In the Appellate Tribunal for Electricity
New Delhi
(Appellate Jurisdiction)

APPEAL NO. 363 OF 2017 & IA NO. 976 OF 2017
AND
APPEAL NO. 16 OF 2018

Dated: 11th April, 2019

Present: Hon'ble Mr. Justice N.K. Patil, Judicial Member
Hon'ble Mr. Ravindra Kumar Verma, Technical Member

APPEAL NO. 363 OF 2017 & IA NO. 976 OF 2017

In the matter of:

GMR Warora Energy Limited
701/704, 7th Floor, Naman Centre,
A- Wing, BKC (Bandra Kurla Complex),
Bandra, Mumbai 400 051 ... **Appellant**

Versus

1. **Central Electricity Regulatory Commission**
3rd& 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001 ... **Respondent No.1**

2. **Power Grid Corporation of India**
B-9, Qutab Institutional Area,
Katwaria Sarai, New Delhi-110016 ... **Respondent No.2**

3. **Central Electricity Authority,**
Sewa Bhawan, Rama Krishna Puram,
New Delhi – 11006 ... **Respondent No.3**

Counsel for the Appellant(s) : **Mr. Hemant Singh**
Mr. Nishant Kumar
Mr. Soumya Singh
Mr. Shourya Malhotra

Mr. Matrugupta Mishra

Counsel for the Respondent(s) : Ms.Suparna Srivastava
Ms. Nehul Sharma
Ms. Sanjna Dua for R-2

APPEAL NO. 16 OF 2018

In the matter of:

Sembcorp Energy India Limited
(Formerly known as Thermal Powertech Corporation of India Ltd.)
6-3-1090, Block A, Level 5
TSR Towers, Rajbhavan Road,
Somajiguda, Hyderabad – 500 082 **... Appellant**

Versus

1. **Central Electricity Regulatory Commission**
3rd& 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001 **... Respondent No.1**

2. **Power Grid Corporation of India**
B-9, Qutab Institutional Area,
Katwaria Sarai, New Delhi-110016 **... Respondent No.2**

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Deep Rao
Mr. Divyanshu Bhatt
Mr. Arjun Agarwal

Counsel for the Respondent(s) : Ms.Suparna Srivastava
Ms. Nehul Sharma
Ms. Sanjna Dua for R-2

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

A. APPEAL NO. 363 OF 2017 & IA NO. 976 OF 2017

1. The Appellant has sought the following relief:-

(i) to set aside the Impugned Order dated 17.10.2017 in Petition No. 153/MP/2016 passed by the Central Commission;

(ii) Quash the letters dated 22.07.2015 and 09.06.2016, and the e-mail dated 01.11.2017 and letter dated 07.11.2017 sent by the Respondent No. 2/PGCIL to the Appellant/GMR Warora asking for payment of relinquishment charges; and

(iii) to pass such other or further orders as this Tribunal may deem appropriate.

1.1 **The Appellant has raised the following Questions of Law:-**

i) Whether the Impugned Order is a non-speaking order thereby being against the principles of natural justice as no reasoning whatsoever has been provided to the primary issue as to what is meant by relinquishment, and that whether in the present case there has been a relinquishment of access rights?

ii) Whether the migration from MTOA to LTA in the present case amounts to relinquishment of MTOA?

iii) Whether the Central Commission failed to appreciate that relinquishment means abandonment of an existing right, which in the present case was the access rights being enjoyed by the Appellant under MTOA?

iv) Whether the Central Commission failed to consider that the Appellant continued to utilize its right of accessing the Inter-State Transmission System by getting promoted from a 3 year access right (Medium Term) to a 15 year access right (Long Term), and as such there was no abandonment of such access rights?

v) Whether the Central Commission failed to appreciate that the Appellant never gave up its right of transmission/ conveyance of power, to the same entity (TANGEDCO) and qua the same PPA, before passing the impugned order?

vi) Whether the Central Commission did not consider that for qualifying as a relinquishment, an action has to result in either vacation/ abandonment of the rights accrued in favour of any other entity or the said rights revert back to the owner (PGCIL), which never happened in the present case?

vii) Whether the Central Commission failed to consider that when availing MTOA was a regulatory compulsion (judgment in Appeal Nos. 94 & 81 of 2015), then the said compulsion cannot afterwards become a liability through imposition of relinquishment charges.

viii) Whether the Central Commission did not consider that the 6th amendment of the CERC Connectivity Regulations was only a

clarification qua Regulation 24, and not a fresh insertion of a legal position?

1.2 **Brief facts of the case:**

1.3 The present appeal is filed by Warora Energy Limited (hereinafter referred to as the **"Appellant/GWEL"**) being aggrieved by the Order dated 17.10.2017 (hereinafter referred to as the **"Impugned Order"**) passed by the Central Electricity Regulatory Commission under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the **"Act"**). The Appellant/GMR Warora is a company incorporated under the Companies Act, 1956 and has set up a 600 MW (2 x300 MW) coal based thermal power plant at Warora, District Chandrapur, Maharashtra.

1.4 The Central Electricity Regulatory Commission is the Respondent No. 1 (hereinafter referred to as the **"the Central Commission/Respondent No.1"**).

1.5 The Respondent No. 2 is the Power Grid Corporation of India Ltd. (hereinafter referred to as **"Respondent No. 2/PGCIL")** which is an Inter-State Transmission Licensee as well as the Central Transmission Utility within the meaning of Section 38 of the Electricity Act, 2003.

1.6 The Respondent No. 3 is the Central Electricity Authority (hereinafter referred to as **"Respondent No. 3/CEA").**

1.7 TANGEDCO, which is the distribution licensee in the state of Tamil Nadu, in the year 2012, floated a tender for procurement of power on a long-term basis. EMCO/Appellant participated in the said bidding process and was declared a successful bidder on 30.10.2013 for supply of 150 MW of power. TANGEDCO thereafter, executed a Power Purchase Agreement (PPA) dated 27.11.2013 with EMCO/Appellant for supply of 150 MW of power starting from 01.06.2014 to 30.09.2028.

1.8 Upon execution of the above PPA, the Appellant applied to PGCIL for grant of an LTA for a quantum of 150 MW in the Southern Region for onward supply to TANGEDCO, through a letter dated 27.11.2013.

1.9 The Appellant also applied for grant of an MTOA on 27.11.2013 for 150 MW in the SR.

1.10 On 22.07.2015, the Appellant received another letter from PGCIL wherein a notional LTA was granted pursuant to the aforementioned meeting dated 15.07.2015. The said LTA was for a period starting from 01.04.2015 to 30.09.2028. The said LTA grant was subject to certain conditions mentioned as a Note in the above grant letter. As per Point No. 2 of the said Note, PGCIL stated that the LTA granted under the above letter would not be operationalized unless the aforementioned MTOA dated 22.07.2015 for a quantum of 150 MW is relinquished.

1.11 On 24.07.2015, the Appellant received a letter from PGCIL wherein the said Appellant was asked to open a Letter of Credit for

Rs. 901.03 Lacs with respect to the aforementioned MTOA dated 22.07.2015.

1.12 On 04.08.2015, the Appellant executed an Agreement for MTOA with PGCIL.

1.13 On 11.08.2015, the Appellant executed an LTA Agreement with PGCIL pursuant to the aforementioned grant of LTA dated 22.07.2015.

1.14 On 18.08.2015, PGCIL informed the Appellant that:

" LTA was expected to be operationalized by October 2015, subject to the fulfilment of conditioned mentioned for grant of LTA intimation and payment of relinquishment charges corresponding to 150 MW MTOA granted.

EMCO Energy Ltd shall furnish confirmed irrevocable, unconditional and revolving Letter of Credit for requisite amount in favour of CTU towards payment security mechanism in accordance with CERC Regulations before the commencement of LTA.

1.15 PGCIL informed to the Appellant that LTA would be operationalized w.e.f. 22.01.2016 and also rejected the request of the Appellant for not claiming relinquishment charges towards stoppage of MTOA.

1.16 The Appellant on 20.01.2016 requested PGCIL to go ahead with the operationalization of LTA dated 22.07.2015 for 150 MW w.e.f. 22.01.2016. PGCIL vide a letter dated 09.06.2016 raised a demand on the Appellant towards payment of Rs. 2,14,71,750/- (Rupees Two Crores Fourteen Lacs Seventy-One Thousand and Seven Hundred Fifty Only). The said demand was towards claiming relinquishment charges for closure of the MTOA of 150 MW dated 22.07.2015, which was a precondition for operationalization of LTA.

1.17 Aggrieved by the Impugned Order dated 17.10.2017 of the 1st Respondent/the Central Commission, the Appellant has filed this instant Appeal.

2. Submissions of the learned counsel appearing for the Appellant:-

2.1 In passing the Impugned Order, the Central Commission erroneously permitted double billing the Appellant for overlapping transmission capacity over the same transmission elements for the same time period. The Appellant is being severely prejudiced since the Central Commission directed it to pay relinquishment charges for MTOA over the same transmission elements for which it was already paying LTA charges for the same time periods. Indeed, Powergrid Corporation of India Limited ("**PGCIL**"), the Respondent No. 2 herein, is being unjustly enriched since it is recovering MTOA relinquishment charges as well as LTA charges for the same transmission capacity on the same transmission elements, without offering any extra service to

the Appellant. PGCIL has suffered no loss whatsoever as a consequence of the Appellant using LTA in place of MTOA and is therefore making a windfall at the Appellant's expense. Such a position cannot be countenanced in law.

2.2 Further, the Central Commission lost sight of the fact that the CERC (Sharing of inter-State transmission charges & losses) Regulations, 2010 ("**Sharing Regulations**") expressly stipulate a set-off of MTOA charges against LTA charges when both open access products are operationalised over the same transmission elements. In other words, the Sharing Regulations provide that when MTOA and LTA are simultaneously operational for a single user over the same transmission elements in order to transmit power to a common beneficiary, PGCIL will not be entitled to levy both MTOA as well as LTA charges as it would amount to double charging. In such a circumstance, the Sharing Regulations stipulate that the MTOA charges would be set off against the LTA charges being paid by the user. By sanctioning the simultaneous levy of LTA charges and MTOA relinquishment charges under Regulation 24 of the Connectivity Regulations, the Central Commission erroneously passed an order contrary to the import of the Sharing Regulations. The incongruity of the Central Commission's Order is explicit when viewed from the perspective that the Appellant would not have had to pay any MTOA charges if it had not formally relinquished its MTOA and simply left it to run in parallel to its LTA. Merely because the Appellant formally converted its MTOA into LTA so PGCIL could release such MTOA capacity on the margins of the transmission infrastructure in favour of any other desirous entity, and didn't keep the MTOA

unnecessarily blocked, the Appellant is being penalised with relinquishment charges.

