

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

**Appeal No. 16 of 2020 and
IA Nos. 27 & 183 of 2020**

Dated : 21st October, 2020

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member (Electricity)**

IN THE MATTER OF:

Odisha Power Generation Corporation Limited
Zone-A, 7th Floor, Fortune Towers,
Chandrashekharapur, Bhubaneswar,
Odisha – 751023.

...Appellant

Versus

1. Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001.
(through Secretary)

...Respondent No. 1

2. Central Transmission Utility
Power Grid Corporation of India Limited,
SAUDAMINI, Plot No.2, Sector 29,
Near IFFCO Chowk,
Gurgaon (Haryana) – 122001.
(through its Chairman and Managing Director)

...Respondent No. 2

3. Odisha Generation Phase II Transmission Limited
F1 Mira Corporate Suites,
1&2, Ishwar Nagar, Mathura Road,
New Delhi – 110065.
(through Chief Executive Officer)

...Respondent No. 3

Counsel for the Appellant (s) : Mr. Basava Prabhu Patil, Sr. Adv.
Mr. Sitesh Mukherjee
Mr. Aryaman Saxena
Mr. Abhishek Kumar

Ms. Harneet Kaur
Mr. Arjun Agarwal
Mr. Karan Arora

Counsel for the Respondent(s) : Ms. Suparna Srivastava for R-2

Mr. SajanPoovayya, Sr. Adv.
Mr. Hemant Singh
Mr. Anirban Mondal
Ms. Shruti Awasthi
Mr. Tushar Srivastava
Ms. Soumya Singh
Mr. Lakshyajit Singh Bagdwal for R-3

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed by M/s. Odisha Power Generation Corporation Limited under Section 111(1) of the Electricity Act, 2003 (**"the Act"**) against the Central Electricity Regulatory Commission's (**"CERC"**) Order dated 26.12.2019 in Petition No. 128/MP/2019 (**"Impugned Order"**). The Appellant, Odisha Power Generation Corporation Limited (**"OPGC"**) is a 'generating company' in terms of Section 2(28) of the Act.
2. **Facts of the case:**
 - 2.1 The Appellant is Odisha Power Generation Corporation Limited (OPGC), a 'generating company' in terms of Section 2(28) of the Act. OPGC has established a Thermal Power Plant in the Jharsuguda District of Odisha (**"Plant"**). Units 1 and 2 of the Plant, with a capacity of 210 MW each, have been in operation since the year 1994. In 2019, OPGC commissioned Units 3 and 4 of the Plant, each with a capacity of 660 MW each (**"Expansion Project"**). OPGC is a Joint Venture Company with 51% shareholding by the Government of Odisha and 49% shareholding by A.E.S. Corporation, U.S.A., having its registered office at Zone-A, 7th Floor, Fortune Towers, Chandrashekharpur, Bhubaneswar, Odisha – 751023.
 - 2.2 The Respondent No. 1 is the Central Electricity Regulatory Commission (CERC).
 - 2.3 Respondent No. 2 is the Power Grid Corporation of India Limited (PGCIL), a Government of India enterprise within the meaning of the Companies Act, 2013 and is undertaking Inter-State Transmission of electricity in India. PGCIL also discharges the functions of the Central Transmission Utility (CTU) as provided under Section 38 of the Act.

- 2.4 Respondent No. 3 is Odisha Generation Phase II Transmission Limited (OGPTL), an Inter-State Transmission System ("**ISTS**") licensee and a subsidiary of Sterlite Grid 3 Limited ("**Sterlite**").
- 2.5 OPGC was incorporated as a wholly owned Government Company of the State of Odisha with the main objective of establishing, operating and maintaining thermal power generating stations in Odisha for catering to the State's growing power requirement. Further to power sector reforms undertaken in the State of Odisha, 49% of the shareholding in OPGC was divested in favour of A.E.S. Corporation, U.S.A., with the balance 51% held by the Government of Odisha.
- 2.6 The entire quantum of electricity generated at Units 1 and 2 of the Plant is sold to GRID Corporation of Odisha Limited ("**GRIDCO**"), the exclusive procurer of power for the distribution companies of the State of Odisha, under the terms of the Bulk Power Supply Agreement dated 13.08.1996, as amended by the Supplementary Agreement dated 19.12.2012 ("**PPA 1**").
- 2.7 As regards Units 3 and 4 (Expansion Project), it was originally envisaged that 50% of the power to be generated at the Expansion Project was to be tied up for sale to GRIDCO and the remaining 50% power was to be sold Inter-State, *i.e.*, outside the State of Odisha. Accordingly, a Power Purchase Agreement dated 04.01.2011 was entered into between OPGC and GRIDCO for sale of 50% of the total power generated at the Expansion Project. In this backdrop, OPGC had applied to PGCIL for the grant of LTA to ISTS for Inter-State sale of power in the Northern, Western and Southern Regions. PGCIL granted the said LTA to OPGC. OPGC's LTA was for a capacity of 600 MW. Consequently, OPGC executed an LTA Agreement dated 11.09.2013 ("**LTA Agreement**") and a Transmission Agreement dated 11.09.2013 (Transmission Agreement) with PGCIL. The LTA Agreement stipulates that the OPGC's LTA to the ISTS would be effective

from July, 2017 or the date on which all the transmission elements specified in Annexures 2 and 3 of the LTA Agreement are commissioned, whichever is later.

As per the LTA Agreement, PGCIL noted that the following pre-requisite elements ought to be commissioned for operationalisation of the aforesaid LTA quantum of 600 MW:

Element(s)	Entity under whose Scope of Work the Element falls
Annexure-2 (Immediate Evacuation)	
OPGC-Jharsuguda (Sundargarh) 400 kV D/C Transmission Line (Triple Snow Conductor)	OGPTL
02 nos. of 400 kV Line Bays at OPGC's generation switchyard	OPGC
02 nos. of 400 kV Line Bays at PGCIL's Jharsuguda (Sundargarh) Substation	PGCIL
Annexure-3 (Transmission System for Phase-II Generation Projects in Odisha)	
Angul - Jharsuguda (Sundargarh) - Dharamjaygarh 765 kV D/c Transmission Line	PGCIL
LILO of both circuits of Rourkela - Raigarh 400 kV D/c (2nd Transmission Line) at Jharsuguda (Sundargarh) Substation	PGCIL
Addition of 2 x 1500 MVA, 765/400kV ICT at Jharsuguda (Sundargarh) Substation; Addition of 2 x 1500 MVA, 765/ 400 kV ICT at Angul Substation; and Split bus arrangement at 400 kV and 765 kV bus in both Angul and Jharsuguda (Sundargarh) Substations	PGCIL
Jharsuguda (Sundargarh) – Raipur Pool 765 kV D/c Transmission Line	OGPTL

Thus, the contract expressly stipulated that LTA would only be operationalised once all the pre-requisite transmission elements necessary for operationalising such LTA are commissioned. The pre-requisite transmission elements delineated in Annexures 2 and 3 of the LTA Agreement were not commissioned till the relinquishment of OPGC's LTA, which is yet to be operationalised either in full or in part by PGCIL. Despite this, purported transmission charges' bills were raised on OPGC – as impugned in underlying Petition No. 128/MP/2019.

2.8 Under the LTA Agreement, transmission charges can be levied on OPGC only after the operationalisation of OPGC's LTA by CTU. OPGC's LTA was never operationalised, even in part. Yet, the CTU has illegally raised bills for purported transmission charges upon OPGC after commissioning of two of the pre-required elements (including OGPTL's Line, *i.e.*, OPGC-Jharsuguda Line) identified for evacuation of power under the LTA Agreement. On the contrary, the purported transmission system made available to OPGC for effectuating OPGC's connectivity was inadequate to ensure end-to-end power flow to Inter-State beneficiaries. As per settled law, LTA cannot be operationalised without commissioning of pre-requisite elements. In the absence of operationalisation of LTA, no liability can be fastened on an LTA grantee due to commissioning of one of the four different transmission lines identified under the LTA grant letter and LTA Agreement by the CTU.

2.9 The following provisions of the LTA Agreement are relevant:

*"C) AND WHEREAS Long Term Access is also to be availed by **"OPGC"** as indicated at **Annexure-1**. The dates, period and other conditions related to grant and Commencement of Long Term Access are contained in **Annexure-1**.*

*D) AND WHEREAS the transmission system required for immediate evacuation (direct injection/drawl) of power from premises of LTC to the suitable points of ISTS has been finalized in accordance with the provisions of the Electricity Act, 2003 and is to be built, owned, operated & maintained by the agencies as indicated at **Annexure-2**.*

*E) AND WHEREAS the common transmission system for transmission of power as indicated at **Annexure-3** has been finalized in accordance with the provisions in the Electricity Act, 2003 & guidelines thereof and is being built, owned, operated and maintained by ISTS licensee(s), which shall be finalized through Tariff Based Competitive Bidding process."*

The terms and conditions for the operationalisation of OPGC's LTA are encapsulated in Annexure-1 to the LTA Agreement. In turn, Annexure-1 of

the LTA Agreement prescribes the following terms, as excerpted hereunder, in the column specifying the date for 'Commencement of LTA':

"From the date of actual commissioning schedule of the ISTS transmission system given at Annexure – 2 & 3 and respective commissioning schedule mentioned at Annexure – 1 whichever is later."

Pertinently, PGCIL was yet to commission its pre-requisite elements as per Annexure-2 and Annexure-3 to the LTA Agreement as of date of OPGC's LTA relinquishment. This has not been disputed by CERC/ PGCIL/ OGPTL in the Impugned Order. Accordingly, the later event of the commissioning of the entire ISTS system (all elements) envisaged under the said Annexure-2 and Annexure-3 was not achieved before OPGC's LTA relinquishment on 13.12.2018. As such, PGCIL could not have and did not operationalise OPGC's LTA on account of OGPTL's as well as PGCIL's own delay in commissioning the aforesaid pre-requisite elements.

- 2.10 The LTA Agreement and the Transmission Agreement provide that the transmission system to facilitate OPGC's evacuation of power would include the OPGC-Jharsuguda Line for connecting 02 400 kV Line Bays at OPGC's generation switchyard to the ISTS through 02 400 kV Line Bays at PGCIL's Jharsuguda Substation. The said Line was to be constructed by a transmission licensee selected on tariff-based competitive bidding ("**TBCB**") basis with a completion time of July 2017. It is stated that Sterlite was selected as the successful bidder for setting up the transmission line through its subsidiary OGPTL.
- 2.11 In line with the originally envisaged power sale scenario, OPGC planned the connectivity scheme within its Plant by installing a split bus arrangement in the 400 kV bus at the Switchyard between its Units 3 and 4 to facilitate sale to GRIDCO and inter-state consumers.

- 2.12 On 23.08.2017, OGPTL self-declared the deemed commissioning of its OPGC-Jharsuguda Line w.e.f. 30.08.2017.
- 2.13 On 18.09.2017, OPGC obtained Central Electricity Authority's ("CEA") Energisation Certificate for commissioning of its switchyard (along with the 02 400 kV Line Bays). OPGC's scope of work was limited to commissioning of the aforesaid "2 nos. 400 kV line bays at generation switchyard" under the LTA Agreement (Annexure-2) and was approved by the CEA on 18.09.2017. The remaining administrative and construction functions are squarely outside OPGC's scope of work.
- 2.14 PGCIL commissioned its 02 400 kV Line Bays at the Jharsuguda Substation on 22.11.2017. As per PGCIL's Petition No. 59/TT/2019 (presently subject matter of OPGC's Appeal No. 230 of 2019): OGPTL self-declared its OPGC-Jharsuguda Line's deemed commissioning w.e.f. 30.08.2017 even though various works like optical fibre cable laying, few jumper connections, various spacer installations among others works were yet to be executed by OGPTL.
- 2.15 OPGC's scope of work as per the LTA Agreement (*i.e.*, 02 400 kV Line Bays at generation switchyard) was approved by the CEA on 18.09.2017. Therefore, there was no delay on OGPC's part in commissioning its scope of work. As seen above, OGPTL's remainder scope of work was initiated on 14.10.2017 – followed by PGCIL's commissioning of its 02 400 kV Line Bays at Jharsuguda Substation on 22.11.2017. OGPTL's OPGC-Jharsuguda Line's Circuit – 2 was idle charged only on 23.11.2017 and the said Line's Circuit – 1 was idle charged only on 05.12.2017. As a result, the "2 nos. 400 kV line bays at generation switchyard" of OPGC could actually be charged on 19.12.2017 only after charging of the upstream elements of PGCIL and OGPTL which was due to delay in commissioning

of the upstream OGTPPL's OPGC-Jharsuguda Line as also the associated PGCIL Line Bays at Jharsuguda Substation.

2.16 Meanwhile, on 21.11.2017, PGCIL intimated the Connection Details (CON-5) to OPGC as well as OGPTL for the connectivity of the Expansion Project and OGTPPL's OPGC-Jharsuguda Line to the ISTS. Pursuant thereto, OPGC signed a Tripartite Connection Agreement with PGCIL and OGPTL on 04.12.2017 ("**Connection Agreement**").

2.17 On 20.06.2018, the 2nd Meeting of Validation Committee for the Application Period from 01.07.2018 to 30.09.2018 discussed as follows:

"(b) Issue of Odisha Generation Phase-II Transmission Limited (OGPTL): 400 kV D/C OPGC-Jharsuguda Transmission Line was commissioned on 30.8.2017. However, due to non-availability of 400 kV GIS bays to be provided by PGCIL at 400 kV Sundargarh-OPGC Circuit -I and II and 2 Nos. of 400 kV Line Bays to be provided by OPGC at OPGC generation switchyard, which were both commissioned on 5.12.2017 and 15.12.2017 respectively, the 400 kV D/C OPGC-Jharsuguda transmission line could be charged on 20.12.2017.

Tariff Payment: From 30.8.2017 -5.12.2017 (To be paid by both PGCIL and OPGC) From 6.12.2017-till date (To be paid by OPGC).

Letters sent by OGPTL to NLDC on 5.4.2018 and CTU on 17.4.2018 for payment of transmission charges.

Representative of CERC clarified that the lines were discussed during Validation Committee meeting held on 29.8.2017 and 29.11.2017. It was asked the reason as to why CTU did not raise the bill, when regulations and CERC order were clear. It was also stated that the issues are similar in nature to one already dealt in Commission's order in petition no. 43/MP/2016, 236/MP/2015 and 201/TT/2015. Accordingly, CTU was advised to raise the bill immediately as per CERC order in Petition No. 43/MP/2016, 236/MP/2015, 155/MP/2016 and 201/TT/2015."

2.18 On 12.09.2018, the 3rd Meeting of Validation Committee for the Application Period from 01.10.2018 to 31.12.2018 discussed as follows:

"7. Other Issues:

(i) The draft TBCB procedure was discussed during the validation committee. POSOCO representative stated that no new comments have been received till the Validation Committee meeting. Chief (Engg), CERC suggested to include the following point in the draft TBCB procedure:-

(a) If the transmission system is commissioned prior to scheduled COD of system and is proposed to be considered under PoC, following documents should be submitted by Transmission Licensee:

- RLDC certificate.
- CEA certificate under Regulation 43 of CEA (Measures Related to Safety & Electricity Supply) Regulations, 2010.
- CEA certificate for early incentivisation as per order dated 28.1.2016 in petition no 284/ADP/2015.

(b) If the transmission system is commissioned after the scheduled COD of system and is proposed to be considered under PoC, following documents should be submitted by Transmission Licensee:

RLDC certificate.

- CEA certificate under Regulation 43 of CEA (Measures Related to Safety & Electricity Supply) Regulations, 2010.

(ii) During the validation committee meeting, representative of CTU raised following issues

(a) With reference to minutes of the last Validation Committee issued on 10.7.2018 following was recorded.

