in quantum of power by more than 100 MW or change in region in which electricity is supplied occurs a fresh application shall be made which shall be considered as per the Regulations.

42. In the present case the Appellants had taken LTA as per the first proviso of Regulation 12(1) by indicating the target region(s) where power is to be supplied. However, there has been change in the target region and they have now applied afresh for LTA.

43. Regulation 18 provides that a long term customer can relinquish LTA rights fully or partly before the expiry of the full term of LTA, by making payment of compensation for the standard capacity. This regulation deals with relinquishment of LTA rights fully or in part on payment of compensation to the transmission licensee for the standard capacity. This provision will be applicable after the LTA has been granted.

44. Regulation 19(2) provides that the start date of the MTOA shall not be earlier than 5 months and not later than 1 year from the last date of the month in which application has been made.

45. Regulation 25 provides for curtailment of power flow on a transmission corridor for reasons of transmission constraints or

in the interest of grid security. If curtailment has to be effected, the short term customer shall be curtailed first followed by long term customers. This clause is related to curtailment in real time operation of the grid and not related to allotment of LTA and MTOA.

46. Regulation 27 provides for detailed procedure to be submitted by CTU for approval of CERC.

47. Let us now examine the detailed procedure as approved by CERC.

48. Rule 9 of the procedure provides that MTOA shall be provided on the basis of availability of transmission capacity in the existing transmission system or transmission system under execution and likely to be available from the intended date of MTOA. No augmentation of transmission system is envisaged for granting MTOA.

49. The timeline for granting MTOA has been described in Rule 14. The MTOA has to be intimated by CTU within 40 days from the last date of the month in which the application was made, in consultation with STUs/RLDC.

50. Rule 16.1-9(a) provides that while issuing MTOA permission, CTU may grant or reject or reduce the time period or reduce the quantum of power applied for MTOA.

51. Rule 22.8 provides that in case of material change in location of the power plant, quantum of power by more than 100 MW or change in target region in which electricity is to be supplied for LTA, a fresh application shall be made and the earlier applications shall be considered as closed.

52. Rule 24.1-6(a) provides that for LTA if the transmission system commissioned/planned in the time frame of the desired long term access is adequate and separate system strengthening is not required for effecting long term access, the intimation for

grant of LTA shall be given within 120 day (from last day of month of application) after discussion in the regional transmission planning forum and concerned RPC(s).

53. As per Rule 24.1-6(b), if there is a constraint in transmission system by the time frame of commencement of desired long term access and system strengthening is necessary for effecting desired transaction system studies shall be carried out to identify system strengthening and such transmission system strengthening shall be considered on 30th June and 31st December in each year in order to develop a coordinated transmission plan. The application received during 1st half of the calendar year shall be considered together by 30th June and finalized by 31st December of the same year. Similarly application received during 2nd half of the calendar year shall be considered together by 31st December and finalized by 30th June of next year.

54. While granting LTA, CTU shall communicate to the applicant, the date from which LTA is granted. The conformation

for LTA shall be given within 120 days from the month in which application is made. Processing time where system strengthening is involved is 180 days as per the main Regulation 7.

55. It is clear from above Regulations that where no augmentation in transmission system is required in the existing and planned/under execution transmission system, for granting LTA from the date LTA is sought, the same shall be granted within 120 days. If the date from which LTA is possible is later than the date from which LTA is sought the augmentation of transmission system needs to be identified to facilitate LTA in the intervening period. However, if the time from which LTA is sought and time from which LTA is permissible on the existing and planned/under execution system is so short that physical augmentation of transmission system is not possible, as in the present case, LTA for the desired quantum in full can be granted from the date from which such LTA is permissible on the existing and planned/under execution system. The question that arises now for our consideration is whether part LTA can be granted for

the period from which LTA is sought which is earlier to the date from which full LTA can be given.

56. There is no provision for granting part LTA in the Regulations and the detailed procedure though for MTOA the detailed procedure provides that the CTU may reduce the time period and quantum of power applied in the MTOA application.

57. As per the existing scheme, the LTA and MTOA applications are considered separately as the time frame for the two products was expected to be different when the Regulations were framed. However, in the present case the Appellants had taken LTA earlier giving the target region(s) of destination of supply and now when their power plants have been commissioned/nearing commissioning they have now applied for change of target region where power is to be supplied. In this way, the time frame of MTOA has overlapped the time period of LTA. Thus, there is no option for CTU but to consider the applications of MTOA and LTA received in the same month together. For LTA applicants for

which no additional transmission system over and above that planned/under execution is required (but full LTA cannot be granted from the date from which LTA is sought), such LTA applicants can be granted LTA for full quantum from the date from which LTA can be fully accommodated on the existing and planned/under execution system. Thereafter, MTOA applicants of the same month shall be granted MTOA for the resultant power that can be accommodated on the existing transmission system as per the priority as per the Regulation. CTU can reduce the quantum and time period if the MTOA for full quantum cannot be granted. LTA applicant, for the intervening period i.e. the date from which LTA has been applied and the date from which full quantum of LTA has been granted, the LTA applicant shall seek MTOA or STOA for transmission of their power.

58. For the LTA applicants for whom additional transmission system is required to be identified and constructed over and above that already planned/under execution, such transmission

augmentation shall be considered on 30th June and 31st December as per the Regulations.

59. We are in agreement with CERC that in view of the Connectivity Regulations and detailed procedure, part LTA cannot be granted. We also agree with CERC that the LTA application shall have higher priority over MTOA applications of the same month, if there is overlapping period for which LTA and MTOA have been sought. However, MTOA applications received during a month shall have priority over the LTA applications of the subsequent month. We also agree with CERC that once LTA for full quantum has been granted for a particular date, if due to delay in commissioning of transmission system, the full quantum of LTA cannot be effected from that date, LTA can be operationalised in phases from the scheduled date depending on the availability of transmission capacity.

60. Learned Counsel for the Applicant have submitted that where there is power to grant more power to grant less is implicit in it. The Learned Counsel for the Appellant have referred to

Atma Ram, Aleman Rama Rao v. Secretary of State of India Council⁵. We feel that this ruling is not applicable in the present case where the Regulations specifically provide for part allocation of MTOA application but there is no provision for part allocation of LTA. As correctly pointed out by the CERC, grant of part LTA is not only against the regulations but will also lead to unavoidable litigations as too many LTA applicants will compete for limited capacity.

61. In view of above, we uphold the findings of the CERC in the impugned order.

62. The Appeals are, therefore, dismissed.

63. Pronounced in the Open Court on this 20th day of May, 2015.

(Rakesh Nath)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

✓ **REPORTABLE/~~NON-REPORTABLE~~**

⁵ (1914) IL W 339 (Mad) (MB) 346