2.3 The Central Commission itself recognised the lacuna in Regulation 24 of the Connectivity Regulations and passed a clarificatory amendment expressly clarifying that MTOA relinquishment charges would not be levied when LTA is operationalised over the same transmission elements. By way of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) (Sixth Amendment) Regulations, 2017, the Central Commission inserted Regulation 15B which reads as follows:

"15B. Firming up of Drawl or Injection by LTA Customers:

Xxx

(2) An LTA Customer who is availing MTOA on account of non-operationalization of LTA granted to it, shall not be required to pay relinquishment charges towards relinquishment of MTOA if the LTA is operationalized during the subsistence of MTOA."

2.4 By the above provision, the Central Commission itself acknowledges and approves the patent injustice and arbitrariness in the levy of MTOA relinquishment charges when LTA is operationalised and LTA charges are being paid by the Appellant. Even though this amendment was notified on 17.02.2017 i.e. after the commencement of this litigation, it is submitted that it is merely

clarificatory in nature and is squarely applicable to the present dispute. Notably, Regulation 24 of the Connectivity Regulations contemplating MTOA relinquishment charges has not been amended by the Central Commission. If the Central Commission interpretation of Regulation 24 taken in the Impugned Order, that no exceptions exist to the levy of MToA relinquishment charges, is upheld then even the amended Regulation 15B would be rendered otiose.

2.5 Furthermore, the levy of MTOA relinquishment charges is especially egregious since the only reason the Appellant even applied for MTOA is because PGCIL delayed the commissioning of LTA that the Appellant had applied for. PGCIL admits at para 3 of its Reply dated 25.07.2018 that it had delayed the commissioning of the transmission elements it was obligated to commission, and resultantly PGCIL was not in a position to operationalize the LTA in terms of the Bulk Power Transmission Agreement dated 24.12.2010 and Transmission Agreement dated 24.12.2010. Thus, the Appellant had no option but to avail of MTOA to transmit 230.55 MW power from its generating station, which was ready well in time before PGCIL could operationalize the LTA. Had PGCIL operationalized LTA in a timely fashion, there would not have been any need for the Appellant to apply for MTOA at all. To add insult to injury, PGCIL has also levied Delay Payment Surcharge on the Appellant in respect of periods when Petition No. 240/MP/2017 was sub judice before the Central Commission, which is impermissible under the Connectivity Regulations.

2.6 In the above context, the following issues arise for this Tribunal's consideration:

a. Whether the Appellant's actions in the instant case amount to a relinquishment of MTOA under law to attract relinquishment charges?

b. Whether it is permissible for PGCIL to double charge the Appellant under Regulation 24 of the Connectivity Regulations for MTOA relinquishment charges as well as LTA charges for overlapping transmission capacity over the same transmission elements for power being transmitted to the very same beneficiary in the same time period?

c. Whether the Central Commission erred in losing sight of the fact that Regulation 15B of the Connectivity Regulations is merely clarificatory in nature?

d. Whether PGCIL is entitled to levy delay payment surcharge on MTOA relinquishment charges, if any?

2.7 The detailed submissions on behalf of the Appellant on the above issues are set out in the following paragraphs.

The Appellant's action does not amount to a relinquishment of MTOA as no transmission capacity was in fact abandoned

2.8 It is submitted that the Appellant did not abandon any transmission capacity to become liable to pay MTOA

relinquishment charges. The Appellant merely converted its MTOA into LTA once PGCIL was prepared to operationalise the Appellant's LTA. The word "Relinquishment" has been defined in Black's Law Dictionary, 6th Ed., to inter alia, mean as follows:

"*A forsaking, abandoning, renouncing, renounce some right or thing.*"

The Hon'ble Supreme Court of India in *Commissioner of Income Tax, Bombay v. RasiklalManeklal (HUF) and Others*; reported in (1989) 2 SCC 454, has defined "relinquishment" as follows:

> "*9. On the question whether there was any relinquishment, the decision must again be against the revenue. A relinquishment takes place when the owner withdraws himself from the property and abandons his rights thereto. … …*"

From the aforesaid, it is quite clear that there has to be a conscious act of abandonment or withdrawal of a right to qualify as "relinquishment". This has certainly not happened in the present case. On the contrary, the right of open access has been strengthened and extended for a longer duration from MTOA to the LTA. Therefore, Regulation 24 of the Connectivity Regulations dealing with exit option of the MTOA customers has not been triggered. The jurisdictional fact or condition precedent for invocation of Regulation 24 of the Connectivity is non-existent as there is no abandonment whatsoever by the Appellant. There has to be a clear abandonment of right and not the extension or improvement of the right for seeking relinquishment charges under the exit clause.

2.9 It is submitted that PGCIL clearly contemplated the termination/ downsizing of the MTOA capacity once the Appellant's LTA was operationalised. It is stated that in the grant of MTOA to the Appellant by PGCIL dated 10.09.2015 [*Kindly see pg. 72 @ pg. 74*], PGCIL of its own accord inserted Note 4, which is excerpted below:

"4. The granted MTOA is liable for termination/downsizing with notice period of 01 month, if the LTA applications granted on target beneficiary basis firm up long term PPA and are operationalised during the period of MTOA"

2.10 The very same condition was incorporated as Recital D into the MTOA agreement dated 06.10.2015 [*Kindly see pg. 76 @ pg. 77 of the Appeal*] executed between the Appellant and PGCIL. In this regard, it is stated and submitted that the fundamental objective underpinning Note 4 is to prevent the MTOA and LTA being operationalized for the same entity qua the same transmission line. Therefore, PGCIL itself contemplated a situation where the Appellant's MTOA would be converted into LTA once LTA got operationalised. In this sense, Note 4 is nothing but a manifestation of the embargo on double charging articulated in Regulation 11 of the Sharing Regulations. The clear intention of the parties was that LTA and MTOA could not run parallelly as MTOA is granted only on the margins of an existing transmission system. Indeed, PGCIL could have terminated the MTOA agreement in accordance with Note 4 above once the Appellant's LTA was operationalised, but PGCIL failed to do so. In either case, it does not amount to a relinquishment as the

parties contemplated from the very beginning of the transaction that MTOA would be converted into LTA once PGCIL completed the relevant transmission elements.

2.11 PGCIL contends that the import of Note-4 and Recital D quoted hereinabove was to cater for the eventuality when MTOA could be curtailed to accommodate the operationalisation of LTA for entities who had been granted LTA on a "***target region***" basis where beneficiaries were yet to be identified. On this ground, PGCIL contends that Note-4 and Recital D were not intended for the Appellant since the Appellant had a firm beneficiary. It is submitted that by making this submission, PGCIL has conceded and admitted the entirety of the Appellant's case since the Appellant was in fact granted LTA only on a tentative target region basis, and not on a firm beneficiary basis. A perusal of S.No. 3 of Annexure – 1 to the Bulk Power Transmission Agreement dated 24.12.2010 ("**BPTA**") will reveal that the Appellant had been granted LTA on a target region basis being 1125 MW in the Southern Region and 115 MW in the Western Region.

2.12 The Appellant did not have any firm beneficiaries or have a power purchase agreement at the time when the BPTA was executed. Surprisingly, at para 23(i)of its Written Submissions dated 29.01.2019, PGCIL has made a factually incorrect statement that the Appellant had target beneficiaries when the LTA was granted. This statement is denied as misleading, false and contrary to the record. It is reiterated that the Appellant was in point of fact granted LTA only on a tentative target region basis as is borne out by a perusal of pg. 56 of the Appeal Paper Book. Specifically, the

column under which the quantum of LTA is set out clearly states in brackets that the Long-Term Access granted is to "*tentative beneficiaries*". The insertion of Note-4 and Recital D in which the word "relinquishment" is conspicuously absent (despite the existence of Regulation 24 of the Connectivity Regulations as on the date when the MTOA was granted to the Appellant) evidences the fact that the parties expressly agreed that the MTOA would be terminated/ downsized and no relinquishment charges would be levied when the Appellant migrated from MTOA to LTA. PGCIL cannot be permitted to resile from this express contractual agreement to levy relinquishment charges. PGCIL has conceded that this provision applies to LTA applicants who were granted LTA on a target region basis. It is incontrovertible that the Appellant was granted LTA on a target region basis, as is borne out from Annexure 1 of the BPTA. The instant Appeal ought to be allowed on this ground alone.

2.13 Thus, it is submitted that PGCIL deliberately inserted Note-4 and Recital D precisely to deal with a situation such as the Appellant's where MTOA was being terminated/ downsized since LTA was operationalised. It is not a case of relinquishment and no relinquishment charges can be levied.

2.14 It is submitted that relinquishment charges are nothing but a species of transmission charges which are levied with a view to compensate PGCIL for the cost of the transmission assets built by it. The levy of relinquishment charges would be legitimate when PGCIL stands to suffer a loss due to the stranding of transmission capacity occasioned by a party's termination of a

contract. Thus, if a party simply relinquishes its MTOA pre-maturely without having any LTA contract over the same transmission capacity, the levy of relinquishment charges is legitimate to compensate PGCIL as there is a possibility of under-recovery of MTOA charges in such a circumstance. In the instant case, PGCIL suffers absolutely no loss as it is levying and being paid full LTA charges for the very same transmission capacity on the same transmission elements in respect of a common time period. On the contrary, PGCIL makes a windfall profit at the Appellant cost by penalising the Appellant for no fault of its own.

2.15 For that it is a settled principle of law that a provision of a statute specifying levy of charges has to be strictly construed, and for the said reason the requirement of the trigger event which in the present case has to be relinquishment/ abandonment of access right must be satisfied. Since in the present matter, the Appellant continues to enjoy the right to open access for conveyance of power (qua the same beneficiary and PPA), no case of relinquishment, whatsoever, can be made out against the Appellant. Thus, PGCIL cannot levy relinquishment charges on the Appellant for termination of MTOA on account of operationalization of its LTA for the same transmission corridor/ region. The Appellant has merely migrated from one open access product (MTOA) to another (LTA), and no transmission capacity is stranded.