"Issue of Odisha Generation Phase-II Transmission Limited (OGPTL): 400 kV D/C OPGC- Jharsuguda Transmission Line was commissioned on 30.8.2017. However, due to non-availability of 400 kV GIS bays to be provided by PGCIL at 400 kV Sundargarh-OPGC Circuit -I and II and 2 Nos. of 400 kV Line Bays to be provided by OPGC at OPGC generation switchyard, which were both commissioned on 5.12.2017 and 15.12.2017 respectively, the 400 kV D/C OPGC- Jharsuguda transmission line could be charged on 20.12.2017. Tariff Payment: From 30.8.2017 -5.12.2017 (To be paid by both PGCIL and OPGC) From 6.12.2017-till date (To be paid by OPGC). Letters sent by OGPTL to NLDC on 5.4.2018 and CTU on 17.4.2018 for payment of transmission charges. Representative of CERC clarified that the lines were discussed during Validation Committee meeting held on 29.8.2017 and 29.11.2017. It was asked the reason as to why CTU did not raise the bill, when regulations and CERC order were clear. It was also stated that the issues are similar in nature to one already dealt in Commission's order in petition no. 43/MP/2016, 236/MP/2015 and 201/TT/2015. Accordingly, CTU was advised to raise the bill immediately as per CERC order in Petition No. 43/MP/2016, 236/MP/2015, 155/MP/2016 and 201/TT/2015."

In this regard representative of CTU submitted following during this meeting:-

"CTU informed that the scope of the work of Odisha Generation Phase-II Trans. Ltd (OGPTL) with respect to the installation of the OPGW up to the terminal box besides some of the TL works were not completed and OPGTL declared deemed commercial of the line wef 30.08.2017 instead of actual completion of works in Nov/Dec'17 and the same has also been represented to the Commission in their Tariff Petition filed for bay extensions at Jharsuguda end."

CTU further informed that such deemed commercial operation of the transmission systems of TBCB Licensees as per their TSA needs to be reviewed by the Validation Committee for incorporation into POC billing or bilateral billing.

Chief (Engg), CERC stated that issue raised by CTU is taken note of but no view can be taken in the Validation Committee on the same at present and CTUs suggestion on POC billing shall be considered while finalizing procedure of TBCB under discussion as per Para 7(i) above subject to decision of Commission."

- 2.19 On 28.09.2018, the 18th Joint Co-ordination Committee Meeting for High Capacity Corridor for IPPs in Eastern Region noted that as of 28.09.2018, critical pre-requisite elements as required under the LTA Agreement were in no position to be commissioned.
- 2.20 On 15.10.2018, PGCIL raised Bill No. OGPTL-OPGC-01 ("**Bill 01**") for purported transmission charges of OGPTL pertaining to the period between 30.08.2017 and 30.09.2018 for an amount of INR 9,16,50,715/- (Rupees Nine Crore Sixteen Lakh Fifty Thousand Seven Hundred and Fifteen Only). This Bill was raised despite the 18th Joint Co-ordination Committee Meeting for High Capacity Corridor for IPPs in Eastern Region dated 28.09.2018 clearly noting that the pre-requisite elements as envisaged in OPGC's LTA Agreement were nowhere close to commissioning. On the same day, OPGC requested PGCIL a break-up for the said Bill – to which PGCIL never responded.
- 2.21 Meanwhile, subsequent to the execution of the LTA Agreement and the Transmission Agreement, the Ministry of Power, Government of India ("**MoP**") issued revised model bidding documents on 05.05.2015, which include requests for qualification, requests for proposals and model power supply agreements for medium term and long-term supply of power to distribution licensees ("**Model Bidding Documents**"). Under the revised Model Bidding Documents, no 'Concessional Fuel' (i.e., coal allocated under the Government allotment route) could be utilised for selling power thereunder. Meanwhile, the Ministry of Coal allocated coal mines under Government allotment route as per Coal Mines Special Provisions Act, 2014 ('Concessional Fuel') for specified end-use of the OPGC's Expansion

Project. On this account, OPGC was statutorily barred from bidding for competitively bid out inter-state sale of power.

2.22 In June 2018, talks were initiated with the Government of Odisha in view of the need to ensure OPGC's financial viability, energy security for the State of Odisha and the upcoming Commercial Operation Date ("**COD**") of the Expansion Project. This culminated in rescinding of Government of Odisha's policy, notified vide its Notification No. 10485/OPGC-25/2018 dated 20.12.2018, requiring the arrangement for executing a supplementary power purchase agreement to the existing Power Purchase Agreement dated 04.01.2011 between OPGC and GRIDCO for:

- a) sale of an additional 25% of installed capacity of the whole power station comprising Units 3 and 4 from COD up to 31.03.2023;
- b) 100% of installed capacity of the whole power station comprising Units 3 and 4 from 01.04.2023 onwards for a period of 25 years thereafter; and
- c) for the remaining 25% of installed capacity of Units 3 and 4 (50% of installed capacity of Unit 4) for first four years (*i.e.*, between COD of Expansion Project and 31.03.2023) OPGC and GRIDCO may enter into a separate power purchase agreement on a best effort basis.

Relevant extract of the aforesaid Government of Odisha Notification is reproduced hereunder:

"4. After careful consideration, Government have been pleased to approve the arrangement worked out in the "Shareholders' meeting of OPGC" to contract the PPA for the entire capacity of Unit-3&4 between OPGC and GRIDCO in the following manner:

(i) OPGC and GRIDCO shall execute a supplementary Agreement to the existing PPA on same terms as the executed PPA for 50% (660 MW), for another 25% (330 MW) of OPGC expansion capacity to be effective from COD of Units 3&4 till 31st March 2023. The Supplementary Agreement shall also include

enhancement of the PPA from 75% to 100% from 1st April, 2023 for a period of 25 years thereafter.

(ii) Supplementary Agreement shall provide for amendment of the existing PPA for 50% of OPGC-II expansion capacity (660 MW) to be co-terminus with the arrangement as proposed in (i) above and to incorporation changes with respect to coal sourcing from OCPL.

(iii) Further, OPGC and GRIDCO will enter into a separate Power Purchase Agreement for balance 50% of Unit-4 (330 MW) for first four years on best effort basis with mutually agreed margin for GRIDCO. The agreed threshold limit of tariff would be Energy Charge Rate (ECR) (Variable Cost). The net excess amount, if any, realised over and above, the total tariff (fixed charges and for energy charge rate), other direct expenses and the mutually agreed margin of GRIDCO shall be shared equally between OPGC and GRIDCO for their portion of the capacity.

...

(v) OPGC, GRIDCO and OPTCL shall ensure evacuation of the entire capacity of expansion project of OPGC through STU (OPTCL) network in due course.

...

(vi) OPGC should ensure that it is not classified as a NPA with any FIs/Banks and drawal of loan would continue as required for completion of the project.....

(vii) OPGC, GRIDCO, OPTCL and Department of Energy Government of Odisha will take necessary approval from OERC for above arrangements."

2.23 In terms of the Government of Odisha Notification: (a) OPGC is to sell 100% power from its Expansion Project to GRIDCO on an intra-state basis; (b) OPGC, GRIDCO and State Transmission Utility, Odisha ("**STU**") shall ensure that evacuation of entire capacity of Expansion Project for this purpose is done through the STU network; and (c) OPGC is obliged to ensure that it is not classified as a Non Performing Asset.

2.24 Pursuant thereto, OPGC and GRIDCO executed the Supplementary Power Purchase Agreement dated 24.01.2019 to the Power Purchase Agreement dated 04.01.2011 (collectively, "**PPA 2**"). In terms of Clause 1(c) of the Supplementary Power Purchase Agreement dated 24.01.2019, GRIDCO intends to draw power from Expansion Project through the STU network:

"c. GRIDCO intends to schedule all power from OPGC Expansion Project (Unit #3 and #4) through the OPTCL (STU) network and pay all the applicable charges thereof. Payment liability of any potential Point of Connection (POC) Charges and Losses associated with the usage of CTU network with respect to the additional

power beyond 50% of station capacity if scheduled from Unit-4, will be mutually settled between GRIDCO & OPGC at a later stage.”

- 2.25 Due to the aforesaid events which were squarely beyond the OPGC’s control, OPGC was constrained to relinquish its LTA capacity vide letter dated 13.12.2018. The said relinquishment by OPGC was accepted by PGCIL vide letter dated 17.01.2019, w.e.f. 01.01.2019.

As a necessary corollary of the aforesaid Notification and relinquishment, OPGC Unit 4 (originally registered as a regional entity) was to be transferred from the Eastern Regional Load Despatch Centre’s (“**ERLDC**”) jurisdiction to State Load Despatch Centre, Odisha’s (“**SLDC**”) jurisdiction. Accordingly, OPGC in addition to relinquishing its LTA, further envisaged a plan to evacuate the power from Unit 4 of the Expansion Project to GRIDCO by closing the bus sectionaliser breaker installed between Unit 3 and Unit 4 and operating the same in common bus mode to ensure the delivery of power through the State Transmission Utility, Odisha Power Transmission Corporation Limited’s (“**STU**”/ “**OPTCL**”) network (*i.e.*, via the OPGC-Lapanga 400 kV D/C Transmission Line connected to Unit 3). This was necessary for compliance with the Government of Odisha’s Notification dated 20.12.2018 and the Supplementary Power Purchase Agreement dated 24.01.2019.

- 2.26 The 19th Joint Co-ordination Committee Meeting for High Capacity Corridor for IPPs in Eastern Region dated 20.12.2018 noted that as of 20.12.2018, critical pre-requisite elements under PGCIL’s scope of work were in no position to be commissioned.
- 2.27 Meanwhile, on 09.10.2018, PGCIL filed Petition No. 350/MP/2018 before CERC challenging the alleged deemed COD of OPGC-Jharsuguda Line along with I.A. No. 97/2018 seeking stay on the operation of Minutes of 2nd Meeting of Validation Committee dated 20.06.2018. On 21.12.2018, CERC

allowed withdrawal of Petition No. 350/MP/2019 and I.A. No. 97/2018 with liberty to approach the CEA and/ or other appropriate bodies to resolve the issues raised therein.

- 2.28 On 08.03.2019, PGCIL raised Bill No. OPGTL-OPGC-02 ("**Bill 02**") for OGPTL's purported transmission charges pertaining to the period between 01.10.2018 and 28.02.2019 for an amount of INR 4,27,55,679/- (Rupees Four Crore Twenty Seven Lakh Fifty Five Thousand Six Hundred and Seventy Nine Only) including late payment surcharge. This was in addition to the amounts already invoiced in Bill 01.
- 2.29 On 16.04.2019, OPGC responded to the aforesaid Bills 01 and 02, disputing the levy of purported transmission charges *inter alia* the ground of non-operationalisation of LTA. No response was received to this letter either.
- 2.30 Aggrieved by the issuance of aforesaid Bills 01 and 02 by PGCIL, OPGC filed the underlying Petition No. 128/MP/2019 before the CERC. In terms of Petition No. 128/MP/2019, OPGC had sought the following reliefs:

"(a) Admit the instant Petition and list the same for urgent hearing;

(b) Set aside Bill Nos. OGPTL-OPGC-01 dated 15.10.2018 and OPGTL-OPGC-02 dated 08.03.2019 issued by the Respondent No. 1, Central Transmission Utility to the Petitioner;

(c) Set aside the Minutes of the Validation Committee Meeting dated 20.06.2018, to the extent that Respondent No. 2 was permitted to bill OGPTL's annual transmission charges on the Petitioner and Respondent No. 1 in 50:50 proportion for the period between 30.08.2017 to 05.12.2017, despite the energisation of the subject 400 kV Line only on 05.12.2017;

(d) Hold that the Petitioner is not liable to pay any transmission charges to Respondent No. 1, Central Transmission Utility or Respondent No. 2, Odisha Generation Phase II Transmission Limited; and

(e) Pass any other order as this Commission may deem fit in the facts and circumstances of the present case."

In the aforesaid Petition, OPGC relied on three primary contentions: (a) OPGC's LTA was never operationalised, hence no transmission charges

are payable by OPGC; (b) there is no delay on OPGC's part; and (c) in any case, the recovery of any purported transmission charges post LTA relinquishment is simply impermissible.

2.31 During the pendency of Petition No. 128/MP/2019, the following bills (collectively, "**New Bills**") were raised by PGCIL, in its capacity as the CTU, for purported transmission charges for OGPTL's OPGC-Jharsuguda Line along with claim for late payment surcharge thereof:

- a) OGPTL-OPGC-03 dated 03.05.2019 for an amount of INR 1,83,85,553 (Rupees One Crore Eighty Three Lakh Eighty Five Thousand Five Hundred and Fifty Three Only) for the period between 01.03.2019 and 30.04.2019 including late payment surcharge for the same period on the earlier Bill 01;
- b) OGPTL-OPGC-04 dated 11.07.2019 for INR 1,92,67,738/- (Rupees One Crore Ninety Two Lakh Sixty Seven Thousand Seven Hundred and Thirty-Eight Only) for the period of 01.05.2019 to 30.06.2019 including late payment surcharge for the same period on the earlier Bills;
- c) OGPTL-OPGC-05 dated 08.10.2019 for INR 2,97,90,134/- (Rupees Two Crore Ninety Seven Lakh Ninety Thousand One Hundred and Thirty-Four Only) for the period of 01.07.2019 to 30.09.2019 including late payment surcharge for the same period on the earlier Bills; and
- d) OGPTL-OPGC-06 dated 10.12.2019 for INR 2,03,28,331/- (Rupees Two Crore Three Lakh Twenty Eight Thousand Three Hundred and Thirty-One Only) for the period of 01.10.2019 to 30.11.2019 including late payment surcharge for the same period on the earlier Bills.

2.32 Meanwhile, OPGC made all possible efforts for technical clearance of its common bus operation proposal through closing of the bus sectionaliser breaker by approaching CEA, ERPC, ERLDC, MOP, Standing Committee on Transmission (ER), etc. Significantly, neither did any of aforesaid authorities approve OPGC's proposal nor did they provide a firm technical reason/ justification for not approving OPGC's proposal. In fact, both the CEA and the STU had already found OPGC's close bus proposal to be technically feasible.

2.33 Accordingly, on 12.08.2019, OPGC filed Petition No. 380/MP/2019 before the CERC *inter alia*:

- a) seeking approval for closing the bus sectionaliser breaker installed between Unit 3 and Unit 4 of its Plant; and
- b) recognition of consequential transfer of OPGC's Unit 4 from ERLDC's jurisdiction to SLDC jurisdiction.

2.34 Notably, neither the Act, any of the regulations issued by CERC nor any of OPGC's contractual arrangements prohibit OPGC from operating the sectionaliser breaker or bus coupler at its Plant in closed condition for common bus mode operation of the Power Station. On the contrary, if OPGC's proposal is denied, OPGC will effectively be denied the right to Open Access. Under Section 2(47) of the Act read with Section 42 thereof, every generator has a vested statutory right to seek Open Access, including intra-state Open Access. In the State of Odisha, right to Open Access to STU's network is effectuated vide Regulation 4(1) of the Odisha Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005.

Moreover, Regulation 6.4.2(c)(iii) of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 ("IEGC") provides that a generating station connected to both CTU and STU will fall under SLDC's jurisdiction if more than 50% share belongs to the host State. Further, Regulation 6.4.2(c)(iv) of the IEGC provides that transition of a generating station from an RLDC's jurisdiction to an SLDC's jurisdiction and *vice versa* must be done expeditiously, *i.e.*, w.e.f. from the next billing period.

2.35 On 17.10.2019, CERC directed OPGC to (a) open the bus sectionaliser breaker between Units 3 and 4 on account of a *prima facie* finding that OPGC lacked requisite ERLDC permission; and (b) make an application to ERLDC for necessary permission as per applicable Regulations for bus closure. CERC directed the ERLDC to decide OPGC's application within

seven days. Accordingly, Meeting of various stakeholders was held by ERLDC on 29.10.2019. The said Meeting concluded:

“After further deliberations, all members agreed that, with the availability of both 400kV OPGC – Lapanga and OPGC – Jharsuguda D/C lines with closed bus sectionalizer operation mode no technical constraint is envisaged in evacuating both units of OPGC. Members other than CTU present in the meeting, generally favoured to close 400 KV Bus sectionalizer of OPGC as an interim measure till CERC issues a direction in this regard after hearing petitions 334/M/2019 of ERLDC and 380/MP/2019 of OPGC.

During this interim period, the control area jurisdiction of OPGC would be governed by Regulation 6.4.2.c.iii of IEGC.

OPGC / GRIDCO agreed to bear all applicable commercial liabilities/charges, if any, arising out of the closing of bus sectionaliser breaker between Unit#3 and Unit#4 of OPGC as per regulations/directions by CERC.”