Double billing the Appellant for MTOA Relinquishment Charges as well as LTA Charges for the same transmission capacity is contrary to the Sharing Regulations

2.16 It is submitted that the Central Commission erred in adopting a narrow interpretation of Regulation 24 of the Connectivity Regulations by reading it in a vacuum, and not in light of the broader regulatory regime governing the levy of transmission charges. It is submitted that under Regulation 11 of the Sharing Regulations, an LTA applicant is to be granted a set off for the MToA charges against the LTA charges paid by it in order to prevent double charging of transmission charges for an overlapping capacity. It would result in an absurdity if MTOA charges are not levied for live MTOA transactions overlapping with payment of LTA charges over the same corridor, but are suddenly and inexplicable foisted on a consumer when MToA is terminated. There is no justification whatsoever for why such MToA charges are leviable despite the fact that the Appellant is paying LTA charges. Since Regulation 11 imposes an express embargo on double charging of transmission charges, the interpretation adopted by the Central Commission in the Impugned Order is wrong and ought to be set aside. A perusal of PGCIL's own bills raised for the month of July, 2016 dated 03.08.2016, when both LTA and MTOA transactions were operational simultaneously (i.e. a period where MTOA was not relinquished by the Appellant), evidences the fact that only LTA charges were levied and MTOA charges were not separately levied.

2.17 In its Reply, PGCIL contends that the Appellant's argument that the imposition of relinquishment charges as well as transmission charges have resulted in its double billing is legally untenable. In light of the fact that the bill dated 22.9.2016 was for the relinquishment of MTOA in accordance with Regulation 24 of the Connectivity Regulations and the recovery of transmission charges is for the grant of LTA, PGCIL contends that there was no double billing. Relying on Regulation 11 of the Sharing Regulations, PGCIL argues that the bills issued by it were in consonance with the Point of Connection ("**POC**") mechanism envisaged there under.

2.18 It is submitted that Regulation 11(5) and Regulation 11(9) of the Sharing Regulations makes clear that a generator has to pay POC charges for the LTA granted to it after offsetting the MTOA charges paid. The said set-off is contemplated in the following provisions which are excerpted below:

*"**11. Billing***

(5) xxx

Provided that the revenue collected from the approved additional Medium-term injection, which has not been considered in the Approved Injection/Approved Withdrawal, shall be reimbursed to the DICs having Long-term Access in the following month, in proportion to the monthly billing of the respective month:

Provided further that the Withdrawal PoC charges for Medium-term Open Access to any region shall be adjusted against Injection PoC charges for the Long-term Access to the target region without identified beneficiaries:

Provided also that a generator who has been granted Long-term Access to a target region shall be required to pay PoC

injection charge for the remaining quantum after offsetting the quantum of Medium-term Open Access:

Provided also that where a generator is liable to pay withdrawal charges for the specified quantum as per the terms of any MTOA contract, then injection charges for same quantum of power shall be offset against LTA granted.]

(9) xxx

Provided that the DICs which were granted LTA to a target region and are paying injection charges for Long Term Access, the injection PoC Charges and Demand PoC Charges paid for Short Term Open Access to any region shall be adjusted in the following month against the monthly injection PoC Charges for Approved injection:

Provided further that agenerator, who has been granted Long-term Access to a target region, shall be required to pay PoC injection charge for the Approved injection for the remaining quantum after offsetting the charges for Medium-term Open Access, and Short-term open access:

Provided also that the injection PoC charge or withdrawal PoC charges for Short term open access given to a DIC shall be offset against the corresponding injection PoC charges or Withdrawal PoC charges to be paid by the DICs for Approved injection/Approved withdrawal corresponding to Net withdrawal (load minus own injection) considered in base case.""

2.19 It is stated and submitted that the singular purpose for the insertion of these provisos was to make it amply clear that a generator is empowered to claim credit for the LTA transmission charges already paid while being billed for MTOA charges so as to avoid double charging by PGCIL for LTA and MTOA simultaneously. Indeed, PGCIL has itself followed this position while raising the bill for the month of July, 2016 @ pg. 117 of the Appeal Paper Book when both LTA and MTOA were running simultaneously. This being the case, it is respectfully submitted

that the approach adopted by the Central Commission and proffered by PGCIL cannot be countenanced in light of the Sharing Regulations. The Connectivity Regulations and the Sharing Regulations need to be interpreted harmoniously.

Regulation 15 B of the Connectivity Regulations is clarificatory in nature and must therefore operate withretrospective effect

2.20 It is submitted that issue of conversion of MTOA to LTA is not expressly covered by Regulation 24 of the Connectivity Regulations. For this reason, the Central Commission had to issue a clarificatory amendment to the Connectivity Regulations in 2017 viz. Regulation 15B. The introduction of Regulation 15B merely articulates the harmonious construction of the Sharing Regulations and the Connectivity Regulations. Once it is accepted that the matter is not covered under an express regulation prior to the 2017 amendment, the regulatory powers available to the Central Commission under section 79(1)(c) of the Electricity Act, 2003, had to be invoked to resolve the issue and provide relief. Since there is full recovery of transmission charges on account of utilisation of LTA, the Central Commission erred in insisting that for the same service, MTOA charges have to be paid. Balancing of inter se rights in the absence of a specific regulation is at the core of the Central Commission ’s powers and functions.

2.21 The Central Commission erred in holding that Regulation 15B of the Connectivity Regulations, inserted on 17.02.2017, applies prospectively and is not clarificatory in nature. It is submitted that

Regulation 15B merely makes explicit the well settled principle that double levy of transmission charges for overlapping transmission elements is impermissible. By imposing an embargo on the imposition of relinquishment charges for terminating MTOA on the payment of LTA charges, the Central Commission has merely clarified the position which was already applicable under Regulation 11 of the Sharing Regulations. As Regulation 15B is clarificatory in nature, it would squarely apply to the Appellant's case and operate retrospectively.

2.22 In *Zile Singh v. State of Haryana &Ors.* (2004) 8 SCC 1, the Hon'ble Supreme Court had occasion to lay down the law on clarificatory amendments in the following terms:

"*14. The presumption against retrospective operation is not applicable to declaratory statutes...In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended…An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect. (ibid, pp.468-469)*.

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, Seventh Edition), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the Courts will give it

such an operation. In the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the Statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated (p.388). The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right (p.392).

…

21. In Allied Motors (P) Ltd. Vs. Commissioner of Income- tax, Delhi, (1997) 3 SCC 472, certain unintended consequences flew from a provision enacted by the Parliament. There was an obvious omission. In order to cure the defect, a proviso was sought to be introduced through an amendment. The Court held that literal construction was liable to be avoided if it defeated the manifest object and purpose of the Act. The rule of reasonable interpretation should apply.

"A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole."

…"

2.23 Thus, it is submitted that Regulation 15B, which merely clarifies that a double levy of transmission charges must not be carried out, ought to be given retrospective effect.

Imposition of Delayed Payment Surcharge

2.24 Last, it is submitted that PGCIL has looked to levy delay payment surcharge on the purported MTOA relinquishment charges. it is submitted that, in accordance with the BCD Procedure, Delayed Payment Surcharge is leviable only under subsisting contracts

where open access transactions are ongoing. In other words, the imposition of such surcharge is impermissible on relinquishment charges. Further, it is submitted that, in the event this Hon'ble Tribunal returns a finding in the Appellant's favour qua the imposition of relinquishment charges, the Delayed Payment Surcharge will not be leviable.

B. APPEAL NO. 16 OF 2018

3. **The Appellant has sought the following relief:-**

(a) allow the present Appeal and set aside the Impugned Order passed by the Central Commission in Petition no. 240/MP/2016;

(b) declare that the Appellant is not bound to pay any charges as regards the relinquishment of 230.55MW MToA granted to it by Respondent No. 2;

(c) Quash the invoices raised by Respondent no. 2 on the Appellant dated 22.9.2016 and 06.11.2017;

(d) Direct PGCIL to refund the amounts paid under protest by the Appellant as MToA relinquishment charges and surcharge thereon, along with interest; and

(e) pass such other and further orders / directions as this Tribunal may deem just and proper in the facts and circumstances of the case.

3.1 The Appellant has raised the following Questions of Law:-

A. Whether the CERC's conclusion that the Appellant is liable to pay MToA relinquishment charges under Regulation 24 of the Connectivity Regulations is not ex facie contrary to Regulation 11 of the Sharing Regulations which prevents the double billing of MToA and LTA charges over the same transmission corridor?

B. Whether the CERC erred in losing sight of the fact that Regulation 15B to the Connectivity Regulations is merely clarificatory in nature?

C. Whether the CERC erred in construing Regulation 24 of the Connectivity Regulations in a manner that brings it in conflict with Regulation 15B and ignored the principle that a statute has to be construed harmoniously?

D. Whether the CERC erred by empowering PGCIL to engage in 'double charging' of LTA and MToA charges for an overlapping transmission capacity over the same transmission corridor?

E. Whether the CERC erroneously held that the termination of the MToA would be governed exclusively by Regulation 24 of the Connectivity Regulations and not by Recital D of the MToA Agreement?

F. Whether PGCIL is entitled to levy delay payment surcharge on MToA relinquishment charges, if any?

Brief facts of the case:

3.2 The present appeal is filed by Thermal Powertech Corporation India Limited (hereinafter referred to as the **"Appellant/TPCIL"**) being aggrieved by the Order dated 30.10.2017 (hereinafter referred to as the **"Impugned Order"**) passed by the Central Electricity Regulatory Commission under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the **"Act"**). The Appellant is engaged in the business of generation and sale of electricity, and is a generating company in meaning of Section 2(28) of the Act.

3.3 The Central Electricity Regulatory Commission is the Respondent No. 1 (hereinafter referred to as the **"the Central Commission/ Respondent No.1"**).

3.4 The Respondent No. 2 is the Power Grid Corporation of India Ltd. (hereinafter referred to as **"Respondent No. 2/PGCIL")** which is an Inter-State Transmission Licensee as well as the Central Transmission Utility within the meaning of Section 38 of the Electricity Act, 2003.

3.5 The Appellant owns and operates a 1320 MW (2 X 660 MW) supercritical coal-fired plant in Krishnapatnam, SPSR Nellore District (**"Power Plant"**), which is connected to the Southern Grid

via the CTU's network. On 24.12.2010, the Appellant entered into a Bulk Power Transmission Agreement ("**BPTA**") with PGCIL for LTA to facilitate inter-State transmission of electricity from the Power Plant. Under the BPTA, PGCIL was required to operationalise the LTA within 45 months of its execution.

3.7. On 24.12.2010, Appellant/TPCIL entered into the Transmission Agreement ("**TA**") with PGCIL.

On 01.04.2013, the Appellant entered into a power purchase agreement ("**PPA**") with Central Power Distribution Company of Andhra Pradesh Limited, Eastern Power Distribution Company of Andhra Pradesh, Southern Power Distribution Company of Andhra Pradesh and Northern Power Distribution Company of Andhra Pradesh ("**AP Discoms**") for the supply of 500 MW of power.
Thereafter, on 18.02.2016, the Appellant entered into another long term PPA with the Southern Power Distribution Company of Telangana Limited and Northern Power Distribution Company of Telengana Limited("**Telangana Discoms**") for the supply of 570 MW of power.

Thereafter, Unit-I and Unit-II of the Power Plant were commissioned on 02.03.2015 and 15.09.2015 respectively.

On 30.07.2015, the Appellant applied for grant of MToA for 230.55 MW from its power plant to the AP Discoms. PGCIL, vide letter dated 10.09.2015, intimated the grant of 230.55 MW MToA for the period from January, 2016 to March, 2017 to the Appellant and requested the Appellant to sign an MToA agreement. Pursuant to

the grant of MToA, Appellant/TPCIL entered into an MToA agreement with PGCIL for transmission of 230.55 MW to AP Discoms for the period from January 2016 to March 2017 on 06.10.2015 ("**MToA Agreement**").

3.8 It is pertinent to note here that MToA Agreement clearly stipulates a condition for termination or downsizing of the MToA upon operationalization of LTA during the period of MToA. The relevant extracts of Recital D of the MToA are as follows:

"D. The grant of MTOA is subject to the condition specified at Note no. 4 of above mentioned intimation. The same is reproduced as below:

Note 4:

The granted MTOA is liable for termination / downsizing with notice period of 01 month, if the LTA applications granted on target beneficiary basis firm up long term PPA and are operationalized during the period of MTOA."

3.9 Subsequently, on 21.06.2016, PGCIL operationalized the Appellant's LTA of 1240 MW.

Pursuant to operationalization of LTA, on 09.08.2016, the Appellant/tpcil immediately informed and requested PGCIL for termination of its MToA of 230.55 MW.

3.10 However, PGCIL vide letter dated 06.09.2016, informed Appellant/TPCIL about acceptance of its request for relinquishment but declined its plea for non-applicability of relinquishment charges for MToA. PGCIL placed reliance on Regulation 24 of the Connectivity Regulations.

4.11 PGCIL vide its demand / invoice letter dated 22.09.2016 raised PoC bill for the month of August 2016 demanding Rs. 8,94,56,167/- (Rupees Eight crores ninety four lakhs fifty six thousand one hundred sixty seven only) towards transmission charges under the Central Electricity Regulatory Commission (Sharing of inter-State Transmission Charges & Losses) Regulations, 2010 ("**Sharing Regulations**").

3.12 Aggrieved by PGCIL's decision to double charge the Appellant for LTA charges and MToA relinquishment charges, the Appellant filed Petition No. 240/MP/2016 before the CERC on 21.11.2016.PGCIL filed a compliance Affidavit dated 23.08.2017 in response to the CERC's query as to how many users were affected by relinquishment charges under Regulation 24 of the Connectivity Regulations pursuant to MToA customers having sought relinquishment / surrender of MToA for operationalization of LTA under the same PPA. Vide the Impugned Order dated 30.10.2017, the CERC dismissed the petition and held that the Appellant is bound to pay relinquishment/transmission charges for the termination of the MToA on the ground that Regulation 24 of the Connectivity Regulations does not contemplate any exceptions to the payment of relinquishment charges.

3.13 It is submitted that the order passed by the Central Commission suffers from several grave infirmities which are outlined below.

Non-consideration of regulatory regime governing imposition of transmission charges:

3.14 It is submitted that the CERC grossly erred in reading Regulation 24 of the Connectivity Regulations in a narrow and isolated fashion. Regulation 24 is extracted below for convenient perusal:

"24. Exit option for medium-term customers

A medium-term customer may relinquish rights, fully or partly, by giving at least 30 days prior notice to the nodal agency:

Provided that the medium-term customer relinquishing its rights shall pay applicable transmission charges for the period of relinquishment or 30 days whichever is lesser."

3.15 It is submitted that it is a well settled principle in the regulatory regime governing the imposition of transmission charges that an applicant should not be billed twice for use of overlapping transmission capacity. In this regard, relevant provisions of the CERC (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 (**"Sharing Regulations**") are quoted below:

*"**2. Definitions***

*(c) **'Approved Injection'** means the injection in MW computed*

by the Implementing Agency for each Application Period on the basis of maximum injection made during the corresponding Application Periods of last three (3) years and validated by the Validation Committee for the DICs at the ex-bus of the generators or any other injection point of the DICs into the ISTS, and taking into account the generation data submitted by the DICs incorporating total injection into the grid:

*(f) **'Approved Withdrawal'** means the withdrawal in MW computed by the Implementing Agency for each application period on the basis of the actual peak met during the corresponding application periods of last three years and validated by the Validation Committee for any DIC in a control area after taking into account the aggregated withdrawal from all nodes to which DIC is connected and which affect the flow in the ISTS, and the anticipated maximum demand to be met as submitted by the DIC.*

11. Billing

(5) xxx

Provided that the revenue collected from the approved additional Medium-term injection, which has not been considered in the Approved Injection/Approved Withdrawal, shall be reimbursed to the DICs having Long-term Access in the following month, in proportion to the monthly billing of the respective month:

Provided further that the Withdrawal PoC charges for Medium-term Open Access to any region shall be adjusted against Injection PoC charges for the Long-term Access to the target region without identified beneficiaries:

Provided also that a generator who has been granted Long-term Access to a target region shall be required to pay PoC injection charge for the remaining quantum after offsetting the quantum of Medium-term Open Access:

Provided also that where a generator is liable to pay withdrawal charges for the specified quantum as per the terms of any MTOA contract, then injection charges for same quantum of power shall be offset against LTA granted.]

(9) xxx

Provided that the DICs which were granted LTA to a target region and are paying injection charges for Long Term Access, the injection PoC Charges and Demand PoC Charges paid for Short Term Open Access to any region shall be adjusted in the following month against the monthly injection PoC Charges for Approved injection:

Provided further that a generator, who has been granted Long-term Access to a target region, shall be required to pay PoC injection charge for the Approved injection for the remaining quantum after offsetting the charges for Medium- term Open Access, and Short-term open access:

Provided also that the injection PoC charge or withdrawal PoC charges for Short term open access given to a DIC shall be offset against the corresponding injection PoC charges or Withdrawal PoC charges to be paid by the DICs for Approved injection/Approved withdrawal corresponding to Net withdrawal (load minus own injection) considered in base case."

3.16 As a bare perusal of the aforementioned scheme makes amply clear, whenever an applicant pays transmission charges for one type of open access (long-term/medium-term/short-term), the same has to be offset against the transmission charges payable for any other kind of open access when the same transmission corridor is used. In the Appellant's case, had it not relinquished its MToA after the operationalisation of the LTA, the Sharing Regulations are designed to prevent the double levy of MToA and LTA, when LTA charges are being paid. Hence, the CERC's finding that MToA relinquishment charges are to be paid by the Appellant despite the fact that it is paying LTA charges is contrary to the regulatory scheme.

3.17 By granting its imprimatur to the imposition of transmission

charges for MToA for the same corridor for which the applicant is already paying LTA charges, the Central Commission adopted an approach which is wholly inconsistent with the express embargo on double charging clearly engrafted in the Sharing Regulations.

3.18 It is submitted that the Appellant's termination of the MToA was in accordance with the MToA Agreement. In light of the fact that the MToA agreement envisages termination of the MToA the moment LTA is operationalized, the Appellant's actions were in consonance with the MToA agreement. Indeed, the parties expressly acknowledged that there would be no need for the MToA once the LTA is operationalised, and provided for a termination of the same without any penal consequences. This being the case, the Central Commission grossly erred in ignoring an express stipulation under the MToA agreement and in upholding the penalization of the Appellant for termination of MToA.

Retrospective application of Regulation 15B of the Connectivity Regulations:

3.19 By way of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) (Sixth Amendment) Regulations, 2017, the Central Commission inserted Regulation 15B which reads as follows:

"15B. Firming up of Drawl or Injection by LTA Customers:

xxx

(2) An LTA Customer who is availing MTOA on account of non-operationalization of LTA granted to it, shall not be required to pay relinquishment charges towards relinquishment of MTOA if the LTA is operationalized during the subsistence of MTOA."

3.20 By the above provision, the Central Commission itself acknowledges and approves the patent injustice and arbitrariness in the levy of MToA relinquishment charges when LTA is operationalised and LTA charges are being paid by the Appellant. Even though this amendment was notified on 17.02.2017 i.e. after the commencement of this litigation, it is submitted that it is merely clarificatory in nature and is squarely applicable to the present dispute. Notably, Regulation 24 of the Connectivity Regulations contemplating MToA relinquishment charges has not been amended by the Central Commission. If the Central Commission's interpretation of Regulation 24 taken in the Impugned Order, that no exceptions exist to the levy of MToA relinquishment charges, is upheld then even the amended Regulation 15B would be rendered otiose.

3.21 In light of the fact that it is a well settled principle that double charging of any applicant is impermissible, it is stated and submitted that Regulation 15B only makes explicit a principle that has long been duly recognized under the Sharing Regulations. At most, it can be said that the amendment clarifies that the embargo on double charging will also apply in a fact situation in which an applicant decides to relinquish MToA on account of the due operationalization of LTA.

3.22 In light of the above, it is clear that Regulation 15B is merely

clarificatory in nature and does not bring about a substantive amendment in the legal position as regards the prohibition of double charging. Since it is a well settled principle that every clarificatory amendment applies retrospectively, it is stated and submitted that the Central Commission erred in holding that Regulation 15B will have no application in this case.

3.23 It is stated and submitted that the interpretation adopted by the Central Commission in the Impugned Order results in Regulation 24 and 15B being at loggerheads with each other. In light of the fact that it is a well settled principle that a regulatory scheme has to be construed harmoniously in order to give full effect to the intention of the legislature, the approach adopted by the Central Commission is bad in law on this count as well.