2.36 On 31.10.2017, CERC directed OPGC to convene a meeting of stakeholders to discuss and sort out technical and commercial issues involved and submit report in this regard by 29.11.2019. Pursuant thereto, Meeting was convened at ERPC, Kolkata on 20.11.2019. In relevant part the discussion, the following was noted:

“2) GRIDCO submitted that by closing the bus sectionaliser, the entire STU system comprising of Unit 3 & 4 bus bar together with 400 kV OPGC – Lapanga STU line is connected to the ISTS, and not OPGC getting connected to the ISTS independently. Hence, after closing of the bus sectionaliser, OPGC – Jharsuguda 400 kV ISTS line is considered as an inter-state tie line and the OPGC switch yard is the inter-connection tie point of the State. Energy accounting can be done considering this as another ISTS interface point of the State, in addition to the existing ISTS interface points. This has been GRIDCO’s submission also in previous meetings. This view of GRIDCO was also generally endorsed by SLDC, ERLDC and ERPC.”

2.37 On 26.12.2019, CERC passed the Impugned Order in Petition No. 128/MP/2019. Pertinently, the following notable findings were rendered by CERC in support of its conclusions:

- a) OGPTL became entitled to transmission charges from the date of alleged deemed COD (i.e., 30.08.2017) declared by OGPTL pursuant to the CEA

Energisation Certificate dated 22.08.2017 and OGPTL's letter to Eastern Regional Load Despatch Centre (ERLDC) dated 23.08.2017;

- b) A conjoint reading of Recitals D, E and I along with Clause 3.0 of the Transmission Agreement shows that OPGC is liable to pay OGPTL transmission charges for OPGC-Jharsuguda Line from the date of the said Line's alleged deemed COD – irrespective of whether OPGC could/ did utilise the Line;
- c) A conjoint reading of Regulation 8(5) of the Central Electricity Regulatory Commission (Sharing of inter-State Transmission Charges and Losses) Regulations, 2010 ("**Sharing Regulations**") and Regulation 8(8) of the Connectivity Regulations shows that OPGC is liable for transmission charges of OPGC-Jharsuguda Line;
- d) The advice of 2nd Meeting of Validation Committee dated 20.06.2018 is neither arbitrary nor detrimental to the interests of OPGC and hence does not merit interference;
- e) Neither PGCIL nor OPGC had commissioned their respective scope of work under the LTA Agreement as of 30.08.2017 – alleged deemed COD of OPGC-Jharsuguda Line. Even after a perusal of CEA Energisation Certificate dated 18.09.2017 for OPGC's scope of work, it is unclear whether OPGC/ PGCIL had completed their respective scope of work necessary to put OPGC-Jharsuguda Line in use. Even though PGCIL's scope of work was completed on 22.11.2017, trial run for the OPGC-Jharsuguda Line was completed on 20.12.2017 – which implies that OPGC's scope of work was not complete as of 18.09.2017. Accordingly, PGCIL and OPGC to pay transmission charges to OGPTL for the period between 30.08.2017 and 22.11.2017 in a 50:50 ratio;
- f) A conjoint reading of Recitals D and I along with Clause 3.0 of the Transmission Agreement shows that the operationalisation of OPGC's LTA was not a pre-condition to the levy of transmission charges on OPGC for the OPGC-Jharsuguda Line;

- g) In view of CERC's Order in Petition No. 141/TT/2015 dated 15.12.2017, transmission charges for dedicated transmission lines (such as OPGC-Jharsuguda Line) are payable even when LTA is not operationalised;
- h) Even after relinquishment of its LTA, OPGC continues to carry the liability to pay transmission charges for the OPGC-Jharsuguda Line – in view of para. 123 of CERC's Order in Petition No. 92/MP/2015 dated 08.03.2019; and
- i) As per Regulation 8(8) of the Connectivity Regulations, a dedicated transmission line can be included in PoC mechanism only post LTA operationalisation. However, OPGC has already relinquished its LTA. Relinquishment of LTA does not discharge OPGC from its liability to pay transmission charges for OPGC-Jharsuguda Line.

2.38 During the pendency of the underlying Petition No. 128/MP/2019 before CERC, OPGC's Unit 3 achieved COD on 03.07.2019 and Unit 4 achieved COD on 21.08.2019.

2.39 Aggrieved by the aforementioned findings of the CERC, the Appellant has filed the captioned Appeal praying the following :

- (a) Admit the present Appeal and set aside the Impugned Order 26.12.2019 passed by the CERC in Petition No. 128/MP/2019.
- (b) Quash and set aside CTU's Bill No. OGPTL-OPGC-07 dated 01.01.2020.
- (c) Restrain PGCIL and OGPTL from realising any sums from OPGC on account of purported transmission charges for OGPTL's OPGC-Jharsuguda 400 kV D/C Transmission Line.
- (d) Restrain PGCIL and OGPTL from encashing Bank Guarantee No. 002GM03133030001 dated 30.10.2013 and/or initiate action under the Central Electricity Regulatory Commission (Regulation of Power Supply) Regulations, 2010; and

(e) Pass any other and further order(s) as this Tribunal may deem fit and proper in the interest of justice.

3. Questions of law:

The following questions of Law arise in the present Appeal:

- 3.1 Whether the CERC could have arbitrarily and illegally directed payment of purported transmission charges for the period post the relinquishment of OPGC's LTA?
- 3.2 Whether the CERC could have arbitrarily and illegally directed payment of purported transmission charges when OPGC's LTA was never operationalised?
- 3.3 Whether the CERC's finding that there has been delay by OPGC can be legally sustained? Even if yes, to what extent is delay attributable to OPGC?
- 3.4 Whether the CERC has erroneously overlooked the well-established principle that several contemporaneous contracts between the same parties forming one composite transaction must be interpreted together as if they were one contract?
- 3.5 Whether the CERC could have ignored its own extant regulations, including the erroneous retrospective application of the Sixth Amendment dated 10.03.2017 to the Connectivity Regulations to OPGC's case, in ruling against OPGC?
- 3.6 Whether the CERC could have upheld the Minutes of the 2nd Meeting of Validation Committee dated 20.06.2018 without addressing OPGC's natural justice and jurisdictional objections at all?

4. Mr. Basava Prabhu Patil, Learned Sr. Counsel for the Appellant has filed the following Written Submissions for our consideration :

4.1 The Impugned Order, which holds OPGC liable for payment of transmission charges for each of the following time periods, suffers from the grave infirmities indicated below.

4.2 Alleged Mismatch (30.08.2017 — 05.12.2017): The Impugned Order erroneously holds OPGC and Respondent No. 2, Power Grid Corporation of India Limited/ Central Transmission Utility (PGCIL/ CTU) liable in 50:50 ratio for payment of transmission charges for OGPTL OPGC-Jharsuguda 400kV D/C Transmission Line (OGPTL Line) for this time period. This finding is ex facie contrary to facts on the record before the CERC:

- (a) Under the Long Term Access Agreement dated 11.09.2013 between the CTU and OPGC (LTA Agreement), OPGC's scope of work was limited to the construction of 02 nos. 400 kV Line Bays at its Plant switchyard (for interconnection with the OGPTL Line). The remaining administrative and construction functions were squarely beyond OPGC's scope of work.
- (b) On 30.08.2017, OGPTL self-declared alleged deemed Commercial Operation Date (COD) of the OGPTL Line. In this regard, the Impugned Order considers Central Electricity Authority's (CEA) energization approval dated 23.08.2017 to be sufficient evidence of OGPTL's alleged readiness. On 18.09.2017, OPGC obtained the CEA energization approval for its 400 kV switchyard at the Plant end.
- (c) As per PGCIL's Petition No. 59/TT/2018 before CERC: OGPTL self-declared its Line's deemed commissioning w.e.f. 30.08.2017 even though various works like optical fibre cable laying, few jumper connections, various spacer installations among others works were yet to be executed by OGPTL. Notably, OGPTL has admitted in its email dated 17.10.2017 that OGPTL had initiated the said balance works. As per Clause 3 of the tripartite Connection Agreement dated 04.12.2017 (Connection Agreement), these works were a pre-requisite for commissioning of the OGPTL Line. This is further corroborated by Clause 6.1.3(a) of OGPTL's Transmission Service Agreement dated 20.11.2015 (TSA). On 23.11.2017, PGCIL commissioned its 02 400 kV Line Bays at the Jharsuguda Substation. In PGCIL's case, CERC had relied on the CEA energization approval dated 23.11.2017 as sufficient proof of PGCIL's readiness.
- (d) OGPTL Line's Circuit — 2 was idle charged only on 24.11.2017 and the Line's Circuit — 1 was idle charged only on 05.12.2017. As a result, the "2 nos. 400 kV line bays at generation switchyard" of OPGC could actually be charged (after trial run) on 19.12.2017 only after respective trial runs and charging of the upstream elements of PGCIL and OGPTL. Transmission Agreement dated 11.09.2013 (Transmission Agreement) clearly stipulates that COD of PGCIL's Line Bays is necessary to effectuate OPGC's connectivity through the OGPTL

Line. OPGC cannot be made liable for any transmission charges whatsoever prior to 23.11.2017. In view of the foregoing, there was no delay by OPGC in commissioning its scope of work as per the LTA Agreement. In fact, both OGPTL and PGCIL were delayed. To this extent, CERC's reliance on the 'delaying-entity-pays' principle is outrightly erroneous. Accordingly, allegations of delay by OPGC and any consequential levy of transmission charges on OPGC is contrary to the facts on record and must be set aside.

4.3 Pre-relinquishment (06.12.2017 — 31.12.2018): The Impugned Order erroneously holds OPGC liable for payment of transmission charges for OGPTL Line for the pre-relinquishment time period. This is *ex facie* illegal since CTU never operationalised OPGC's LTA due to non-commissioning of other pre-requisite elements to be constructed by PGCIL/ OGPTL. Both in terms of the LTA Agreement and CERC's past Orders LTA could not have been operationalised without the commissioning of these pre-requisite elements. This is not disputed by the Respondents. Further, as per Clause 2.1 of the Connection Agreement, OPGC was liable to pay transmission charges for the OGPTL Line only for the 'use of ISTS as and when LTA is availed' by OPGC in accordance with the extant CERC regulations.

4.4 Pertinently, the regulatory framework effectively requires all LTA applicants to compulsorily apply for Inter-State Transmission System (ISTS) connectivity first (or simultaneously with their LTA applications). Reference is apposite to Regulations 3, 8 & 15 of the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2010 (Connectivity Regulations) as also Clauses 5.4, 6.1, 7.2, 7.3, 22.4 & 23.2 of the Detailed Procedures titled 'Procedure for making an application for grant of connectivity in ISTS' (Detailed Procedure). A perusal of these provisions would establish that: (a) applying for "connectivity" is a pre-requisite for application for LTA; (b) an LTA applicant has to, mandatorily enter into standard form LTA, Transmission and Connection Agreements with the CTU as part of the this composite LTA transaction; and (c) thus, OPGC cannot

be said to have applied for “connectivity” on a standalone basis. There was only one composite transaction, i.e., for the grant of LTA to OPGC.

- 4.5 Thus, the LTA Agreement, the Transmission Agreement and the Connection Agreement are standard documents prescribed by the CTU with due approval from CERC. All three documents, when read harmoniously, indicate that transmission charges are payable only after (or post readiness for) the operationalisation of LTA. In fact, none of the contracts between parties envisage two distinct transactions for “connectivity system” and “LTA system” as wrongly argued by the CTU. Instead, the LTA Agreement and therefore the “LTA system” includes all elements required to operationalize OPGC’s LTA, including the OGPTL Line.
- 4.6 Under the regulatory framework, only three types of charges can potentially be applicable in connection with LTA:

- (a) Transmission Charges: Ordinarily the obligation to pay the transmission charges is that of the beneficiaries of the LTA, which is defrayed by the beneficiaries through the Point of Connection (POC) mechanism. There are certain exceptions to this general rule, whereby the entity delaying or causing delay to others' actual use of the concerned transmission line(s) may be made liable to pay these charges bilaterally to the transmission licensee.
- (b) Relinquishment Charges: These are payable if a user were to opt to relinquish its LTA. But after relinquishment, no further transmission charges are applicable. Once open access granted on a line is relinquished, only the POC pool is liable to pay the transmission charges for the line and no further liability for transmission charges of such line can be fastened upon the relinquishing entity. There is no provision in any Regulation whereby any charges are payable for availing connectivity. The connectivity is granted by the CTU as a precursor to LTA and its charges are linked to LTA alone, i.e., transmission charges or relinquishment charges.
- (c) Charges for Drawl of Start-up Power: In the present case, these have been admittedly paid by OPGC and are therefore not in any dispute.

4.7 Since there was neither any delay on OPGC's part, nor its LTA was operationalised CERC's direction for bilateral levy of transmission charges is contrary to the extant regulatory scheme. In any case and without prejudice to the foregoing (or each other), the following palpable errors of law are evident in the Impugned Order:

- (a) The Impugned Order is patently illegal for being contrary to the extant regulatory scheme. It is settled law that CERC's regulations override all past and future contracts. This is also borne out by Recital 'L' of the LTA Agreement and Recital 'K' of the Transmission Agreement. Further, there can be no waiver or estoppel¹ in tariff matters. Even if it is assumed (without admitting) that certain contractual provisions may arguably authorize levy of transmission charges in the present case, such contractual provisions are overridden by the aforesaid regulatory framework which does not allow for the levy of any transmission charges in such a scenario.
- (b) Retrospective application of the Sixth Amendment to the Regulation 8 of the Connectivity Regulations is prima facie illegal. Even if the said Sixth Amendment is applicable, amended Regulation 8 would apply only when the LTA is operationalised/ ready to be operationalised (but delayed due to generator's delay) and is not relinquished. In the present case, LTA was relinquished by OPGC on 13.12.2018 — by which time, both PGCIL and OGPTL had not commissioned all of the prerequisite elements under the LTA Agreement. In any case, even the amended Regulation 8 reflects the standard 'delaying-entity-pays' principle, which is applicable to all transmission lines. It is inapplicable in this case when the subject LTA system is itself not ready to be operationalised.
- (c) Erroneous overreliance on and misinterpretation of provisions of the Transmission Agreement to the outright exclusion of clauses of the LTA Agreement and the tripartite Connection Agreement. By cherry-picking provisions solely from the Transmission Agreement, I-d. CERC has wrongly ignored key provisions of the other contracts forming a part of the same transaction. It is trite that several contemporaneous contracts between the same parties and forming one composite transaction must be interpreted together as if they were one contract. The provisions of the Connectivity

Regulations and the Detailed Procedure further fortify the composite nature of the transaction for grant of LTA to any entity. The OGPTL Line was merely one of the several pre-requisite elements required for operationalisation of OPGC's LTA. The fact that OGPTL Line was intended for immediate evacuation from OPGC's Plant does not alter the composite nature of the transaction for the overall transmission scheme envisaged to effectuate OPGC's LTA. In fact, OPGC's LTA Agreement includes all elements required for operationalisation of OPGC's LTA, including the OGPTL Line. CERC has failed to even consider OPGC's submissions regarding certain provisions of the LTA Agreement and Connection Agreement. For instance, CERC has erroneously ignored Recital C of the LTA Agreement, which required commissioning of pre-requisite elements for operationalisation of OPGC's LTA.

- (d) Respondent No.1 has wrongly misconstrued provisions of the Transmission Agreement — particularly Clause 3.0 thereunder. "Delay in utilisation of connectivity" under the said Clause 3.0 refers to "Delay in utilisation of connectivity for the purpose of availing LTA". It is settled law that when several contemporaneous contracts form a part of one composite transaction, each of them is executed on the faith of all others being executed simultaneously and is therefore intended to speak only as part of the overall transaction. If one seeks to make equities apply, they must be equities arising out of the transaction as a whole.

In view of the above, there can be no levy of transmission charges before LTA operationalisation when the OGPTL Line has not served its intended purpose of operationalizing OPGC's LTA.

- 4.8 For evacuation beyond PGCIL's Jharsuguda Substation, several elements of the common transmission system were to be commissioned by PGCIL and OGPTL. Both these entities did not commission all such other pre-requisite elements till the relinquishment of OPGC's LTA on 13.12.2018. Between the alleged deemed COD of the OGPTL Line (30.08.2017) and relinquishment by OPGC (13.12.2018), OGPTL Line was therefore redundant for evacuation from OPGC's Plant and failed to serve its intended purpose of effectuating OPGC's LTA. No transmission charges

could have been levied on OPGC before LTA operationalisation in these circumstances. This has been ignored by the Impugned Order without any discussion or citing any justification whatsoever.