3.24 It is stated and submitted that PGCIL has not suffered any loss/damage on account of the Appellant's failure to pay transmission/ relinquishment charges for termination of MToA. Here it bears noting that the monthly transmission charges to be payable as per the Point of Connection (**"PoC"**) mechanism are same for both LTA and MToA. The Appellant is using PGCIL's transmission system and paying the same transmission charges against the LTA as would be payable for MToA. Since PGCIL is getting the same amount that it would have gotten if the Appellant had availed of MToA, it is stated and submitted that PGCIL would be double billing the Appellant if it is allowed to recover MToA relinquishment charges while also recovering LTA transmission charges. As a result, the order of the Central Commission is bad in law, inasmuch as it sanctions double billing by PGCIL. After

passage of the Impugned Order, PGCIL addressed a letter dated 06.11.2017 to the Appellant claiming MToA relinquishment charges along with late payment surcharge for the same aggregating Rs. 10,46,75,970 (Rupees Ten Crores Forty Six Lakhs Seventy Five Thousand Nine Hundred and Seventy Only). It is stated that the Billing, Collection and Disbursement Procedure approved by the Central Commission does not contemplate the levy of any delay payment surcharge on relinquishment charges. Delay payment surcharge is leviable only under subsisting contracts where open access transactions are ongoing. Hence, PGCIL's claim for delayed payment surcharge is contrary to law and illegal.

3.25 Without prejudice to its rights under law and under protest, the Appellant has paid the charges claimed by PGCIL and communicated the same to PGCIL vide its letter dated 13.11.2017.

3.26 Aggrieved by the Impugned Order dated 30.10.2017 of the 1st Respondent/the Central Commission, the Appellant has filed this instant Appeal.

4. Submissions of the learned counsel appearing for the Appellant:-

4.1 The Central Commission has held that the Appellant is liable to pay MTOA relinquishment charges even in cases where such relinquishment was only for operationalization of its long-term

access ("**LTA**") over the very same transmission elements to the same beneficiaries. The Central Commission interpreted Regulation 24 of Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in Inter-State Transmission and related matters) Regulations, 2009 ("**Connectivity Regulations**") to be a strictly mandatory provision to levy MTOA relinquishment charges in any and all circumstances with absolutely no exceptions. Thus, the Appellant was levied with MTOA relinquishment charges even though it did not in effect relinquish or abandon any transmission capacity. The Appellant merely converted its MTOA to LTA and continued to pay LTA charges for use of the said transmission capacity.

4.2 Powergrid Corporation of India Limited ("**PGCIL**"), Respondent No. 2 herein, is being unjustly enriched since it is recovering MTOA relinquishment charges as well as LTA charges for the same transmission capacity on the same transmission elements, without offering any extra service to the Appellant. PGCIL has suffered no loss whatsoever as a consequence of the Appellant using LTA in place of MTOA and is therefore making a windfall at the Appellant's expense. Such a position cannot be countenanced in law.

4.3 Further, the Central Commission lost sight of the fact that the CERC (Sharing of inter-State transmission charges & losses) Regulations, 2010 ("**Sharing Regulations**") expressly stipulate a set-off of MTOA charges against LTA charges when both open access products are operationalised over the same transmission elements. In other words, the Sharing Regulations provide that

when MTOA and LTA are simultaneously operational for a single user over the same transmission elements in order to transmit power to a common beneficiary, PGCIL will not be entitled to levy both MTOA as well as LTA charges as it would amount to double charging. In such a circumstance, the Sharing Regulations stipulate that the MTOA charges would be set off against the LTA charges being paid by the user. By sanctioning the simultaneous levy of LTA charges and MTOA relinquishment charges under Regulation 24 of the Connectivity Regulations, the Central Commission erroneously passed an order contrary to the import of the Sharing Regulations. The incongruity of the Central Commission's Order is explicit when viewed from the perspective that the Appellant would not have had to pay any MTOA charges if it had not formally relinquished its MTOA and simply left it to run in parallel to its LTA. Merely because the Appellant formally converted its MTOA into LTA so PGCIL could release such MTOA capacity on the margins of the transmission infrastructure in favour of any other desirous entity, and didn't keep the MTOA unnecessarily blocked, the Appellant is being penalised with relinquishment charges.

4.4 The Central Commission itself recognised the lacuna in Regulation 24 of the Connectivity Regulations and passed a clarificatory amendment expressly clarifying that MTOA relinquishment charges would not be levied when LTA is operationalised over the same transmission elements. By way of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) (Sixth Amendment) Regulations, 2017, the

Central Commission inserted Regulation 15B which reads as follows:

"15B. Firming up of Drawl or Injection by LTA Customers:
xxx
(2) An LTA Customer who is availing MTOA on account of non-operationalization of LTA granted to it, shall not be required to pay relinquishment charges towards relinquishment of MTOA if the LTA is operationalized during the subsistence of MTOA."

4.5 By the above provision, the Central Commission itself acknowledges and approves the patent injustice and arbitrariness in the levy of MTOA relinquishment charges when LTA is operationalised and LTA charges are being paid by the Appellant. Even though this amendment was notified on 17.02.2017 i.e. after the commencement of this litigation, it is submitted that it is merely clarificatory in nature and is squarely applicable to the present dispute. Notably, Regulation 24 of the Connectivity Regulations contemplating MTOA relinquishment charges has not been amended by the Central Commission. If the Central Commission's interpretation of Regulation 24 taken in the Impugned Order, that no exceptions exist to the levy of MToA relinquishment charges, is upheld then even the amended Regulation 15B would be rendered otiose.

4.6 Furthermore, the levy of MTOA relinquishment charges is especially egregious since the only reason the Appellant even applied for MTOA is because PGCIL delayed the commissioning of LTA that the Appellant had applied for. PGCIL admits at para 3 of its Reply dated 25.07.2018 that it had delayed the commissioning of the transmission elements it was obligated to commission, and

resultantly PGCIL was not in a position to operationalize the LTA in terms of the Bulk Power Transmission Agreement dated 24.12.2010 [*Kindly see pg. 48 of the Appeal]* and Transmission Agreement dated 24.12.2010 [*Kindly see pg. 64 of the Appeal]*. Thus, the Appellant had no option but to avail of MTOA to transmit 230.55 MW power from its generating station, which was ready well in time before PGCIL could operationalize the LTA. Had PGCIL operationalized LTA in a timely fashion, there would not have been any need for the appellant toapply for MTOA at all. To add insult to injury, PGCIL has also levied Delay Payment Surcharge on the Appellant in respect of periods when Petition No. 240/MP/2017 was sub judice before the Central Commission, which is impermissible under the Connectivity Regulations.

4.7 It is submitted that the Appellant did not abandon any transmission capacity to become liable to pay MTOA relinquishment charges. The Appellant merely converted its MTOA into LTA once PGCIL was prepared to operationalise the Appellant's LTA. The word "Relinquishment" has been defined in Black's Law Dictionary, 6th Ed., to inter alia, mean as follows:

"*A forsaking, abandoning, renouncing, renounce some right or thing.*"

The Hon'ble Supreme Court of India in *Commissioner of Income Tax, Bombay v. Rasiklal Maneklal (HUF) and Others*; reported in (1989) 2 SCC 454, has defined "relinquishment" as follows:

"*9. On the question whether there was any relinquishment, the decision must again be against the revenue. A relinquishment takes place when the owner withdraws himself from the property and abandons his rights thereto. … …*"

From the aforesaid, it is quite clear that there has to be a conscious act of abandonment or withdrawal of a right to qualify as "relinquishment". This has certainly not happened in the present case. On the contrary, the right of open access has been strengthened and extended for a longer duration from MTOA to the LTA. Therefore, Regulation 24 of the Connectivity Regulations dealing with exit option of the MTOA customers has not been triggered. The jurisdictional fact or condition precedent for invocation of Regulation 24 of the Connectivity is non-existent as there is no abandonment whatsoever by the Appellant. There has to be a clear abandonment of right and not the extension or improvement of the right for seeking relinquishment charges under the exit clause.

4.8 It is submitted that PGCIL clearly contemplated the termination/ downsizing of the MTOA capacity once the Appellant's LTA was operationalised. It is stated that in the grant of MTOA to the Appellant by PGCIL dated 10.09.2015 [*Kindly see pg. 72 @ pg. 74*], PGCIL of its own accord inserted Note 4, which is excerpted below:

"4. The granted MTOA is liable for termination/downsizing with notice period of 01 month, if the LTA applications granted on target beneficiary basis firm up long term PPA and are operationalised during the period of MTOA"

The very same condition was incorporated as Recital D into the MTOA agreement dated 06.10.2015 [*Kindly see pg. 76 @ pg. 77 of the Appeal*] executed between the Appellant and PGCIL. In this regard, it is stated and submitted that the fundamental objective underpinning Note 4 is to prevent the MTOA and LTA being operationalized for the same entity qua the same transmission line. Therefore, PGCIL itself contemplated a situation where the Appellant's MTOA would be converted into LTA once LTA got operationalised. In this sense, Note 4 is nothing but a manifestation of the embargo on double charging articulated in Regulation 11 of the Sharing Regulations. The clear intention of the parties was that LTA and MTOA could not run parallelly as MTOA is granted only on the margins of an existing transmission system. Indeed, PGCIL could have terminated the MTOA agreement in accordance with Note 4 above once the Appellant's LTA was operationalised, but PGCIL failed to do so. In either case, it does not amount to a relinquishment as the parties contemplated from the very beginning of the transaction that MTOA would be converted into LTA once PGCIL completed the relevant transmission elements.

4.9 At paras 17 and 23(iv) of its Written Submissions dated 29.01.2019, PGCIL contends that the import of Note-4 and Recital D quoted hereinabove was to cater for the eventuality when MTOA could be curtailed to accommodate the operationalisation of LTA for entities who had been granted LTA on a "***target region***" basis where beneficiaries were yet to be identified. On this ground, PGCIL contends that Note-4 and Recital D were not intended for the Appellant since the Appellant had a firm beneficiary. It is

submitted that by making this submission, PGCIL has conceded and admitted the entirety of the Appellant's case since the Appellant was in fact granted LTA only on a tentative target region basis, and not on a firm beneficiary basis. A perusal of S.No. 3 of Annexure – 1 to the Bulk Power Transmission Agreement dated 24.12.2010 ("**BPTA**") @ pg. 56 of the Appeal Paper book will reveal that the Appellant had been granted LTA on a target region basis being 1125 MW in the Southern Region and 115 MW in the Western Region.

4.10 The Appellant did not have any firm beneficiaries or have a power purchase agreement at the time when the BPTA was executed. Surprisingly, at para 23(i)of its Written Submissions dated 29.01.2019, PGCIL has made a factually incorrect statement that the Appellant had target beneficiaries when the LTA was granted. This statement is denied as misleading, false and contrary to the record. It is reiterated that the Appellant was in point of fact granted LTA only on a tentative target region basis as is borne out by a perusal of pg. 56 of the Appeal Paper Book. Specifically, the column under which the quantum of LTA is set out clearly states in brackets that the Long-Term Access granted is to "*tentative beneficiaries*". The insertion of Note-4 and Recital D in which the word "relinquishment" is conspicuously absent (despite the existence of Regulation 24 of the Connectivity Regulations as on the date when the MTOA was granted to the Appellant)evidences the fact that the parties expressly agreed that the MTOA would be terminated/ downsized and no relinquishment charges would be levied when the Appellant migrated from MTOA to LTA. PGCIL cannot be permitted to resile from this express contractual

agreement to levy relinquishment charges. PGCIL has conceded that this provision applies to LTA applicants who were granted LTA on a target region basis. It is incontrovertible that the Appellant was granted LTA on a target region basis, as is borne out from Annexure 1 of the BPTA @ pg. 56 of the Appeal Paper Book. The instant Appeal ought to be allowed on this ground alone.

4.11 Thus, it is submitted that PGCIL deliberately inserted Note-4 and Recital D precisely to deal with a situation such as the Appellant's where MTOA was being terminated/ downsized since LTA was operationalised. It is not a case of relinquishment and no relinquishment charges can be levied.

4.12 It is submitted that relinquishment charges are nothing but a species of transmission charges which are levied with a view to compensate PGCIL for the cost of the transmission assets built by it. The levy of relinquishment charges would be legitimate when PGCIL stands to suffer a loss due to the stranding of transmission capacity occasioned by a party's termination of a contract. Thus, if a party simply relinquishes its MTOA pre-maturely without having any LTA contract over the same transmission capacity, the levy of relinquishment charges is legitimate to compensate PGCIL as there is a possibility of under-recovery of MTOA charges in such a circumstance.In the instant case, PGCIL suffers absolutely no loss as it is levying and being paid full LTA charges for the very same transmission capacity on the same transmission elements in respect of a common time period. On the contrary, PGCIL makes a windfall profit at the Appellant cost by penalising the Appellant for no fault of its own.

4.13 For that it is a settled principle of law that a provision of a statute specifying levy of charges has to be strictly construed, and for the said reason the requirement of the trigger event which in the present case has to be relinquishment/ abandonment of access right must be satisfied. Since in the present matter, the Appellant continues to enjoy the right to open access for conveyance of power (qua the same beneficiary and PPA), no case of relinquishment, whatsoever, can be made out against the Appellant. Thus, PGCIL cannot levy relinquishment charges on the Appellant for termination of MTOA on account of operationalization of its LTA for the same transmission corridor/ region. The Appellant has merely migrated from one open access product (MTOA) to another (LTA), and no transmission capacity is stranded.

4.14 It is submitted that the Central Commission erred in adopting a narrow interpretation of Regulation 24 of the Connectivity Regulations by reading it in a vacuum, and not in light of the broader regulatory regime governing the levy of transmission charges. It is submitted that under Regulation 11 of the Sharing Regulations, an LTA applicant is to be granted a set off for the MToA charges against the LTA charges paid by it in order to prevent double charging of transmission charges for an overlapping capacity. It would result in an absurdity if MTOA charges are not levied for live MTOA transactions overlapping with payment of LTA charges over the same corridor, but are suddenly and inexplicable foisted on a consumer when MToA is terminated. There is no justification whatsoever for why such MToA charges

are leviable despite the fact that the Appellant is paying LTA charges. Since Regulation 11 imposes an express embargo on double charging of transmission charges, the interpretation adopted by the Central Commission in the Impugned Order iswrong and ought to be set aside. A perusal of PGCIL's own bills raised for the month of July, 2016 dated 03.08.2016 [*Kindly see pg. 117 of the Appeal*], when both LTA and MTOA transactions were operational simultaneously (i.e. a period where MTOA was not relinquished by the Appellant), evidences the fact that only LTA charges were levied and MTOA charges were not separately levied.

4.15 In its Reply, PGCIL contends that the Appellant's argument that the imposition of relinquishment charges as well as transmission charges have resulted in its double billing is legally untenable. In light of the fact that the bill dated 22.9.2016 [*Kindly see pg. 89 of the Appeal*] was for the relinquishment of MTOA in accordance with Regulation 24 of the Connectivity Regulations and the recovery of transmission charges is for the grant of LTA, PGCIL contends that there was no double billing. Relying on Regulation 11 of the Sharing Regulations, PGCIL argues that the bills issued by it were in consonance with the Point of Connection ("**POC**") mechanism envisaged thereunder.

4.16 It is submitted that Regulation 11(5) and Regulation 11(9) of the Sharing Regulations makes clear that a generator has to pay POC charges for the LTA granted to it after offsetting the MTOA charges paid. The said set-off is contemplated in the following provisions which are excerpted below:

*"**11. Billing***

(5) xxx
Provided that the revenue collected from the approved additional Medium-term injection, which has not been considered in the Approved Injection/Approved Withdrawal, shall be reimbursed to the DICs having Long-term Access in the following month, in proportion to the monthly billing of the respective month:

Provided further that the Withdrawal PoC charges for Medium-term Open Access to any region shall be adjusted against Injection PoC charges for the Long-term Access to the target region without identified beneficiaries:

Provided also that a generator who has been granted Long-term Access to a target region shall be required to pay PoC injection charge for the remaining quantum after offsetting the quantum of Medium-term Open Access:

Provided also that where a generator is liable to pay withdrawal charges for the specified quantum as per the terms of any MTOA contract, then injection charges for same quantum of power shall be offset against LTA granted.]

(9) xxx
Provided that the DICs which were granted LTA to a target region and are paying injection charges for Long Term Access, the injection PoC Charges and Demand PoC Charges paid for Short Term Open Access to any region shall be adjusted in the following month against the monthly injection PoC Charges for Approved injection:

Provided further that a generator, who has been granted Long-term Access to a target region, shall be required to pay PoC injection charge for the Approved injection for the remaining quantum after offsetting the charges for Medium-term Open Access, and Short-term open access:

Provided also that the injection PoC charge or withdrawal PoC charges for Short term open access given to a DIC shall

be offset against the corresponding injection PoC charges or Withdrawal PoC charges to be paid by the DICs for Approved injection/Approved withdrawal corresponding to Net withdrawal (load minus own injection) considered in base case.""

4.17 It is stated and submitted that the singular purpose for the insertion of these provisos was to make it amply clear that a generator is empowered to claim credit for the LTA transmission charges already paid while being billed forMTOA charges so as to avoid double charging by PGCIL for LTA and MTOA simultaneously. Indeed, PGCIL has itself followed this position while raising the bill for the month of July, 2016 @ pg. 117 of the Appeal Paper Book when both LTA and MTOA were running simultaneously. This being the case, it is respectfully submitted that the approach adopted by the Central Commission and proffered by PGCIL cannot be countenanced in light of the Sharing Regulations. The Connectivity Regulations and the Sharing Regulations need to be interpreted harmoniously.

4.18 It is submitted that issue of conversion of MTOA to LTA is not expressly covered by Regulation 24 of the Connectivity Regulations. For this reason, the Central Commission had to issue a clarificatory amendment to the Connectivity Regulations in 2017 viz. Regulation 15B. The introduction of Regulation 15B merely articulates the harmonious construction of the Sharing Regulations and the Connectivity Regulations. Once it is accepted that the matter is not covered under an express regulation prior to the 2017

amendment, the regulatory powers available to the Central Commission under section 79(1)(c) of the Electricity Act, 2003, had to be invoked to resolve the issue and provide relief. Since there is full recovery of transmission charges on account of utilisation of LTA, the Central Commission erred in insisting that for the same service, MTOA charges have to be paid. Balancing of inter se rights in the absence of a specific regulation is at the core of the Central Commission's powers and functions.

4.19 The Central Commission erred in holding that Regulation 15B of the Connectivity Regulations, inserted on 17.02.2017, applies prospectively and is not clarificatory in nature. It is submitted that Regulation 15B merely makes explicit the well settled principle that double levy of transmission charges for overlapping transmission elements is impermissible. By imposing an embargo on the imposition of relinquishment charges for terminating MTOAon the payment of LTA charges, the Central Commission has merely clarified the position which was already applicable under Regulation 11 of the Sharing Regulations. As Regulation 15B is clarificatory in nature, it would squarely apply to the Appellant's case and operate retrospectively.

4.20 In *Zile Singh v. State of Haryana & Ors.* (2004) 8 SCC 1, the Hon'ble Supreme Court had occasion to lay down the law on clarificatory amendments in the following terms:

"*14. The presumption against retrospective operation is not applicable to declaratory statutes...In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be*

without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended…An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect. (ibid, pp.468-469).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, Seventh Edition), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the Statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated (p.388). The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right (p.392).

…

21. In Allied Motors (P) Ltd. Vs. Commissioner of Income- tax, Delhi, (1997) 3 SCC 472, certain unintended consequences flew from a provision enacted by the Parliament. There was an obvious omission. In order to cure the defect, a proviso was sought to be introduced through an amendment. The Court held that literal construction was liable to be avoided if it defeated the manifest object and purpose of the Act. The rule of reasonable interpretation should apply.

"A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole."

…"

4.21 Thus, it is submitted that Regulation 15B, which merely clarifies that a double levy of transmission charges must not be carried out, ought to be given retrospective effect.

4.22 Last, it is submitted that PGCIL has looked to levy delay payment surcharge on the purported MTOA relinquishment charges. it is submitted that, in accordance with the BCD Procedure, Delayed Payment Surcharge is leviable only under subsisting contracts where open access transactions are ongoing. In other words, the imposition of such surcharge is impermissible on relinquishment charges. Further, it is submitted that, in the event this Tribunal returns a finding in the Appellant's favour qua the imposition of relinquishment charges, the Delayed Payment Surcharge will not be leviable.

5. **Submissions of the learned counsel appearing for the contesting Respondent "PGCIL/2nd Respondent" herein in both Appeals are as follows:-**

5.1 The Appellant in Appeal No.363/2017 has impugned the Order dated 17.10.2017 passed by the Respondent No.1/the Central Commission in Petition No.153/MP/2016 whereby, the Central Commission has held the Appellant liable to pay relinquishment charges in the sum of Rs.2.14 crores for surrendering the medium-term open access (MTOA) dated 22.7.2015 granted to it by Respondent No.2 upon operationalization of the long-term access

(LTA) dated 22.7.2017 for supply of 150MW power to the distribution company in Tamil Nadu.