- 4.9 Under the Connectivity Regulations, “connectivity” is defined as the state of being connected to the Inter-State Transmission System (ISTS). CTU has itself previously admitted that there is no separate charge for connectivity.
- 4.10 In the Impugned Order, CERC’s interpretation is that OPGC consciously agreed to pay transmission charges solely for the OGPTL Line irrespective of LTA operationalisation (or CTU’s ability to operationalize LTA) implies that the CTU could even completely abandon the rest of the system strengthening planned for operationalizing OPGC’s LTA and yet levy transmission charges on OPGC for the OGPTL Line alone. This, in itself, is in the teeth of the composite nature of the transaction and is accordingly bad in law. CERC’s approach obliterates provisions of the LTA Agreement as well as the Connection Agreement. It is settled law that in business transactions the law desires to effect by the implication such business efficacy in the transaction as must have been intended by both parties who are businessmen.
- 4.11 In any case and without prejudice, CERC has illegally ignored Clause 2.1 of the tripartite Connection Agreement between OPGC, CTU and OGPTL which contemplates levy of transmission charges only for the 'use of ISTS as and when LTA is availed. Since OPGC's LTA was admittedly never operationalised, OPGC could never use ISTS as contemplated in its LTA grant. Hence, no transmission charges can be levied on OPGC. Accordingly, the levy of the transmission charges for the pre-relinquishment period (23.11.2017 — 31.12.2018) cannot be countenanced in law or contract and must be set aside.
- 4.12 **Post-Relinquishment (01.01.2019 to present):** The Impugned Order erroneously holds OPGC liable for payment of transmission charges for the OGPTL Line even post relinquishment of OPGC’s LTA. This is ex facie

illegal since by relinquishing its LTA/ “Open Access” rights, OPGC has also surrendered its connectivity rights over the OGPTL Line. The said relinquishment has been accepted by CTU w.e.f. 01.01.2019. There is no separate procedure for surrendering the connectivity under the extant regulations either. Pertinently, when CTU accepted OPGC’s relinquishment, CTU did not inform OPGC of any further requirements for so-called “connectivity relinquishment”. Evidently, CTU’s contention that connectivity subsists post relinquishment of LTA is an afterthought. In fact, OPGC has no objection to physical disconnection of the OGPTL Line even today. Accordingly, any levy of transmission charges beyond 01.01.2019 is prima facie illegal.

- 4.13 As per CTU’s own letter dated 05.02.2020, the OGPTL Line has also been considered as having 100% Stranded Capacity for the purpose of calculating OPGC’s alleged relinquishment charges of about Rs. 113 Crores. CTU appears to be deliberately vague regarding the legal basis for double charging of transmission charges (as both transmission charges and relinquishment charges) for the same element (i.e., the OGPTL Line) and for the same period of time (i.e., post 01.01.2019).
- 4.14 A key premise for CERC’s erroneous decision is that a “connectivity” line cannot be relinquished. When any transmission line (including a “connectivity” line) is built by an ISTS licensee, the licensee is equally bound by duties of a transmission licensee under Section 40 of the Act and such line is considered a part of ISTS and same has been mentioned in Annexure-2 of LTA Agreement. Among other things, Section 40 of the Act requires a transmission licensee to provide non-discriminatory “open access” to its transmission system for use by any generating station. Accordingly, same law and regulations are equally applicable to the grant of “open access” by any transmission licensee on any transmission line, including on a “connectivity” line. No exception is created by the

Connectivity Regulations when LTA/ Open Access rights are granted over “connectivity” lines either.

4.15 Further, Regulation 18 of the Connectivity Regulations bestows an unconditional right on an LTA grantee to relinquish its LTA and related rights, subject only to payment of relinquishment charges (if any). The CERC, in its Impugned Order, has completely deprived OPGC of its said right under Regulation 18 on wholly extraneous and erroneous considerations.

4.16 Apart from Regulation 18 of the Connectivity Regulations, paragraph 5.0(a) of FORMAT-CON-8 for instances where "dedicated" transmission system is taken up by CTU/ ISTS licensee) statutorily prescribes:

"The (Name) shall not transfer its rights and obligations specified in the Transmission Agreement. The (Name) may relinquish its rights specified in the Transmission Agreement, subject to payment of compensation in accordance with the Regulations as amended from time to time."

4.17 Accordingly, CERC and CTU's positions that “connectivity rights” for OGPTL Line cannot be relinquished by OPGC by way of relinquishment of its LTA are clearly contrary to the CERC's regulatory framework. This is also confirmed by CTU's own letter dated 05.02.2020. Pertinently, there is neither a separate procedure for relinquishment of connectivity, nor any separate charge envisaged for surrender of connectivity. Therefore, LTA relinquishment clearly leads to relinquishment of “connectivity” rights under statutorily prescribed FORMAT-CON-8.

4.18 Post relinquishment of LTA, no transmission charges at all can be levied on an LTA grantee. Only relinquishment charges, if otherwise found payable, may be recovered from such relinquishing LTA grantee for the period after relinquishment. In the instant case, the CERC has entirely wrongly authorised illegal double recovery. Such double recovery would result in unjust enrichment for PGCIL at OPGC's cost. CERC has illegally directed OPGC to pay purported transmission charges for the entire period of service (35 years) of the OGPTL Line along with simultaneous payment of

66% net present value or estimated transmission charges ('relinquishment charges') proportionate to the stranded capacity in the same Line (which is considered 100% stranded) calculated upfront for a period of 12 years [alleged relinquishment charges of approximately INR 113 Crores have been notified. Such double recovery is ex facie illegal and contrary to CERC's past Orders.

- 4.19 In fact, the aforesaid understanding that relinquishment charges include compensation against relinquishment of the OGPTL Line is also confirmed by CTU's own letter dated 05.02.2020. In the said letter dated 05.02.2020, CTU unequivocally admits that it has considered the OGPTL Line 100% stranded for the purpose of calculation of alleged relinquishment charges sought to be recovered from OPGC. In fact, the OGPTL Line constitutes a large portion of the entire alleged relinquishment charges as per the CTU. This is in addition to the transmission charges for the OGPTL Line sought to be levied for the (same) post-relinquishment phase, which are inter alia impugned in the captioned Appeal.
- 4.20 In any and without prejudice to OPGC's contentions in Appeal No. 322 of 2019 and I.A. No. 804 of 2019, Regulation 18 of the Connectivity Regulations caps the compensation on account of relinquishment of LTA at an amount equal to 66% of estimated transmission charges for the stranded transmission capacity for the time period falling short of 12 years. Regulation 18(3) mandates that the compensation so received on account of relinquishment shall be applied for reducing the transmission charges of other long term and medium term customers who are required to bear the additional transmission charges on account of relinquishment. Since the Connectivity Regulations clearly intend to limit the liability of the long term customer who relinquishes his long term access, there is no question of any further levy of purported transmission charges on the relinquishing long term customer. Such further levy of purported transmission charges (beyond the relinquishment charges) is also unsupported in terms of the

LTA Agreement, the Transmission Agreement and the tripartite Connection Agreement.

- 4.21 Neither the amended Regulation 8, nor Regulation 18 carve out any exception against relinquishment of a “dedicated”/ “connectivity” transmission line before or after LTA operationalisation. On the contrary, Regulation 18 of the Connectivity Regulations clearly implies that relinquishment of “Access Rights” includes relinquishment of corresponding connectivity rights. Resultantly, the OGPTL Line must automatically be included under the POC pool mechanism post relinquishment. This position is also supported by Note 3 to Schedule: 1 of OGPTL’s TSA (part of SBDs) dated 20.11.2015, wherein the signatory Long Term Transmission Customers have agreed for the inclusion of the OGPTL Line under the POC pool. Even as per Note 4 of Annexure 2 to the Transmission Agreement, parties’ right and liabilities thereunder are governed by Standard Bidding Documents for TBCB route issued by Ministry of Power (SBDs).
- 4.22 The Impugned Order has committed a grave and obvious infirmity by directing OPGC to pay transmission charges for the OGPTL Line for the period beyond relinquishment of OPGC’s LTA. OGPTL Line is presently in use as Odisha’s inter-state tie line and must accordingly be included under the POC mechanism.
- 4.23 After OPGC’s coal block cancellation, the Government of Odisha vide its Notification dated 20.12.2018 required OPGC to sell all of the power from its Plant to the Grid Corporation of Odisha (GRIDCO) and evacuate such power only through Odisha Power Transmission Corporation Limited, State Transmission Utility’s (STU) network. To comply with the changed Government policy, OPGC was required to relinquish its LTA and change the split bus arrangement in its switchyard (between Units 3 and 4) to common bus mode. Here, the relevance as also the veracity of CTU’s

contention that only open bus mode operation were originally contemplated is outrightly denied.

4.24 On 12.08.2019 (before COD), OPGC filed Petition No. 380/MP/2019 inter alia seeking closure of the bus breaker sectionaliser between Units 3 and 4. On 29.10.2019, the Eastern Regional Load Despatch Centre (ERLDC) allowed OPGC to operate in common bus mode during the pendency of ERLDC's Petition No. 334/MP/2019 (filed on 17.09.2019) and OPGC's Petition No. 380/MP/2019 before CERC. Thus, OPGC's Plant is evacuating power to GRIDCO through OPGC-Lapanga 400 kV D/C Transmission Line, a part of the STU network, and the entire power is being scheduled by the State Load Despatch Centre. Further, there is no scheduling of power through OGPTL line and OPGC is not using the OGPTL Line. OPGC has no inter-state PPA either. Resultantly, the power flow through OGPTL Line is GRIDCO power and the Line has been used as Odisha's inter-state tie line since the closure of the bus coupler. It is vehemently denied that OPGC power flows through OGPTL Line. Accordingly, the OGPTL Line is no more stranded and becomes a part of ISTS. This is therefore a fit case for the inclusion of the Line in the POC pool. As per the extant regulatory scheme, the transmission charges for OGPTL Line should be paid by its present user(s). This position is also supported by Note 3 to Schedule: 1 of OGPTL's TSA dated 20.11.2015, wherein the signatory Long Term Transmission Customers have agreed for the inclusion of the OGPTL Line under the POC pool. This is also borne out from this Tribunal's Order dated 18.06.2020.

4.25 Pertinently, an STU System Study had already concluded that the STU network is sufficient to evacuate the entire power (1320 MW) of the Plant. Further, common bus mode operation increases the system's reliability. As of date, all authorities (including the CTU, ERLDC, State Load Despatch Centre, Odisha (SLDC) and the Eastern Regional Power Committee

(ERPC) have accepted the technical feasibility of OPGC's close bus proposal.

- 4.26 Further, in Meeting held on 20.11.2019 pursuant to CERC's direction dated 31.10.2019 in OPGC's LA. No. 83/2019 in Petition No. 380/MP/2019, various entities including GRIDCO, ERLDC, SLDC and ERPC agreed that OGPTL Line may be utilised as an inter-state tie line. Evidently, there is a high likelihood of the OGPTL Line having an alternate utilisation as an inter-state tie line for Odisha. Even otherwise, various POC scenarios are possible wherein the said Line may have alternate utilization by other generators/ users. In any such scenario, OGPTL will get invariably paid through POC for the said Line.
- 4.27 The CTU has fairly accepted that all other litigation between OPGC and CTU (pending before this Tribunal and CERC) is unrelated to the present dispute. Herein, the Tribunal is inter alia ruling on the nature of charges payable by OPGC post relinquishment (namely, transmission charges or relinquishment charges). In OPGC's Petition No. 380/MP/2019 before Ld-CERC, the commercial implications (if any) will be limited to the quantum of the charges payable.
- 4.28 OPGC is not liable to pay any ISTS transmission charges when operating in the closed bus condition post relinquishment. Presently (under the closed bus condition), no OPGC power is scheduled to flow through the OGPTL Line. As per Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 (IEGC): since more than 50% power is allocated to the host State of Odisha, Odisha SLDC is scheduling evacuation of power from both Units of OPGC's Plant solely via the STU network (OPGC-Lapanga 400 kV D/C Transmission Line). In terms of Clauses 1.1, 32(a) and 3.2(d) of OPGC's PPA dated 04.01.2011, GRIDCO is liable to evacuate its share of power from OPGC's Plant on an ex-bus basis. Accordingly, applicable transmission charges for use of STU network

are being settled by GRIDCO with the STU for OPGC's entire Plant capacity of 1320 MW (net ex-bus injection approximately 1245 MW).

4.29 Under the closed bus condition, neither any part of ISTS is being used for wheeling electricity from OPGC nor can any ISTS transmission losses possibly be caused on account of wheeling of power through the STU network. It is settled by an earlier Order of the CERC:

- (a) Two charges cannot be applied on the same account (i.e., for purported evacuation of the same capacity) when an entity is connected to both STU and CTU networks; and
- (b) Transmission charges and losses are applicable on schedule of energy only.

4.30 Therefore, the question of levy of ISTS transmission charges does not arise under the closed bus operation by OPGC since all OPGC power is evacuated exclusively via the STU network under SLDC control area.

5. Ms. Suparna Srivastava, Learned Counsel for the Respondent No. 2 has submitted the following Written Submissions for our consideration :

5.1 The Appellant has sought setting aside of the impugned Order as also setting aside of impugned Bill dated 1.1.2020 raised on it by Respondent No.2 towards payment of transmission charges for the OPGC- Jharsuguda line.

5.2 Dedicated transmission lines are also used for drawal of start-up power while testing and commissioning of the generating station, besides availing access into ISTS for undertaking power transmissions on long-term/medium-term/short-term basis. Thus, connectivity to ISTS system is prerequisite for undertaking transmission of power. However, a generator may opt only for connectivity without opting for LTA or MTOA. A generator may relinquish its LTA; however, it may undertake power transmission on

medium-term/short-term basis. Even if no such transmission is undertaken, so long as the generator remains connected to the ISTS grid and there is power generation from its generating station, there is some power flow through the ISTS on account of physical displacement.

- 5.3 Under Regulation 8, a generator may be required by Respondent No.2 to construct a dedicated transmission line to the point of connection with ISTS to enable connectivity with the grid. In cases where implementation of the dedicated/connectivity system is undertaken as part of the coordinated transmission planning (for thermal generating stations of 500 MW and above and renewable energy based generating stations of 250 MW and above), the transmission charges for such system are payable by the generator till operationalization of the associated LTA after which, the line is included in PoC pool and serviced from the PoC pool [*Regulation 8(8)*]. Thus, dedicated transmission lines are to be built and owned by the generator except in cases of generating stations of 500 MW/250 MW and above where they are to be built as part of coordinated transmission systems planning by an ISTS licensee. After amendment VI to connectivity Regulation, Connectivity lines upto ISTS pooling point in all cases are to be built and owned by generators only.
- 5.4 Where the dedicated transmission lines are built under coordinated transmission planning by an ISTS licensee, then Regulation 8(8) provides that the transmission charges for such system are payable by the generator (even if the generation project gets delayed or is abandoned) till operationalization of the associated LTA whereafter, the line is included in the PoC pool and is serviced from the said pool.
- 5.5 There is no provision in the Regulations by which the dedicated lines built by an ISTS licensee are to be serviced at all times only through the PoC pool (as has been the submission of Respondent No.3) and this issue has

neither been raised nor decided by the Respondent No.1 Commission in the proceedings before it.

- 5.6 Under Regulation 27 of the Connectivity Regulations, a Detailed Procedure has been notified by the Respondent No.1 Commission. In clause 7.3 thereof, provision has been made for signing of a Transmission Agreement by the connectivity grantee for payment of transmission charges for the connectivity system and also for providing payment security in the form of the prescribed bank guarantee where the connectivity/dedicated system is implemented by an ISTS licensee. There is a provision for furnishing of a common bank guarantee by a generator for connectivity and LTA and even if LTA is relinquished, the bank guarantee remains available for encashment in the event of nonpayment of transmission charges for the connectivity system. In clause 25 of the Detailed Procedure, provision is made for signing of a Bulk Power Transmission Agreement (BPTA) by an LTA grantee with Respondent No.2, agreeing to pay transmission charges for use of the ISTS. Connectivity and LTA are thus different products governed under different regulatory provisions and contractual arrangements with generators/licensees, carrying separate and distinct obligations for payment of transmission charges.
- 5.7 The Respondent No.1 Commission has also notified the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010. Under the said Regulations, the Point of Connection (PoC) method for sharing of transmission charges for use of the ISTS has been enforced. The prescription made is that all entities that are physically connected with the ISTS are required to share the Yearly Transmission Charges (YTC) i.e. the annual transmission charges for existing lines determined by the Commission; the YTC is payable monthly, to be recovered fully and exactly [Regulations 4 and 5]. Respondent No.2 is entrusted with the responsibility of billing of PoC charges, ensure recovery

of the same and upon receipt thereof, disburse them amongst the transmission licensees in the manner laid down in the Regulations.

- 5.8 The method of determination of specific transmission charges applicable to a DIC where approved withdrawal or injection is not materializing either fully or partially is envisaged under Regulation 8 as under:

“8. Determination of specific transmission charges applicable for a Designated ISTS Customer.....

(5) Where the Approved Withdrawal or Approved Injection in case of a DIC is not materializing either partly or fully for any reason whatsoever, the concerned DIC shall be obliged to pay the transmission charges under these regulations;

Provided also that where the construction of dedicated transmission line has been taken up by the CTU or the transmission licensee, the transmission charges for such dedicated transmission line shall be payable by the generator as provided in the Regulation 8(8) of the Connectivity Regulations:”

- 5.9 The Regulation reiterates that where the construction of dedicated line has been undertaken by Respondent No.2/ISTS licensee and power flow from the generating station has not materialized under the LTA, then the transmission charges for such dedicated line are payable by the generator even when the generation project gets delayed or abandoned. The liability to pay these charges for the connectivity line is independent of the liability to pay transmission/relinquishment charges for the ISTS system under the LTA grant. As such, even if the LTA is relinquished, the liability to pay transmission charges for the connectivity line subsists.

- 5.10 The method of raising transmission charges bills for long term access in ISTS is laid down in the Billing, Collection and Disbursement (BCD) Procedure framed under the Sharing Regulations whereunder Respondent No.2 is entrusted with the responsibility of billing of PoC charges, ensure recovery of the same and upon receipt thereof, disburse them amongst the transmission licensees in the manner laid down in the Regulations read with the BCD Procedure framed thereunder.

- 5.11 Respondent No.2 is the notified CTU mandated to perform its statutory

functions as per the provisions of the applicable Regulations and the Orders passed by the Respondent No.1 Commission; its actions towards the Appellant have at all material times been in accordance thereto. Respondent No.2 has a limited role in billing of transmission charges under the Sharing Regulations and raises bills of transmission charges based on the Regional Transmission Accounts (RTAs) issued based on the Validation Committee Meetings. It acts only as an intermediary between the Designated ISTS Customers (DICs) and the ISTS licensee in the scheme of collection and disbursement of ISTS transmission charges and in case of bilateral billing, transmission charges are payable directly by the generator to the ISTS licensee.

- 5.12 The Appellant had applied to Respondent No.2 for grant of connectivity for 618 MW and for grant of LTA for 600 MW for inter-State sale of power to beneficiaries in the Northern, Western and Southern regions. In the Meeting in regard to Connectivity/LTOA with constituents of Eastern Region held on 5.1.2013, power from the Appellant's project was approved to be pooled at Jharsuguda sub-station of Respondent No.2 and immediate evacuation system proposed from the Appellant's plant was the "*OPGC-Jharsuguda 400kV D/c (triple snowbird)*" line alongwith the associated bays. The said line connecting the Appellant's power plant to the sub-station of Respondent No.2 was approved by empowered committee for transmission for being implemented through tariff based competitive bidding (TBCB) route.
- 5.13 Vide letter dated 8.4.2013 Respondent No.2 granted the LTA to the Appellant for evacuation of power from its project as revised vide intimation dated 11.9.2013 to modify the start date of LTA to July, 2017 instead of September, 2017. The Appellant then entered into a Long Term Access (LTA) Agreement with Respondent No.2 on 11.9.2013 wherein the transmission system for immediate evacuation of the generation project

was agreed.

- 5.14 The common transmission system for Phase-II generation projects in Odisha (which included the generation project of the Appellant) was identified as the LTA system for evacuation of power from the Appellant's project among other IPPs and was agreed for implementation under the LTA Agreement. The LTA was to commence on the date when the transmission system for immediate evacuation and common transmission system for Phase-II IPPs was actually commissioned.
- 5.15 The connectivity was granted to the Appellant vide intimation dated 8.4.2013 and revised vide intimation dated 11.9.2013 at the Jharsuguda (Sundargarh) 765kV sub-station of Respondent No.2; the transmission system required for connectivity consisted of OPGC TPS-Jharsuguda (Sundargarh) 400kV D/c line with Triple Snowbird Conductor, which was decided to be implemented through the TBCB route.
- 5.16 The aforesaid power evacuation scheme of the Appellant was designed with split bus arrangement at 400kV switchyard of the Appellant with one unit (Unit-3) to remain connected to the system of Odisha Power Transmission Co. Ltd. (the State Transmission Utility or STU) at 400/220kV Lapanga sub-station through 400kV OPGC-Lapanga D/c line. The other unit (Unit-4) was to be connected to 765/400kV Jharsuguda sub-station (ISTS) of Respondent No.2 through 400kV OPGC-Jharsuguda D/c line as the connectivity system. Both the units were to be connected to their respective 400kV transmission systems with the sectionalizing Circuit Breakers (CB) at OPGC 400kV switchyard kept open. Split bus arrangement for both the units was planned at generation switchyard so that both ISTS and system of STU were not operated in parallel under normal condition and were closed only when a situation of exigency arose.
- 5.17 The Appellant entered into a Transmission Agreement dated

11.9.2013 laying down the terms and conditions for utilization of connectivity. For payment of transmission charges for the connectivity system to be built by TBCB licensee, the Transmission Agreement recorded as under:

*"I) AND WHEREAS "OPGC" has to share and pay all the applicable transmission charges of the total transmission system as indicated at Annexure 2 from the date of connectivity as mentioned at **Annexure-1** or actual commissioning of the system, whichever is later, in accordance with the sharing mechanism as decided/ notified/determined/adopted by CERC from time to time.*

.....

Now, therefore, in consideration of the above premises, it is hereby agreed by and between the parties as follows:

1.0 (a) "OPGC" shall furnish a bank guarantee from a nationalized bank for an amount as specified by CERC as security mechanism for the transmission system to be built, owned and operated by ISTS licensee...

.....

3.0 In case, "OPGC" delays to utilize the connectivity provided and the assets covered under the transmission system, as indicated at Annexure-2 have been declared under commercial operation, either in part or in full; the "OPGC" shall bear the charges so as to ensure full recovery of the transmission tariff corresponding to the commissioned portion of the transmission system indicated at Annexure-2.

.....

7.0 This Agreement shall be valid from the date of signing of this agreement till the validity of Connectivity subject to its revision made by the parties to this Agreement provided that this Agreement may be mutually renewed or replaced by another Agreement on such terms as the parties may mutually agree. "

- 5.18 In this manner, under contractual arrangement, the Appellant undertook and agreed with Respondent No.2 to pay the transmission charges of the dedicated line built by the TBCB licensee, as contained in Annexure-2 of the Agreement, from the date of commissioning of the system. Further, in an eventuality where delay was made by the Appellant to utilize the connectivity, the transmission charges were to be paid in full, so as to ensure recovery of transmission tariff corresponding to the commissioned portion of the transmission system. This liability of the Appellant to pay

transmission charges for the connectivity system continued to remain valid till the validity of the connectivity.

- 5.19 Under the above provisions of the Transmission Agreement, the Appellant furnished to Respondent No.2 a bank guarantee dated 30.9.2013 in the sum of Rs.30.90 crores (which is subsisting till 29.10.2011). Notwithstanding any disputes or differences with the Appellant, Respondent No.2 was within its rights to invoke the bank guarantee for realization of unpaid dues towards transmission charges for the connectivity system.
- 5.20 The implementation of the connectivity line through the TBCB route was undertaken by Respondent No.3 with the scheduled date of commercial operation as July, 2017. Vide letter dated 22.8.2017. Respondent No.3 informed Respondent No.2 regarding completion of the works awarded to it. Subsequently, in view of the completion of construction of line and non-availability of bays at the sub-station built by Respondent No.2, Respondent No.3, vide its letter dated 23.8.2017 addressed to the Eastern Region Power Committee (ERPC) declared deemed commercial operationalization of the OPGC-Jharsuguda 400kV D/c transmission line w.e.f. 30.8.2017. The Certificate for energization of the line was granted by the Central Electricity Authority on 18.9.2017. On 24.10.2017, Respondent No.3 applied for the first time charging clearance from Eastern Region Load Despatch Center (ERLDC) which was accorded on 24.11.2017.
- 5.21 The issue as regards billing of transmission charges pertaining to the 400kV OPGC- Jharsuguda transmission line was discussed in the 3rd Meeting of Validation Committee (Application Period for 1.10.2017 to 31.12.2017) for implementation of the Sharing Regulations held on 29.8.2017. In the said Meeting, the matter regarding inclusion of existing/new transmission assets for which tariff was to be shared, was

discussed. With respect to the transmission asset commissioning by Respondent No.3, the Meeting recorded as under:

“Not to be considered in PoC. Dedicated line shall be considered under the provision of CERC Connectivity Regulations as per Regulation No.8(8)”

- 5.22 Considering the dedicated nature of the above line, it was decided that corresponding transmission charges for the line were not to be included in the PoC pool but were to be governed in accordance with Regulation 8(8) of the Connectivity Regulations.
- 5.23 Thereafter, on 20.6.2018 during the 2nd Meeting of Validation Committee for the Year 2018-19 [Application Period from 1.7.2018 to 30.9.2018], Respondent No.3 raised the issue regarding recovery of transmission charges for the 400kV D/c OPGC-Jharsuguda transmission line. When the Minutes of the said Meeting were issued on 10.7.2018, Respondent No.2 was specifically directed to raise transmission charges bills for the 400kV D/c OPGC-Jharsuguda transmission line as claimed by Respondent No.3. Accordingly, Respondent No.2 raised a bill towards transmission charges on the Appellant in the sum of Rs.9,16,50,715/- for the period from 30.8.2017 to 30.9.2018. The Appellant failed to discharge the same.
- 5.24 The Appellant vide letter dated 13.12.2018 informed Respondent No.2 that it had been rendered incapable of selling its power on an inter-State basis due to change in provisions of power sale by the Central Government, and thus, was constrained to relinquish the 600 MW LTA. Vide its letter dated 17.1.2019, Respondent No.2 accepted the relinquishment of LTA by the Appellant subject to payment of applicable relinquishment charges as were to be determined by the Commission in pending proceedings in Petition No.92/MP/2015. Notwithstanding such relinquishment, the connectivity of the Appellant's generating station to the ISTS continued to be in place and as such, the Appellant continued to be liable to pay transmission charges

for the said connectivity. There was no “double charging” sought to be done by Respondent No.2 as has been wrongly pleaded by the Appellant in complete misreading of the provisions of the Connectivity Regulations and the Sharing Regulations.

- 5.25 Subsequently, the Respondent No.1 Commission vide Order dated 8.3.2019 passed in Petition No.92/MP/15, ruled on the aspect of levy the relinquishment charges to ensure recovery of compensation from relinquishing entities so that the transmission assets built were serviced. Based thereon, the Appellant’s liability to pay relinquishment charges worked out to Rs.112.88 crores. The Appellant has filed an Appeal [being Appeal No.322/2019] before this Tribunal challenging the aforesaid Order dated 8.3.2019 and consequent levy of relinquishment charges, which is presently pending adjudication.
- 5.26 However, the issue therein has no relation whatsoever with the present, where the liability of the Appellant to pay transmission charges under the Transmission Agreement for the connectivity system is being agitated. In the event the Appellant is aggrieved with the methodology adopted for computation of relinquishment charges (as has been sought to be agitated during the course of arguments in the present proceedings), the Appellant may seek such remedy in that regard as may be available to it in law.
- 5.27 Subsequent to the relinquishment of LTA and considering the non-payment of transmission charges levied on the Appellant, Respondent No.2, vide its letter dated 8.3.2019 raised the transmission charges bill upon the Appellant (including late payment surcharge against bill dated 15.10.2018) in the sum of Rs.4,27,55,679- with request to pay the same directly to Respondent No.3. Respondent No.2 further raised the following bills towards transmission charges (including late payment surcharge) for servicing of the OPGC-Jharsuguda line pursuant to the decision in the

Validation Committee Meeting, which the Appellant was bound and obliged to pay as per the applicable Regulations:

- a) Bill dated 3.5.2019 in the sum of Rs. 1,83,85,553/- for the period from 1.3.2019 to 30.4.2019;
- b) Bill dated 11.7.2019 in the sum of Rs. 1,92,67,738/- for the period from 1.5.2019 to 30.6.2019;
- c) Bill dated 8.10.2019 in the sum of Rs.2,97,90,134/- for the period from 1.7.2019 to 30.9.2019;
- d) Bill dated 10.12.2019 in the sum of Rs.2,03,28,331/- for the period from 1.10.2019 to 30.11.2019.

5.28 Considering that the entire power from its generation project was to be transmitted within the State, the Appellant had unilaterally decided to operate the power plant in common bus mode with closed bus sectionalizer between Units 3 and 4. Accordingly, the Appellant closed the bus coupler when Unit-4 of the plant was nearing commissioning and requested the Eastern Region Load Despatch Center (ERLDC) to approve the withdrawal of Unit 4 from regional entity status. ERLDC then approached the Commission by filing Petition No.334/MP/2019, seeking directions for opening the bus sectionaliser breakers between Units 3 and 4 and a direction to the State Load Dispatch Centre (SLDC) to stop scheduling power immediately. Simultaneously, another Petition [being Petition No.380/MP/2019] was filed by the Appellant seeking the Commission's approval for closing the bus coupler between Units 3 and 4 for operating its generation project in Odisha under common bus mode and deliver power to GRIDCO Ltd. Through the State network. Pending resolution of the issue, the status of the OPGC-Jharsuguda line continued to be that of a connectivity line and the provisions of the Transmission Agreement continued to be binding and in force upon the Appellant.

5.29 During the discussions in various Meetings as regards operation of the power plant in common bus mode, GRIDCO and the Appellant proposed

that OPGC-Jharsuguda 400 kV ISTS line to be treated as an inter-State tie line (lines connecting two control areas) and the Petitioner's generation switchyard as the interconnection tie point of the State. However, the stand of Respondent No.2 was that the said line could not be treated as a tie-line as it was the Appellant's generating station which was the connecting point between the State and Regional grid; in the eventuality of closing of bus sectionaliser, Unit-3 and Unit-4 of the generating station were to get connected to ISTS and the connectivity line was then not connecting two control areas. However, the issue as regards the connectivity line proposed to be treated as a tie-line is pending adjudication before the Commission. As such, the said connectivity line cannot be considered as a tie-line at this stage as has wrongly been pleaded by the Appellant by unilaterally seeking to pre-judge the issue pending before the Commission.

- 5.30 Thus, after considering the regulatory provisions, the contractual terms and the settled legal position, the Respondent No.1 Commission rightly directed the Appellant to pay transmission charges for the connectivity line implemented solely for evacuating power from the Appellant's generation project. Consequently, the Commission directed Respondent No.2 to raise modified bills towards transmission charges towards 400kV OPGC-Jharsuguda transmission line within 15 days alongwith applicable charges as per the provisions of the TSA. Further, taking note of the bank guarantee submitted by the Appellant under the Transmission Agreement which was liable to be encashed in case of non-payment of transmission charges, the Respondent No.1 Commission directed as under:

"117. We direct that in case, the Petitioner does not make payment of transmission charges as per bills raised by CTU within stipulated time, CTU shall be at liberty to encash the above-said Bank Guarantee and reimburse the transmission charges due to Respondent No. 2 (OGPTL) from such encashed BG."

5.31 The above direction of the Commission was a reiteration of the right of Respondent No.2 agreed by the Appellant under the Transmission Agreement to resort to payment security available in the event of non-payment of transmission charges for the connectivity line. It is in line with the aforesaid directions of the Commission that Respondent No.2 raised a consolidated bill dated 1.1.2020 in the sum of Rs.24,17,36,656/- towards the transmission charges for period between 30.8.2017 to 31.12.2018.