5.2 The Appellant in Appeal No.16/2018 has impugned the Order dated 30.10.2017 passed by the Respondent No.1/ the Central Commission in Petition No.240/MP/2016 whereby, the Central Commission has held the Appellant liable to pay relinquishment charges in the sum of Rs.8.94 crores together with late payment surcharge of Rs.1.52 crores for terminating the 230.55MW MTOA granted to it by Respondent No.2 after operationalization of the LTA for the same quantum.

5.3 Thus, in both the Appeals (with their respective facts and contexts), the challenge is to the levy of relinquishment charges on the Appellants upon relinquishment of their respective MTOAs when the LTAs granted in their favour have been operationalized by Respondent No.2. The contention, inter alia, is that the MTOAs have been sought on account of the non-availability of corridor for power transfer by use of LTAs. When once the corridor has been available for operationalization of the LTAs, the same power has continued to be transmitted through use of the same transmission corridor to the same entity. As such, while surrendering the MTOAs, there is no relinquishment of the corridor by the Appellants so as to entitle Respondent No.2 to levy any relinquishment charges upon the Appellants.

Regulatory scheme regarding grant of open access:

5.4 "Open access" is defined in Section 2(47) of the Electricity Act, 2003 (hereinafter, the "2003 Act") as under:

"(47) "open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;"

A power generator supplies power to its beneficiaries by use of this open access into the inter-State or intra-State transmission system by connecting its generating station to the inter/intra-State grid through the dedicated system built by it.

5.5 Under Section 38(2) of the 2003 Act, Respondent No.2 has been designated as the Central Transmission Utility (CTU) and has been entrusted with the functions, inter alia, of,

(a) discharging all functions of planning and coordination relating to inter-State transmission system or the ISTS;
(b) ensuring development of an efficient, coordinated and economical system of ISTS for smooth flow of electricity from generating stations to the load centres; and
(c) providing non-discriminatory open access to its transmission system for use by any licensee or generating company (or a consumer) on payment of the transmission charges as specified by the Respondent No.1/the Central Commission.

5.6 Thus, providing non-discriminatory open access to its transmission system as per the Regulations framed by the Respondent No.1/the Central Commission for use, inter alia, by any licensee or a generating company on payment of transmission charges, is the statutory mandate for Respondent No.2 acting as the designated

CTU. The said statutory mandate is reiterated for Respondent No.2 as a transmission licensee in Section 40(c)(i) of the Act. Respondent No.2 is thus necessarily to ensure that its transmission lines are available in a non-discriminatory manner for use by any licensee or generating company through open access on payment of transmission charges and for that purpose, comply with the Regulations framed by the Respondent No.1/ Central Commission in that behalf.

5.7 Importantly, the 2003 Act [in its Section 10(3)] also casts a corresponding obligation on the generators to co-ordinate with the CTU for transmission of electricity generated by it. This includes firming up of buyer(s) in anticipated region(s) and coordinating with the CTU for evacuation of power to the said buyer(s) in the given region(s) through its transmission lines. It is with the co-joint operation of Section 38(2) and Section 10(3) of the Act that open access in ISTS is granted to a generator as part of coordinate transmission planning in ISTS. The various Joint Coordination Committee Meetings of constituents in different regions held from time to time together with the participation of long-term customers are in furtherance of the above scheme for open access laid down under the 2003 Act to ensure an efficient, coordinated and economic system of ISTS for smooth flow of power from the generating stations to load centers.

5.8 Under Section 79 of the 2003, the Respondent No.1/the Central Commission is enjoined with the function, inter alia, of regulating the inter-State transmission of electricity. Subsequent to the passing of the 2003 Act and in exercise of the rule-making power

conferred upon it under Section 178, the process for granting and regulating open access in ISTS was initiated by the Respondent No.1/ Central Commission by notifying the CERC (Open Access in inter-State Transmission) Regulations, 2004 whereunder detailed provisions for grant of access to ISTS were made. The transmission customers under the said Regulations were divided into two categories, namely, long-term customers and short-term customers. The persons availing or intending to avail access to the ISTS for the period of 25 years or more were to be the long-term customers and all transmission customers other than long-term customers were to be the short-term customers provided that the maximum duration for which short-term access could be allowed at a time was not to exceed one year. The criteria for allowing transmission access was that while long-term access could be allowed in accordance with the transmission planning criteria stipulated in the Grid Code, short-term access could be allowed if request could be accommodated by utilizing the margins. The ISTS was thus to be utilized primarily for transmission of power through long-term access, while short-term access could be availed on the available margins. The allotment priority of long-term customers was to be higher than reservation priority of short-term customers.

5.9 The above Regulations have since then been replaced by the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (“Connectivity Regulations”). Under the said Regulations (which are presently in force), the Central Commission has created a new category of open access, namely, “medium-

term open access" where the use of ISTS is to be for a period exceeding three months but not exceeding three years. Long-term access has been modified to mean the use of ISTS for a period exceeding 12 years but not exceeding 25 years. Planning for augmentation of transmission system for transmission access has continued to be linked to long-term access only. Both medium-term and short-term access can use the available margins in the inter-State transmission capacity and hence, no transmission system is required to be augmented for such type of open access:

"9. Criteria for granting long-term access or medium-term open access
(1) Before awarding long-term access, the Central Transmission Utility shall have due regard to the augmentation of inter-State transmission system proposed under the plans made by the Central Electricity Authority.
(2) Medium-term open access shall be granted if the resultant power flow can be accommodated in the existing transmission system or the transmission system under execution:
Provided that no augmentation shall be carried out to the transmission system for the sole purpose of granting medium-term open access:……."

Respondent No.2 as the CTU is designated as the Nodal Agency for grant of connectivity, LTA and MTOA to the ISTS [Regulation 4] to whom applications for the said grant are required to be made [Regulation 5].

5.10 The procedure for grant of LTA is laid down in Regulation 12 of the Connectivity Regulations which requires an application to be made in prescribed format. Regulation 13 further requires that upon receipt of the application, the Nodal Agency (i.e. Respondent No.2 herein) is to carry out the system studies. Thereafter, the grantee

of LTA is required to sign a Long-term Access Agreement (LTAA) or a Bulk Power Transmission Agreement (BPTA) with the CTU in accordance with the provisions under the Detailed Procedure [Regulation 15]. A perusal of these provisions shows that,

(i) whenever an application for grant of LTA is received for transmission of power either on target region basis or from specified point of injection to specified point of drawal, Respondent No.2 as the CTU/Nodal Agency is required to conduct a system study to ascertain the requirement, if any, for system augmentation;

(ii) if the system studies reveals that the power transfer envisaged under the LTA application causes congestion at one or more ISTS corridors, then optimal augmentation to relieve those congestions are evolved through the studies. No valid application for grant of LTA can be refused on account of congestion or, in other words, on account of lack of transmission infrastructure;

(iii) LTA is to be granted to an applicant either with the available transmission system or with such addition to the existing transmission system as is capable of catering to the applicant's power injection/drawal requirements; and

(iv) an applicant to whom LTA has been granted, is required to pay such transmission charges for the use of ISTS, which are payable as per prescribed methodology and for that purpose, enter into an LTAA/BPTA with Respondent No.2.

As per Regulation 7, an LTA application when received, is to be processed within 120 days if no transmission system augmentation

is required and within 180 days if transmission system augmentation is required.

5.11 Regulations 18 of the Connectivity Regulations makes provisions for relinquishment of LTA as under:

> ***"18. Relinquishment of access rights***
> *(1) A long-term customer may relinquish the long-term access rights fully or partly before the expiry of the full term of long-term access, by making payment of compensation for stranded capacity as follows:-"*

An LTA customer can thus relinquish its LTA rights either in full or in part before expiry of the term of LTA by paying compensation for stranded capacity. Relinquishment thus entails payment of a "compensation" for "stranded capacity". As per Regulation 18(3), the recipient of the relinquishment compensation are the other LTA customers and MTOA customers of ISTS, whose burden of additional transmission charges on account of relinquishment is required to be lessened.

5.12 The procedure for grant of MTOA is laid down in Regulations 19 to 21 of the Connectivity Regulations whereunder,

(i) the application for grant of MTOA is to contain such details as may be laid down under the Detailed Procedure and, in particular, include the point of injection into the grid, point of drawal from the grid and the quantum of power for which MTOA has been applied for;

(ii) on receipt of the application, the nodal agency, in consultation and through coordination with other agencies involved in ISTS to be used, is to process the application and

carry out the necessary system studies as expeditiously as possible so as to ensure that the decision to grant or refuse MTOS is made within the timeframe specified in Regulation 7;

(iii) on being satisfied that the requirements specified under clause (2) of Regulation 9 are met, the nodal agency is to grant MTOA for the period stated in the application; MTOA may also be granted for a period less than that sought for by the applicant;

(iv) the start date of MTOA is not to be earlier than 5 months and not later than 1 year from the last day of the month in which application has been made;

(v) the applicant is to sign an agreement for MTOA with Respondent No.2 in accordance with the provision made in the Detailed Procedure;

As per Regulation 7, an MTOA application when received, is to be processed within 40 days.

5.13 Regulations 24 of the Connectivity Regulations makes provisions for relinquishment of LTA as under:

> ***"24. Exit option for medium-term customers***
> *A medium-term customer may relinquish rights, fully or partly, by giving at least 30 days prior notice to the nodal agency:*
>
> *Provided that the medium-term customer relinquishing its rights shall pay applicable transmission charges for the period of relinquishment or 30 days whichever is lesser."*

Regulation 24 with "shall" appearing therein is mandatory in its operation. Unlike the relinquishment of LTA where the compensation payable is linked to the stranded capacity, relinquishment of MTOA entails a quantified compensation namely, applicable transmission charges for the period of relinquishment or 30 days whichever is lesser. The Connectivity Regulations have made a distinction between relinquishment of LTA and MTOA and such distinction, which is intra vires the 2003 Act, is to be given full effect to.