5.32 There is no infirmity in the impugned Order dated 26.12.2019 passed by the Respondent No.1 Commission as alleged by the Appellant. This would be evident from the following :

- a) the transmission charges raised upon the Appellant vide the impugned Bill dated 1.1.2020 are for the servicing of OPGC-Jharsuguda connectivity line and have been so raised in accordance with the provisions of the applicable Regulations and the Order passed by the Respondent No.1 Commission;
- b) the relinquishment charges payable by the Appellant are towards the compensation for servicing of the LTA system identified for evacuation from Appellant's generation project;
- c) transmission charges for servicing of the assets comprised in the connectivity system and in the LTA system are distinct and separate and are governed by separate agreements containing the terms and conditions with respect to payment thereof. Payment of transmission charges for the connectivity system and transmission charges/relinquishment charges for the LTA system are required to be made as per the Regulations and Orders of the Commission.
- d) despite the relinquishment of LTA, the connectivity granted to the Appellant has subsisted and the generating station has continued to remain in a state of connectivity with the ISTS. Therefore, the liability to pay transmission charges for servicing of the dedicated/connectivity line has continued under the provisions of the Transmission Agreement and the same is independent of the relinquishment of access rights made by the Appellant;
- e) since the Appellant has furnished a common bank guarantee for securing payment of charges under the Transmission Agreement and the LTA Agreement, then even when the LTA is relinquished, Respondent No.2 remains within its right and entitlement to encash the bank guarantee furnished by the Appellant on non-payment of connectivity charges;
- f) considering that the Appellant has been well aware of the contractual arrangements entered into by the Appellant whereunder it has agreed to pay the transmission charges in case of delay in utilization of the said line, it cannot now be allowed to challenge the imposition of charges from the deemed COD of

the line; and

- g) the submission of the Appellant with respect to OPGC- Jharsuguda line being considered as an inter-state tie line is based on mere assumptions and the proceedings in relation to the same are currently pending adjudication before the Respondent No.1 Commission. Therefore any reliance placed by the Appellant in this regard is completely misplaced.

5.33 The Appellant is therefore liable to pay transmission charges billed upon it as per the directions of the Commission given under the impugned Order, failing which Respondent No.2 is within its right and entitlement to encash the bank guarantee towards recovery of its unpaid dues.

5.34 Besides, connectivity to grid is essential for power flow by a generator irrespective of LTA and a generator can get its power scheduled under STOA/MTOA in the absence of LTOA but power cannot be scheduled without connectivity in place. Further, connectivity is required even before commissioning of the generator to draw startup power. Thus, generator is liable to pay transmission charges for its connectivity line even when there is no LTA in picture. Admittedly, this liability for payment of transmission charges for connectivity line continue to exist after commissioning of the generator as well.

5.35 Further, during the course of hearing, the Appellant has submitted that it has not transacted any power through the subject connectivity line and as such it cannot be burdened with the responsibility of payment of transmission charges for the same. However, contrary to the aforesaid, in view of the line being operated with closed bus sectionalisers, both Units of the Appellant's project are connected and power from Appellant's project is being delivered to Orissa by using both intra-State (OPGC-Lapanga) and inter-State (OPGC-Jharsuguda) interconnecting lines. Accordingly, power flowing through the subject OPGC-Jharsuguda line is only from Appellant's project and no other generator's power is flowing through it. Though the power from the appellant's generation project is flowing through this line,

the appellant's generation project is flowing through this line, the appellant after relinquishment of LTA is not taking any access (LTA, MTOA or STOA) on the ISTS.

6. Mr. Sajan Poovayya, Learned Senior Counsel for the Respondent No. 3 has submitted the following Written Submissions for our consideration :

- 6.1 The sole issue in the present appeal is which entity has to bear the transmission charges for the OPGC-Jharsuguda (Sundargarh) 400 kV D/C Transmission Line which was constructed by the Respondent No. 3. As per the impugned order, the Appellant has been directed to make payment of transmission charges to the Respondent No. 3.
- 6.2 At the outset, it is submitted that the Respondent No. 3 is an inter-state transmission licensee, and that the transmission license was granted to the said Respondent by the Respondent Commission on 30.06.2016. It is submitted that under the provisions of the Electricity Act, 2003 (hereinafter referred to as the "**Act**"), transmission charges/ tariff is either determined under Section 62, or under Section 63 of a transmission licensee.
- 6.3 Before participation under the bidding process, the Respondent No. 3/ OGPTL entered into a Transmission Service Agreement (TSA) dated 20.11.2015 with the various Long-Term Transmission Customers, whereby all the obligations of the said Respondent were recorded. In the said TSA, the following was recorded:

- "A. In accordance with the Bidding Guidelines, the Bid Process Coordinator (hereinafter referred to as BPC) had initiated a competitive bidding process through issue of RFQ and RFP for selecting a Successful Bidder to build, own, operate and maintain the Project comprising of the element mentioned in Schedule 2 (hereinafter referred to as the Project)*
- B. Pursuant to the said bidding process, the BPC shall identify the Selected Bidder as the TSP, who will be responsible to set up the Project on build, own, operate and maintain basis and to provide Transmission Service on long term basis to the Long Term*

Transmission Customers on the terms and conditions contained in this Agreement and the Transmission License.

- C. *The Selected Bidder will acquire one hundred percent (100%) of the equity shareholding of Odisha Generation Phase II Transmission Limited along with all its related assets and liabilities in terms of the provisions of the Share Purchase Agreement.*
- D. *The TSP has agreed to make an application for a Transmission License to the Appropriate Commission for setting up the Project on build, own, operate and maintain basis.*
- E. *The TSP has further agreed to make an application to the Appropriate Commission for the adoption of the Transmission Charges under Section 63 of the Electricity Act, 2003, along with a certification from the Bid Evaluation Committee in accordance with the Bidding Guidelines issued by Ministry of Power, Government of India.*
- F. *The Long Term Transmission Customers agree, on the terms and subject to the conditions of this Agreement, to use the available transmission capacity of the Project and pay TSP the Transmission Charges as determined in accordance with the terms of this Agreement.*
- G. *The terms and conditions stipulated in the Transmission License issued by the Appropriate Commission to the TSP shall be applicable to this Agreement and the TSP agrees to comply with these terms and conditions. In case of inconsistency between the License terms & conditions and the conditions of this Agreement, the conditions, stipulated in the License granted by the Appropriate Commission shall prevail.”*

6.4 Further, the Schedule 1 of the TSA provides as follows:

“Schedule:1

[Note: As referred to in the recital of this Agreement and in the definition of “Long Term Transmission Customers” in this Agreement]

Sl. No.	Name of the Long Term Transmission Customer	Address of Registered Office	Allocated Project Capacity (in MW)
1.	North Bihar Power Distribution Company Limited		As per PoC Mechanism prescribed by CERC
2.	South Bihar Power Distribution Company		As per PoC Mechanism prescribed by CERC

	Limited		
3.	Jharkhand Bijli Vitran Nigam Limited		As per PoC Mechanism prescribed by CERC
4.	Damodar Valley Corporation		As per PoC Mechanism prescribed by CERC
5.	GRIDCO LIMITED		As per PoC Mechanism prescribed by CERC
6.	Energy and Power Department, Govt. of Sikkim		As per PoC Mechanism prescribed by CERC
7.	West Bengal State electricity Distribution Company Limited		As per PoC Mechanism prescribed by CERC

Note:

- (a) The above list of Long Term Transmission Customers in on date. Any addition or deletion in this list after the award of Lol shall be duly notified to the parties to the TSA.
- (b) The new Long Term Transmission Customers shall become a party to the TSA after agreeing to the terms and conditions of the TSA and signing a Supplemental Agreement as annexed in Schedule 12 to the TSA.
- (c) The transmission scheme would be included in National Transmission Pool for recovering transmission charges through PoC mechanism.
- (d) While the bidding is being done on the basis of existing SBDs, and the list of LTTC is being provided as per the format of the existing SBDs, the transmission charges will be shared and recovered as per the applicable CERC regulation and will be recovered by the CTU from the Designated ISTS customers(DICs) and disbursed to the TSPs as per the Revenue Sharing Agreement.”

6.5 The Long-Term Transmission Customers (LTTCs), with whom the aforesaid TSA was executed by the Respondent No. 3, specifically agreed to utilize the transmission “project” and pay the transmission charges/ tariff to the entity which will emerge as the successful bidder. Schedule 1 of the TSA specifically recorded that the transmission charges/ tariff for the entire

transmission “project”, i.e. including the subject transmission line, will be paid under the Point of Connection (POC)/ sharing mechanism, as prescribed by the Respondent Commission. The aforesaid means that as per the scheme of the TSA, under which the Respondent No. 3 submitted its bid, the transmission charges to the said Respondent No. 3 are required to be paid from the POC pool, irrespective of the fact as to which generator pays, and which does not. This is how the POC pool functions. Having laid down the transmission infrastructure, under a bidding process coordinated by CEA and the Respondent No. 2/ CTU, the Respondent No. 3 has to be paid tariff as assured under the TSA.

- 6.6 As such, it is apparent that under the above regulatory scheme, it was assured to the Respondent No. 3 that the quoted levelized tariff derived through the competitive bidding under Section 63 of the Act, will be reimbursed to the said Respondent under the POC/ sharing mechanism of the Respondent Commission. Hence, based upon the above assurance the Respondent No. 3/ OGPTL participated in the bidding process conducted by the bid process coordinator (BPC). It is pertinent to mention herein that the bankers/ lenders financing the transmission project of the Respondent No. 3 had also relied on Schedule 1 of the TSA.
- 6.7 It was only thereafter that the Respondent No. 3 became a successful bidder, and the Aggregate Revenue Requirement/ tariff quoted by the said Respondent, was adopted by the Respondent Commission vide an order dated 31.05.2016. Therefore, today, the CTU/ Respondent No. 2/ PGCIL cannot at all be allowed to take an about turn and contend that the transmission charges/ tariff will not be paid under the POC mechanism, contrary to what was assured in the aforementioned TSA.
- 6.8 The commissioning of the OPGC-Jharsuguda 400 kV D/C Transmission line, which is the issue in the present appeal, was declared on 30.08.2017. Hence, the Respondent No. 3 is required to be paid transmission charges/ tariff from the aforesaid date.

6.9 The regulations which are applicable in the present case are Regulation 8 (8) of the CERC Connectivity 6th Amendment Regulations, 2009 read with the CERC Sharing Regulations. As per the aforesaid regulations, the Appellant has to bear the liability to pay transmission charges from the date of commissioning of the transmission line of the Respondent No. 3 (30.08.2017), till the date of synchronization of the generating unit by the said Appellant (26.12.2018) and the transmission charges of the Respondent No. 3, after the date of synchronization of the generating unit of the Appellant (26.12.2018) has to be paid as per the POC/ sharing mechanism provided under the CERC Sharing Regulations, 2010.

Respondent No. 3 is supporting the stand of the Appellant to the extent that after the synchronisation of the generating station of the said Appellant on 26.12.2018, the transmission tariff/ charges ought to be paid to the Respondent No. 3 as per the POC/ sharing mechanism of the Respondent Commission.

6.10 PGCIL's contention that the POC/ sharing mechanism is not applicable in the present case as the transmission line of the Respondent No. 3 is a dedicated transmission line, meant for evacuation of power from the power plant of the Appellant, and therefore, the transmission charges of the said line has to be paid by only the Appellant, and the same cannot be shared. Respondent No.3 has submitted that the transmission line of the Respondent No. 3 is an ISTS, on account of the fact that the said line was constructed by the Respondent No. 3 pursuant to a competitive bidding process, which process was initiated in coordination with the CTU/ PGCIL/ Respondent No. 2. Subsequently, the Respondent Commission granted an "inter-state" transmission license to the Respondent No. 3 on 30.06.2016, after the said Respondent became successful in the aforesaid bidding process.

- 6.11 In the present appeal, the fact that the aforesaid transmission line is part of ISTS has not been disputed either by the Appellant or by the Respondent No. 2/ PGCIL. PGCIL, in the present appeal, is contending that despite the transmission line being part of ISTS, the same is also a dedicated transmission line, and as such, the transmission charges for the said line cannot be shared by other interstate transmission system users under the POC/ sharing mechanism.
- 6.12 Respondent No. 3 has referred to the Removal of Difficulty (5th Order) under the Act, issued by the Central Government, whereby it is mentioned that a dedicated transmission line is neither a transmission line in terms of sub-section (72) of Section 2 of the Act nor it is a distribution system connecting the point of a connection to the installation of consumer in terms of sub-section (19) of Section 2 of the Act. Respondent No. 3 has also referred to a judgment dated 23.05.2012, passed by the APTEL in *Appeal No. 145 of 2011*, titled as, *The Chairman TSEB &Ors. V. M/s. Ind Bharath Thermal Power Ltd. &Anr.*, wherein it was held that the dedicated transmission lines cannot be classified as transmission lines.
- 6.13 As per Section 2(74) of the Act, transmit/ transmission means conveyance of electricity by means of “transmission lines”. As per Section 12 of the Act, the transmission of electricity is a “licensed” activity. As such, in terms of the aforesaid definition of “transmit”, a transmission licensee is entitled to transmit electricity by utilizing the “transmission lines”, and not dedicated transmission lines. When as per the Act no license is required for constructing a dedicated line and Respondent No. 3 has been granted a license by the Commission to construct transmission lines itself negates the contention that it is a dedicated line. Therefore, being an inter-state “transmission licensee”, the Respondent No. 3/ OGPTL can only construct “transmission lines” and not dedicated transmission lines.
- 6.14 The Central Commission enacted the CERC Connectivity Regulations, 2009 for the purpose of regulating transmission licensees as well as for

providing open access in the transmission system. As per Regulation 8(8) of the 6th Amendment to the CERC Connectivity Regulations, which was applicable from 17.02.2017 onwards, the following was provided:

"3. Amendment of Regulation 8 of Principal Regulations: Clause(8) of Regulation 8 of the Principal Regulations shall be substituted as under:

...

(8) The dedicated transmission line from generating station of the generating company to the pooling station of the transmission licensee (including deemed transmission licensee) shall be developed, owned and operated by the applicant generating Company. The specifications for dedicated transmission lines may be indicated by CTU while granting Connectivity or Long term Access or Medium term Open Access:

Provided that in case of a thermal generating station of 500 MW and above and a hydro generating station or a generating station using renewable sources of energy of capacity of 250 MW and above, CTU shall plan the system such that maximum length of dedicated transmission line shall not exceed 100 km from switchyard of the generating station till the nearest pooling substation of transmission licensee:

Provided that where the dedicated transmission lines have already been constructed/are under construction by CTU under coordinated transmission planning, the following shall apply:

(a) The transmission charges for such dedicated transmission lines shall be payable by the concerned generating company to the transmission licensee (including deemed transmission licensee) from the date of COD of the dedicated line till operationalisation of LTA of the generating station of the generating company:

(b) After operationalisation of the LTA, the dedicated transmission line shall be included in the POC pool and payment of transmission charges for the said dedicated transmission line shall be governed as per the CERC (Sharing of inter-state transmission charges and losses) Regulations, 2010 as amended from time to time.

(underline supplied)

It is stated the aforesaid regulation is applicable to dedicated lines constructed by CTU under coordinated transmission planning. The subject transmission line was constructed by the Respondent No. 3 pursuant to the coordinated transmission planning by the Respondent No. 2/ CTU.

- 6.15 The Central Commission completely substituted the aforesaid provision, by way of the 7th Amendment to the CERC Connectivity Regulations. Vide the 7th Amendment of the CERC Connectivity Regulations, the Respondent

Commission made its regulations in line with the provisions of the Act, by providing that dedicated lines will not be constructed by the CTU. The said Amendment is set out herein below:

“4. Amendment of Regulation 8 of the Principal Regulations:

.....

(8) The sub-clause (8) of Regulation 8 of the Principal Regulations shall be substituted as under:

“The dedicated transmission line from generating station of the applicant generating Company or any other entity on behalf of generating company to the pooling station of the transmission licensee (including deemed transmission licensee) shall be developed, owned and operated by the applicant generating Company or any other entity on behalf of generating company. The specifications for dedicated transmission lines may be indicated by CTU while granting Connectivity or Long term Access or Medium term Open Access:

Provided that CTU shall plan the system such that maximum length of dedicated transmission line does not exceed 100 km from switchyard of the applicant till the nearest pooling substation of transmission licensee:

Provided further that dedicated transmission line may exceed 100 km, if such an Applicant, so chooses: Provided also that in case any connectivity grantee is not utilizing the bay allocated to it at ISTS substation, CTU may cancel its Connectivity as per provisions of these regulations and detailed procedure and allocate the bay to other Applicant. In such an event, the original grantee shall either dismantle its bay or enter into an Agreement with a new grantee as indicated by CTU for utilization of the bay within a period of 2 months of cancellation of Connectivity” (underline supplied)

- 6.16 Therefore, the 7th Amendment categorically provides that a dedicated transmission line shall only be constructed by a generating company or by its contractor. The role of CTU/ PGCIL/ Respondent No. 2 is to only provide specifications for construction of the dedicated line. Hence, with the 7th Amendment to the CERC Connectivity Regulations, 2009, the Central Commission brought its regulations in line with the aforementioned provisions of the Electricity Act, 2003 which mandate that dedicated transmission lines cannot be constructed by transmission licensees.

6.17 In view of the aforesaid, in any event, after the promulgation of the 7th Amendment of the CERC Connectivity Regulations on 09.01.2019, Regulation 8(8) does not contain any provision towards payment of transmission charges for the transmission line constructed as dedicated. Hence, after the 7th Amendment, the only regulation which is applicable for the purpose of payment of transmission charges of transmission line which is part of ISTS, is the CERC Sharing Regulations, 2010, and consequentially the POC/ sharing mechanism. CERC Sharing Regulations, 2010 provides as follows:

“CHAPTER-2

SCOPE OF THE REGULATIONS

3. Yearly Transmission Charges, revenue requirement on account of foreign exchange rate variation, charges in interest rate etc. as approved by the Commission and Losses shall be shared amongst the following categories of Designated ISTS

Customers who use the ISTS:-

- (a) Generations Station (i) which are regional entities as defined in the Indian Electricity Grid Code (IEGC) or (ii) are having LTA or MTOA to ISTS and are connected either to STU or ISTS OR both;]*
- (b) State Electricity Boards/ State Transmission Utilities connected with ISTS or designated agency in the State (on behalf of distribution companies, generators and other bulk customers connected to the transmission system owned by the SEB/STU/ intra- State transmission licensee);]*
- (c) Any bulk consumer directly connected with the ISTS; and*
- (d) Any designated entity representing a physically connected entity as per clauses (a), (b) and (c) above.”*

.....

CHAPTER-3

*PRINCIPLES AND MECHANISM FOR SHARING OF
ISTS CHARGES AND LOSSES*

4. Principles for sharing ISTS charges and losses

(1) Based on the Yearly Transmission Charges of ISTS Transmission Licensees and transmission losses in the ISTS network, the Implementing Agency shall compute the Point of Connection charges and Loss Allocation Factors for all DICs:-

- (a) using load –flow based methods; and*
- (b) based on the Point of Connection Charging method.*

(2) A detailed explanation of the Hybrid methodology to be applied for sharing the ISTS charges and losses amongst the Designated ISTS Customers is set out in Annexure-I to these regulations, which may be reviewed by the Commission from time to time either upon an application by any interested party or otherwise.”

(underline supplied)

From the Sharing Regulations, it is evident that the transmission charges/ yearly transmission charges of the transmission licensees, with respect to ISTS, are recovered through the sharing mechanism (also called as POC) whereby the said charges are shared by all the interstate transmission system users across the country.

- 6.18 The Respondent No. 2/ PGCIL/ CTU referred to a judgement passed by this Tribunal dated 18.04.2017 in Appeal No. 59 of 2015. PGCIL contended that in the said judgement transmission license, and in turn payment of transmission charges under the POC mechanism, cannot be granted for a dedicated transmission line. The reliance of the PGCIL on the aforesaid judgement, is fundamentally flawed, for the reason that in the above appeal, the transmission line was not constructed by any transmission licensee. Rather, the line was constructed by the generating company under Section 10 of the Act as a dedicated line. Therefore, the said judgement is not applicable to the facts of the present case, in which the subject transmission line has been constructed by an inter-state transmission “licensee”, i.e. the Respondent No. 3.
- 6.19 Therefore, the argument of PGCIL that the transmission line constructed by the Respondent Number 3 is a “dedicated transmission line”, and therefore POC/ sharing mechanism is not applicable, is fundamentally flawed and is liable to be rejected. The Respondent No. 3/ OGPTL is entitled for recovery of transmission charges from 26.12.2018 onwards, as per the POC/ sharing mechanism read with Schedule 1 of the TSA.
- 6.20 The argument of CTU/ PGCIL qua non-applicability of the POC/ sharing mechanism, is also completely contrary to the terms of the transmission service agreement (TSA) executed by Respondent No. 3, which under Schedule 1 categorically provided that the transmission charges for the

subject transmission line of the said Respondent would be recovered as per the POC/ sharing mechanism. The Respondent No. 3 participated in the bidding process for implementing the subject transmission line, based upon the aforesaid provision of the TSA. It is also important to consider that the aforesaid bidding process was conducted in coordination with CTU/ PGCIL as provided under Section 38(2)(c) of the Act. As such, the aforesaid Schedule 1 of the TSA was inserted in coordination with CTU/ PGCIL, and when the Respondent No. 3, based upon Schedule 1, implemented the subject transmission line, then, PGCIL cannot today renege from the applicability of the POC/ sharing mechanism.

6.21 From the date of commissioning of the subject transmission line of the Respondent No. 3 (30.08.2017) till the date of synchronisation/ operationalisation of LTA (26.12.2018), the transmission charges are payable by the Appellant, in accordance with the aforementioned 6th Amendment of the CERC Connectivity Regulations.

6.22 In this context, further reference be made to the relevant clauses of the LTA Agreement (LTAA) dated 11.09.2013, and the Transmission Agreement (TA) dated 11.09.2013 executed by the Appellant, which are as follows:

Relevant Clause of the LTAA:

“2.0 In case, the LTC has not identified or partially identified the demand customer or the generating company as the case may be; and the assets' covered under the transmission system, as indicated at Annexure-3 have been declared under commercial operation, either in part or in full; the LTC shall bear the full transmission charges that would have been applicable to the demand customer or the generating company, as the case may be, so as to ensure full recovery of the transmission tariff corresponding to the commissioned portion of the transmission system indicated at Annexure-3.”

Relevant Clause of the TA:

“3.0 In case, “OPGC” delays to utilize the connectivity provided and the assets covered under the transmission system, as indicated at Annexure-2 have been declared under commercial operation wither in part or in full; the “OPGC” shall bear the charges so as to ensure full recovery of the transmission tariff corresponding to the commissioned portion of the transmission system indicated at Annexure-2.”

From the above, it is clear that the aforesaid agreements categorically provide that OPGC shall have to pay "transmission charges".

- 6.23 One of the contentions of the Appellant during the hearing was that it is disputing the commissioning date of the transmission line of the Respondent No. 3 even though it is not subject matter of this appeal. The Appellant alleged that the work related to the aforesaid transmission line was not completed by the Respondent No. 3, and that the commissioning of the line claimed on 30.08.2017 is wrong. According to the Appellant, the Respondent No. 3/ OGPTL did not construct the required optical ground wire (OPGW). The said contention of the Appellant is completely erroneous, for the reason that the Respondent No. 3 was mandated to carry out the following works, as mentioned in Schedule 2 of the TSA:

“Schedule: 2

Project Description and Scope of Project

.....

B. OPGC – Jharsuguda (Sundargarh) 400kV D/c (Triple Snowbird Conductor):

(i) On OPGC – Jharsuguda (Sundargarh) 400kV D/c (Triple Snowbird Conductor), Transmission line, one OPGW containing 24 Fibers is to be installed by the TSP in place of conventional earth wire during the construction of line for grid management and substation operation purpose by CTU. The installation of OPGW shall be done from gantry of Jharsuguda (Sundargarh) Substation up to gantry of 400kV OPGC Substation and shall be terminated in a Joint Box by TSP at both the ends. These Joint Boxes shall be installed at a height of around 10m above ground and shall conform to IP66.

(ii) All these fibers of the OPGW shall be utilized for grid management purpose. The maintenance of the OPGW shall be the responsibility of TSP.”

(underline supplied)

- 6.24 It is evident that qua OPGW, the responsibility of the Respondent No. 3 was to construct OPGW from the “gantry” of Jharsuguda (Sundergarh)

sub-station, to the “gantry” of 400 kV OPGC sub-station, and the said OPGW was to be terminated at a joint box at both the ends by the Respondent No. 3. The said obligation was fulfilled by the Respondent No. 3. It is because of the same that the Respondent No. 3/ OGPTL, on 23.08.2017, obtained the Central Electricity Authority’s (CEA) Energisation Certificate for commissioning of the OPGC-Jharsuguda Line.

- 6.25 There is no pending challenge to the aforesaid CEA certificate by any of the entities. The Respondent No. 2/ PGCIL filed a petition, being Petition No. 350/MP/2018, before the Respondent Commission seeking setting aside of the commissioning date of the Respondent No. 3/ OGPTL. However, PGCIL withdrew the aforesaid petition, which was allowed by the Respondent Commission vide an order dated on 21.12.2018. Therefore, today the Appellant cannot at all dispute the commissioning of the Respondent No. 3. Further, the Appellant is raising the aforesaid issue solely to wash off its hands from the liability of payment of transmission charges from 30.08.2017 till the operationalisation/ synchronisation of the LTA on 26.12.2018, as mandated under the 6th Amendment of the CERC Connectivity Regulations.
- 6.26 Even though as per the Schedule 1 of the TSA, the Respondent No. 3 is entitled to receive the transmission charges from the date of commissioning (30.08.2017) through PoC mechanism. However, as per the directions of the Tribunal, vide interim order dated 16.01.2020, the Appellant was directed to make a payment of Rs. 14 Crores to the Respondent No. 3, as provided under Regulation 8(8) of the 6th Amendment of the CERC Connectivity Regulations 2009. This payment was towards the transmission charges for the period from 30.08.2017 to 01.01.2019.
- 6.27 Further, in any event, after the promulgation of the 7th Amendment of the CERC Connectivity Regulations, Regulation 8(8) does not contain any provision towards payment of transmission charges for the transmission

line constructed as dedicated. The 7th Amendment was issued on 09.01.2019. Hence, after the 7th Amendment, the only regulation which is applicable for the purpose of payment of transmission charges of transmission line which is part of ISTS, is the CERC Sharing Regulations, 2010. Therefore, the Respondent No. 2/CTU is completely wrong to submit that POC/ sharing mechanism is not applicable for the purpose of payment of transmission charges of the Respondent No. 3.

- 6.28 The Respondent No. 3 is entitled to receive transmission charges from the PoC pool from the date of commissioning i.e. 30.08.2017 as per the Contracts and Schedule 1 of the TSA irrespective of the payment to be made by the Appellant for the defaulting period. However, the payment from the period from 30.08.2017 to 01.01.2019 has been made by the Appellant in line with the directions dated 6.1.2020 of the Tribunal, therefore, the recovery of transmission charges for the subject transmission line of the Respondent No. 3/ OGPTL ought to be allowed under POC/ sharing mechanism from 26.12.2018 onwards as per the Contract, Bidding Guidelines and Schedule 1 of the TSA. In this context, reference may be made to the interim orders dated 18.06.2020 and 26.06.2020, whereby this Tribunal passed an interim order directing the Respondent No. 2/ PGCIL/ CTU to make a payment of ₹ 10 crores. However, the unpaid transmission charges dues have accumulated to more than ₹ 6.65 Crores approximately.

- 7. We have heard learned Counsel appearing for the Appellant and the learned Counsel appearing for the Respondents at consideration length of time and considered the written submissions carefully and evaluated the entire relevant material available on record. The following issues emerge out of the Appeal for our consideration:**

Issue No.1: (a) Whether there was any mismatch in the COD of the transmission line as alleged by the Appellant?

(b) Whether the Appellant is liable to pay the Transmission Charges for 400kV OPGC-Jharsuguda D/C line from the date of its deemed COD upto synchronization of its generating Units?

Issue No.2: How the transmission charges of the transmission line constructed and implemented by the Respondent No. 3 will be recovered?

Our Findings and Analysis:

8. Issue No.1 (a) & (b):-

8.1 We have considered the submissions of all the parties. One of the contentions of the Appellant during the hearing was that it is disputing the commissioning date of the transmission line of the Respondent No. 3 even though it is not subject matter of this Appeal. The Appellant has alleged that the work related to the aforesaid transmission line was not completed by the Respondent No. 3, and that the commissioning of the line claimed on 30.08.2017 is wrong. According to the Appellant, the Respondent No. 3/OGPTL did not construct the required optical ground wire (OPGW). From the perusal of Schedule 2 of the TSA, the said contention of the Appellant seems completely erroneous, for the reason that qua OPGW, the responsibility of the Respondent No. 3 was to construct OPGW from the “gantry” of Jharsuguda (Sundergarh) sub-station, to the “gantry” of 400 kV OPGC sub-station, and the said OPGW was to be terminated at a joint box at both the ends by the Respondent No. 3. The said obligation was fulfilled by the Respondent No. 3. It is because of the same that the Respondent No. 3/OGPTL, on 23.08.2017, obtained the Central Electricity Authority’s

(CEA) Energization Certificate for commissioning of the OPGC-Jharsuguda Line.

- 8.2 There is no pending challenge to the aforesaid CEA certificate by any of the entities. In fact, Respondent No. 2/PGCIL filed a petition, being Petition No. 350/MP/2018, before the Central Commission seeking setting aside of the commissioning date of the Respondent No. 3/ OGPTL. However, Respondent No. 2 withdrew the aforesaid petition, which was allowed by the Central Commission vide an order dated 21.12.2018. Therefore, the Appellant's contention disputing the commissioning of the Respondent No. 3 is hereby rejected.
- 8.3 The Respondent No. 3/ OGPTL entered into a Transmission Service Agreement (TSA) dated 20.11.2015 with various Long-Term Transmission Customers (LTTCs). The said TSA was executed prior to participating in the bid process by the Respondent No. 3. As per Schedule 1 of the TSA, the transmission scheme would be included in National Transmission Pool for recovering transmission charges through PoC mechanism which means that the TSA specifically records that the transmission charges/ tariff for the entire transmission "project", i.e. including the subject transmission line i.e. 400 kV D/C OPGC-Jharsuguda transmission line will be paid under the Point of Connection (POC)/ sharing mechanism, as prescribed by the Respondent Commission. The Respondent No. 3 was made to bid for an inter-state transmission project, which comes under the supervision of the CTU/ PGCIL, based on the representations contained in the TSA, including recovery of transmission charges as per PoC mechanism.
- 8.4 Learned counsel for the Respondent No.3 submitted that as per the 6th Amendment of the CERC Connectivity Regulations, the following is the legal position qua payment of transmission charges:

- a) Appellant is liable to bear transmission charges from the date of commissioning of the transmission line constructed by the Respondent No. 3, on 30.08.2017, till the date of synchronisation (i.e. operationalisation of the LTA) of the generating station of the Appellant with the ISTS, on 26.12.2018. As per Schedule 1 of the TSA, Respondent no. 3 has to receive transmission charges with effect from 30.8.2017 from PoC pool irrespective of the above payment to be made by the Appellant. This payment shall go to the PoC pool and disbursed to all the ISTS Licensees as per the Sharing Regulations to balance the PoC pool account.
- b). After the aforesaid operationalisation/ synchronisation, i.e. post 26.12.2018, the transmission charges for the line built by the Respondent No. 3 has to be paid into the PoC pool by all the DICs and recovered therefrom.

8.5 Learned counsel for PGCIL contended that the transmission line in question was built as a dedicated transmission line, and therefore PoC mechanism is not applicable. The interpretation of the Electricity Act, 2003. Section 2 (16) of the Act says that “dedicated transmission line” can only be developed by a captive generating plant referred in Section 9 of the Act, or a generating station referred in Section 10 of the Act. Apart from a captive generating plant defined under Section 9, or a generating company defined under Section 10, there is no other entity which can construct a dedicated transmission line as per the provisions of the Electricity Act, 2003.

8.6 Further, it is noted that an Inter-state transmission system is planned by the CTU/ PGCIL, as provided in Section 38 of the Act. The said provision does not mandate that an ISTS line can be constructed as a dedicated transmission line. Once a transmission line is held to be part of inter-state

transmission system (ISTS), then it cannot be dedicated. In the present case, the subject line has been constructed by the Respondent No. 3, who is an inter-state transmission licensee, meaning thereby that the said asset is part of ISTS, and therefore, the same cannot be termed as dedicated.

- 8.7 We now refer to the fact that the Central Commission came out with the 7th Amendment to the CERC Connectivity Regulations, whereby the above said 6th Amendment was repealed and a new provision substituted. The said Amendment is setout herein below:

“4. Amendment of Regulation 8 of the Principal Regulations:

.....

(8) The sub-clause (8) of Regulation 8 of the Principal Regulations shall be substituted as under:

“The dedicated transmission line from generating station of the applicant generating Company or any other entity on behalf of generating company to the pooling station of the transmission licensee (including deemed transmission licensee) shall be developed, owned and operated by the applicant generating Company or any other entity on behalf of generating company. The specifications for dedicated transmission lines may be indicated by CTU while granting Connectivity or Long term Access or Medium term Open Access:

Provided that CTU shall plan the system such that maximum length of dedicated transmission line does not exceed 100 km from switchyard of the applicant till the nearest pooling substation of transmission licensee:

Provided further that dedicated transmission line may exceed 100 km, if such an Applicant, so chooses: Provided also that in case any connectivity grantee is not utilizing the bay allocated to it at ISTS substation, CTU may cancel its Connectivity as per provisions of these regulations and detailed procedure and allocate the bay to other Applicant. In such an event, the original grantee shall either dismantle its bay or enter into an Agreement with a new grantee as indicated by CTU for utilization of the bay within a period of 2 months of cancellation of Connectivity”

- 8.8 It is the case of Respondent No. 3 that the 7th Amendment of the Connectivity Regulations aligns with the provisions of the Electricity Act, 2003 that a dedicated transmission line shall only be constructed by a generating company or by its contractor. It is opined that the said submission is in line with the interpretation of the Electricity Act, 2003 i.e. dedicated transmission lines cannot be built for an ISTS network built under

the supervision and coordinated planning of the CTU/ PGCIL. The role of CTU/ PGCIL/ Respondent No. 2 is to only provide specifications for construction of the dedicated line, but not to construct them. In other words, once an asset becomes part of ISTS, then the same cannot be treated as dedicated.

- 8.9 It was also brought to our knowledge that the Central Government issued the Removal of Difficulty (5th Order) under the Act, which provides that a dedicated transmission line is neither a transmission line in terms of Section 2 (72) of the Act nor it is a distribution system. The Appellant also referred to a judgment passed by the Tribunal in Appeal No. 145 of 2011 in the case of The Chairman TSEB &Ors. v. M/s. Ind Bharath Thermal Power Ltd. &Anr., wherein it was held that the dedicated transmission lines cannot be classified as transmission lines. In the light of the said judgment, the argument of PGCIL that the transmission line in question is a dedicated line merits no consideration, as the same is part of ISTS.
- 8.10 We have noted that after the promulgation of the 7th Amendment of the CERC Connectivity Regulations on 09.01.2019, Regulation 8(8) does not contain any provision towards payment of transmission charges for the transmission line constructed as dedicated. Hence, we note that especially after the 7th Amendment, the only regulation which is applicable for the purpose of payment of transmission charges of a transmission line, which is part of ISTS, is the CERC Sharing Regulations, 2010, and consequentially the PoC/ sharing mechanism. It is necessary to refer to the various provisions of the Sharing Regulations (stated Supra). From the sharing regulations, it is evident that the transmission charges/ yearly transmission charges of ISTS lines, are recovered through the sharing mechanism (also called as PoC) whereby the said charges are shared by all the interstate transmission system users nationally.

- 8.11 During the hearing, counsel for Respondent No. 2/ PGCIL/ CTU referred to a judgement passed by the Tribunal dated 18.04.2017 in Appeal No. 59 of 2015. Learned counsel for Respondent No. 2 contended that in the said judgement, the transmission license, and in turn, payment of transmission charges under the POC mechanism, cannot be granted for a dedicated transmission line. The reliance of the Respondent no. 2 on the aforesaid judgement is erroneous, because in the above appeal, the transmission line was not constructed by any transmission licensee. Instead, the same was constructed by the generating company under Section 10 of the Act as a dedicated line. Therefore, the said judgement is not applicable to the facts of the present case, in which the transmission line has been constructed as ISTS, by an inter-state transmission licensee, i.e. the Respondent No. 3. Thus, the argument of PGCIL that the transmission line constructed by the Respondent No. 3 is a “dedicated transmission line”, and therefore POC/ sharing mechanism is not applicable, stands to be rejected. The argument of CTU/ PGCIL qua non-applicability of the POC/ sharing mechanism, is also completely contrary to the terms of the transmission service agreement (TSA) executed by Respondent No. 3, which under Schedule 1 specifically provided that the transmission charges for the transmission line in question is to be recovered as per the PoC/ sharing mechanism.
- 8.12 Learned counsel for the Respondent No. 3 submitted that it participated in the bidding process for implementing the subject transmission line, based upon the aforesaid Schedule 1 provision of the TSA issued by the Ministry of Power (MoP) in coordination with CEA/CTU/ PGCIL. Therefore, in view of the above, Respondent No. 3/ OGPTL is entitled for recovery of transmission charges as per the POC/ sharing mechanism in accordance with Schedule 1 of the TSA with effect from Scheduled/Deemed COD.

8.13 We have considered the provisions under Schedule 1 of the TSA which envisages that the subject transmission line shall be included in PoC pool for recovery of transmission charges with effect from SCOD/Deemed COD. However, in accordance with the default liability principles laid down by the Central Commission in its several orders, the defaulting entities are liable to pay the transmission charges for the defaulting period. The responsibility for collection of transmission charges to be paid by defaulting entities into the PoC pool account lies with the CTU. In the present case, the Respondent No. 3 commissioned its line on 30.8.2017 and the line could be charged only on 20.12.2017 due to delay in commissioning of the corresponding assets by PGCIL and OPGC. Since, PGCIL commissioned its bays on 22.11.2017, therefore the transmission charges for the defaulting period i.e. from 30.8.2017 till 20.12.2017 shall be shared by the defaulting entities in the ratio of 50:50 i.e. both OPGC and PGCIL. Further, the Appellant synchronized its power plant on 26.12.2018 and was drawing start up power using the subject transmission line, therefore, from 23.11.2017 till 26.12.2018, the Appellant is liable to pay transmission charges. Accordingly, we are inclined to agree with the findings of the Central Commission in paras 100 and 122 of its order dated 26.12.2019 in Petition No. 128/MP/2019. The relevant extract under Para 100 is reproduced as under :

"Para No. 100.

Since both the petitioner and PGCIL were responsible for delay in putting the 400 Kv OPGC – Jharsuguda transmission line into service, the petitioner and PGCIL shall be liable to pay the transmission charges in the ratio of 50:50 from the date of deemed COD of 400 Kv OPGC – Jharsuguda transmission line i.e. from 22.11.2017 when the bays of PGCIL achieved COD. From 23.11.2017 onwards, the petitioner shall pay the transmission charges to Respondent No. 2 for the 400 Kv OPGC - Jharsuguda transmission line."

In this context, further reference may be made to the clause 2.0 of the LTA Agreement (LTAA) dated 11.09.2013 and clause 3.0 of the Transmission

Agreement (TA) 11.09.2013 executed by the Appellant. Therefore, as per the above agreements, the Appellant cannot escape liability of payment of transmission charges till synchronization of its generating units i.e. 26.12.2018.

- 8.14 The Tribunal in its judgment dated 14.09.2020 in Appeal No.17 of 2019 has held that in cases of mis-match of commissioning of transmission elements, the liability for payment of transmission charges during the defaulting period cannot be imposed on defaulting entity who has itself been granted force majeure relief i.e. extension of Scheduled Commercial Operation Date by the Commission. Relevant portion of the said judgment is extracted as under:

“8.19 We are of the opinion that once the Commission allows extension of COD of the transmission elements/system under the terms of the TSA, it revokes all the tacit or explicit agreements made by the parties or system planning authorities regarding scheduled commercial operation dates of transmission elements. The Scheduled Commercial Operation date is accordingly shifted to actual COD. The decision of the Commission to impose liability of IDC and IEDC of PGCIL bays on the Appellant for delay in commissioning of the transmission system is completely contradictory to relief granted to the Appellant under the provisions of force majeure of the contract by way of extension of COD”.

Since, in the present matter, no force majeure relief has been granted to PGCIL for force majeure claims filed by it before the Central Commission in Petition No. 59/TT/2018, therefore applying the aforesaid principle laid down by this Tribunal, PGCIL alongwith the Appellant is liable to pay transmission charges to Respondent No. 3 in the ratio of 50:50 for the delayed period due to its default i.e. from 30.8.2017 to 22.11.2017 as decided by the Central Commission.

- 8.15 Further, the Tribunal in its judgment dated 01.09.2020, passed in Appeal Nos. 51 of 2018 and batch held that till the dedicated lines are not built by the generating companies, the transmission charges have to be paid exclusively by the said generators under the non-PoC mechanism. In the

present case, the generating unit was synchronised by the Appellant with ISTS on 26.12.2018, hence, applying the principle laid down in the above judgment, after such synchronisation, the recovery of transmission charges have to be done as per the PoC mechanism.

9. Issue No.2: -

9.1 Now, the issue arises as to how the payment of transmission charges of the subject transmission line are to be recovered. Since, the relinquishment of the Long-Term Access has been made by the Appellant w.e.f. 1.1.2019 and the Unit II of the Appellant's generation plant was synchronized on 26.12.2018, therefore, the payment of transmission charges will be as follows:

From 30.08.2017 to 22.11.2017 and from 23.11.2017 to 26.12.2018

9.2 As considered by us supra, from the date of commissioning of the subject transmission line of the Respondent No. 3 (30.08.2017) till the date of commissioning of the corresponding bays by PGCIL i.e. 22.11.2017, the transmission charges shall be borne by both PGCIL and OPGC in the ratio of 50:50. OPGC synchronized Unit-II of the power plant on 26.12.2018, therefore, the transmission charges from 23.11.2017 to 26.12.2018 are payable by the Appellant, in accordance with the default liability principles laid down by CERC. In this context, further reference has been made to the Clause 2.0 of the LTA Agreement (LTAA) dated 11.09.2013, and Clause 3.0 of the Transmission Agreement (TA) dated 11.09.2013 executed by the Appellant. Therefore, as per the above agreements, the Appellant cannot escape liability of payment of transmission charges till 26.12.2018.

9.3 Since, the 400kV OPGC-Jharsuguda D/C line constructed by the Respondent No. 3 is the only source for evacuation of power from the Appellant's Power Plant, it becomes clear from the same that the Appellant was drawing start-up power from the above line and injecting infirm power. Even on the date when the appeal was argued, we have been informed that power was flowing in the line of Respondent No. 3. In other words, the said line is being used. This position was admitted by all the parties. We are informed that Respondent No. 3 had submitted bills for transmission charges from 30.8.2017 to CTU/ PGCIL, and CTU in turn has raised the bills on the Appellant. The Appellant had not made any payment and Respondent No. 3 had remained unpaid since August 2017. However, the Appellant, in compliance vide our interim order dated 16.01.2020 had made a payment of Rs. 14 Crores to the Respondent No. 3. The said payment was directed to be made towards the transmission charges for the period from 30.08.2017 to 26.12.2018 as per Regulation 8(8) of the 6th Amendment of the CERC Connectivity Regulations 2009 read with default liability principles set out by the Central Commission. Further, vide our orders dated 18.6.2020 and 26.6.2020, we had directed CTU to release a payment of Rs. 10 crores to Respondent No. 3 from the STOA Account.

From 26.12.2018 onwards

9.4 As already stated hereinbefore, in terms of the TSA dated 20.11.2015, the Schedule 1 categorically provides that the transmission charges shall be recovered by the Respondent No. 3 as per the POC/ sharing mechanism. As per the 6th Amendment of the CERC Connectivity Regulations, after the aforementioned operationalisation/ synchronisation of LTA on 26.12.2018, the transmission charges for the subject transmission line built by the Respondent No. 3 is to be recovered as per the PoC mechanism provided under the Sharing Regulations. Therefore, from 26.12.2018 onwards, the recovery of transmission charges for the subject transmission line of the

Respondent No. 3/ OGPTL are to be recovered under POC mechanism as per Schedule 1 of the TSA.

- 9.5 Learned counsel for the Respondent No. 3 submitted that even after the payment of Rs. 14 crores by OPGC for the period from 30.8.2017 till 26.12.2018 and Rs. 10 crores by CTU w.e.f.26.12.2018, the unpaid transmission charges dues have accumulated to more than Rs. 6.65 Crores approximately and needs to be paid in accordance with the Sharing Regulations, read with the TSA. As per Regulation 11 of the Sharing Regulations, CTU is responsible for raising bills, collections and disbursement of the transmission charges to ISTS transmission licensee. Accordingly, we opine that CTU shall consolidate bill of all outstanding dues in accordance with the Sharing Regulations read with TSA towards 400 KvD/C OPGC-Jharsuguda transmission line to the extent required in terms of the decision in this judgement/order for payment to Respondent No. 3. With this, prayer (b) of the Appellant stands addressed.
- 9.6 We further observe that the Appellant has furnished Bank Guarantee towards OPGC-Jharsuguda Transmission line under Transmission Agreement dated 11.9.2013 which provides as follows:

“(a) “OPGC” shall furnish a Bank guarantee from a nationalized bank for an amount as specified by the CERC as security mechanism for the transmission system to be built, owned and operated by ISTS licensee (the same being maximum Rs.5 lakhs/mw, currently). The bank guarantee format is enclosed as Annexure-Y.”

- 9.7 The Tribunal vide order dated 16.1.2020 in IA No. 27 of 2020 filed in the instant appeal directed the respondents not to initiate any coercive action (including revocation of Bank Guarantee) against the Appellant. The Appellant as directed vide the same order has already made the payment of Rs. 14 crores towards transmission charges of 400 kV D/C OPGC-Jharsuguda transmission line for the period from 30.08.2017 to 26.12.2018. Further, while disposing another IA No. 183 of 2020, this

Tribunal vide its orders dated 18.06.2020/26.06.2020 directed that the transmission charges for the said line for the period from 26.12.2018 onwards to be paid from the STOA Account/PoC pool in terms of the Sharing Regulations and Schedule 1 of the TSA. Therefore, the said interim directions stand vacated from the date of issue of this judgment. Accordingly, the Respondents are restrained from encashing the Bank Guarantee submitted by the Appellant or from taking any other coercive action under the Central Electricity Regulatory Commission (Regulation of Power Supply) Regulations, 2010. However, the Appellant is directed to keep alive the submitted Bank Guarantee until disposal of Appeal No. 332 of 2019 in this Tribunal and Petition Nos. 380/MP/2019 and 384/MP/2019 pending in CERC. With this, the prayers (c) and (d) of the Appellant have been addressed.

10. Summary of findings.

Based on our analysis and findings on the various issues raised in the Appeal, we summarise our findings as under :

- 10.1 We hold that there was no mismatch in the declared COD of the transmission line as alleged by the Appellant. Accordingly, the transmission charges for the period 30.08.2017 to 22.11.2017 shall be borne by the Appellant and PGCIL in the ratio of 50:50.
- 10.2 As the Appellant was drawing start up power and injecting infirm power through the said line, the transmission charges from 23.11.2017 to 26.12.2018 shall be borne by the Appellant. It is decided that the transmission charges for the reference transmission line for the period from 23.11.2017 to 26.12.2018 shall be borne by the Appellant and thereafter the transmission charges shall be recovered under the POC mechanism.

10.3 In line with the TSA, the transmission charges from 26.12.2018 onwards shall be payable to the transmission licensee (OGPTL) from the POC pool in accordance with sharing regulations notified by the Central Commission.

ORDER

For foregoing reasons as stated supra, we are of the considered view that some issues raised in the instant Appeal No. 16 of 2020 have merits and hence, the appeal is partly allowed.

The Impugned Order dated 26.12.2019 passed by the Central Commission is hereby upheld/set aside to the extent of our findings given under Para 10.1 to 10.3 in the present judgment.

Needless to mention that pending IAs if any shall stand disposed of.

No order as to costs.

Pronounced in the Virtual Court on this **21st day October, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

mkj