5.14 It is a settled principle that the text is to be read in the context in which it appears. Relinquishment in the context of access rights connotes giving up or surrendering of such rights. Neither under Regulation 18 nor under Regulation 24 is there any abandonment or waiver of such rights. All that happens upon relinquishment is that the entity in whose favour the right to use the ISTS for power transactions through use of long-term or medium-term open access exists under a grant by Respondent No.2, surrenders such rights to Respondent No.2. It follows that such surrender must necessarily be accompanied with payment of relinquishment charges as prescribed in the Regulations.

5.15 A perusal of the provisions of the Connectivity Regulations shows that LTA and MTOA are two different and distinct products for open access. The manner of their grant is different, their relinquishment is different and they are also processed separately as is evident from Regulation 10 below:

"10. Relative priority

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

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

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

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

……"

5.16 Further, the purpose of availing the LTA and MTOA differ: while LTA caters to the long-term power supply requirements, MTOA meets the interregnum requirements of power supply as also facilitates power market transactions. Seeking open access in a particular form is the decision of the applicant to be taken based on its requirements and the availability of the available transfer capacity in ISTS. An applicant may apply for LTA and MTOA simultaneously for supply of the same power to the same entity by using the same corridor (as is the case in Appeal No.363/2017) or an applicant may choose to apply for MTOA if, being an LTA grantee, it finds that the system availability under LTA is not coinciding with its contractual power supply obligations (as is the case in Appeal No.16/2018). In both the situations, there are two different and distinct open access grants with all its attendant

obligations to pay transmission/ relinquishment charges. When MTOA rights are relinquished upon operationalization of LTA, there is no "conversion" to a higher access and there is no case of MTOA being "subsumed" in the LTA. A relinquishment MTOA grantee cannot then be heard to contend that it is not liable to pay relinquishment charges since the supply of same power to the same entity continues by use of the same corridor, albeit under LTA.

5.17 There are occasions when the LTA is applied for on target region basis. Meaning thereby that the region for power supply is identified though the beneficiaries of power supply in that region are yet to be identified and contractual arrangements are yet to be entered into with them. The transmission system planning by Respondent No.2 takes place keeping in view the target region. When the LTA is ultimately operationalized upon identification of beneficiaries, then the subsisting MTOAs may be curtailed if required, to accommodate the now operationalized LTA which has priority over the use of transmission corridor. This curtailment in an existing MTOA is not akin to relinquishment or termination of an MTOA. Importantly, there cannot be any curtailment of an existing MTOA if the capacity in that same corridor has become available for operationalizing the LTA for supply of same power to the same beneficiary.

5.18 The Connectivity Regulations do not envisage grant of part LTA as has been held by the Respondent No.1/the Central Commission in its Order dated 16.2.2015 passed in Petition No.92/MP/2015: Kerela State Electricity Board vs. Power Grid Corporation of India

Ltd. & Ors.. The Central Commission has, however, held that in case of generating station multiple units, LTA "shall" be operationalized if the transmission system are available for evacuation of entire contracted power from a particular unit. Part grant of LTA is different from part operationalization of LTA: while the former is impermissible, the latter is mandated. This position has been upheld by this Tribunal in its Order dated 20.5.2015 passed in Appeal No.94/2015: Jindal Power Ltd. vs. Central Electricity Regulatory Commission & Ors. wherein this Tribunal has held [in para 59] that once LTA for the full quantum has been granted for a particular date, if due to delay in commissioning of transmission system the full quantum of LTA cannot be effected from that date, LTA can be operationalized in phases from the scheduled date depending on the availability of transmission capacity.

5.19 The Connectivity Regulations, as originally notified, have not contained a provision as regards migration from one form of access to the other. Vide the Sixth Amendment dated 17.2.2017 to the Connectivity Regulations, the following provision with respect to migration from MTOA to LTA has been inserted:

"15B. Firming up of Drawl or Injection by LTA Customers:
(1) The Long Term Access Customer who has been granted long term access to a target region shall, after entering into power purchase agreement for supply of power to the same target region for a period of not less than one year, notify the Nodal Agency about the power purchase agreement along with copy of PPA for scheduling of power under LTA:
Provided that scheduling of power shall be contingent upon the availability of last mile transmission links in the target region:

Provided further that on receipt of the copy of the PPA, CTU shall advise concerned RLDC for scheduling of power at the earliest, but not later than a period of one month:
Provided also that if the capacity required for scheduling of power under LTA has already been allocated to any other person under MTOA or STOA, then MTOA or STOA shall be curtailed in accordance with Regulation 25 of these Regulations corresponding to the quantum and the period of the PPA:
Provided also that where capacities under existing MTOA are curtailed for considering scheduling of power under the PPA of the Long term Access Customer, such MTOA customer shall be permitted to relinquish its MTOA without any relinquishment charges.
(2) An LTA Customer who is availing MTOA on account of non-operationalization of LTA granted to it, shall not be required to pay relinquishment charges towards relinquishment of MTOA if the LTA is operationalized during the subsistence of MTOA."

5.20 Thus, relinquishment of MTOA can be permitted without payment of relinquishment charges in the following circumstances:

(i) when capacities under existing MTOAs have been curtailed for considering scheduling of power under PPAs of LTA customers; and

(ii) when an LTA customer is availing MTOA on account of non-operationalization of LTA granted to it and the LTA is operationalized during the subsistence of MTOA.

Except for the aforesaid, all relinquishment of MTOA is necessarily to be alongwith payment of relinquishment charges. Importantly, the above amendment in the Connectivity Regulations is prospective in its operation and cannot be made applicable to MTOA relinquishments made prior thereto. The law is well settled that where a statutory provision which is not expressly made

retrospective by the legislature seeks to affect vested rights and corresponding obligations of parties, such provision cannot be said to have any retrospective effect by necessary implication.

Factual matrix in Appeal No.363/2017 and the impugned Order dated 17.10.2017:

5.21 The relevant factual matrix in the above Appeal is as under:

(i) in a bidding process initiated by TANGEDCO in 2012 for procurement of power 150 MW power on a long-term basis, the Appellant is declared a successful bidder and executes a Power Purchase Agreement with TANGEDCO;

(ii) on 27.11.2013, the Appellant submits an application to Respondent No.2 for grant of MTOA for the period from 1.6.2014 to 31.5.2017*;*

(iii) after having applied for grant of MTOA, the Appellant also makes an application dated 18.12.2013 to Respondent No.2 for grant of LTA for the same 150 MW power to be supplied to TANGEDCO. Thus, acting in its own commercial wisdom and despite being fully aware that LTA and MTOA are two different and distinct types of access under the Connectivity Regulations with separate rights and obligations attached thereto, the Appellant chooses to seek both LTA and MTOA rights from Respondent No.2 to “secure” the transmission corridor for transfer of 150 MW power to TANGEDCO under the PPA executed with it;

(iv) the above applications of the Appellant are discussed in the Meeting of Western and Southern Region constituents held on 15.7.2015; In the said Minutes, the Appellant categorically

states that MTOA may be granted as per its application made in November, 2013 and it would relinquish MTOA rights and pay the applicable relinquishment charges in line with the Regulations as and when the LTA for the application made in December, 2013 is operationalised. At that time, the Sixth Amendment to the Connectivity Regulations is not in place and even otherwise, the said Amendment is not applicable to the Appellant's case as there is no curtailment of MTOA capacities considering scheduling of power under PPAs of LTA customers taking place and the Appellant is not availing MTOA on account of non-operationalization of LTA;

(v) vide letter dated 22.7.2015, the Appellant is granted MTOA for 150 MW for the period from 1.8.2014 to 31.5.2017, subject to signing of the requisite MTOA Agreement and fulfillment of other conditions intimated in the grant;

(vi) vide letter dated 22.7.2015, the Appellant is also granted LTA for transfer of 150 MW from its generation project in Maharashtra to Tamilnadu. The said LTA grant is made with the following specific conditions:

> *"2. As decided in the meeting held on 15.07.2015 for processing of pending LTA & MTOA applications received in Nov' 13 & Dec' 13, the; above grant of LTA shall not be operationalized until the earlier granted MTOA of 150 MW for the same PPA against the application made in Nov' 13 is relinquished. …….*
> *5. That the above LTA is being granted with the condition that the applicant shall pay relinquishment charges corresponding to 150 MW from WR as may be decided by CERC in Petition No.92/MP/2015.";*

(vii) pursuant to the aforesaid grants, the Appellant executes with Respondent No.2 the MTOA Agreement on 4.8.2015 and also the LTA Agreement on 11.8.2015;

(viii) vide letter dated 18.8.2015 , Respondent No.2 informs the Appellant that the LTA is expected to be operationalized by October, 2015 subject to the Appellant relinquishing the MTOA of 150 MW granted for the same PPA and upon payment of relinquishment charges corresponding to 150 MW MTOA;

(ix) vide its letter dated 20.8.2015, the Appellant submits to Respondent No.2, letter of credit in the sum of Rs.901.03 lakhs under the MTOA granted to it;

(x) vide letter dated 28.8.2015, Respondent No.2 informs the Appellant that operationalization of LTA granted for 150 MW is subject to relinquishment of 150 MW earlier granted MTOA, therefore, the letter of credit opened for 150 MW MTOA can be considered for 150 MW LTA after relinquishment of 150 MW MTOA;

(xi) vide letter dated 13.10.2015, the Appellant requests Respondent No.2 to operationlise the MTOA for 150 MW against the TANGEDCO PPA;

(xii) vide letter dated 19.10.2015, Respondent No.2 informs the Appellant that in view of the availability of 170 MW Available Transfer Capability (ATC) for operationalization of MTOA granted to the applications received in November, 2013, operationalization of part MTOA of 56 MW is permitted for evacuation of power from the Appellant's power plant to TANGEDCO/Tamil Nadu with immediate effect. It is further informed that further enhancement in operationalization of

MTOA is to be done progressively based on increase in ATC and margins available in the Grid;

(xiii) in its letter dated 30.10.2015, the Appellant agrees with Respondent No.2 for operationalization of the remaining quantum of 94 MW of MTOA as soon as the ATC is available and also agrees that its MTOA as and when LTA is operationalized, may be "short closed" for the balance period of the grant and treated as per the provisions of the Regulations;

(xiv) the MTOA operationalization is further enhanced by 65 MW under intimation dated 30.11.2015 of Respondent No.2 and the balance quantum of 29 MW MTOA is subsequently operationalized under intimation dated 14.12.2015 of Respondent No.2. In this manner the entire 150 MW MTOA is operationalized for evacuation of power from the Appellant's power plant to TANGEDCO w.e.f. 16.12.2015;

(xv) with the commissioning of Narendra-Kolhapur line and the consequent availability of ATC, Respondent No.2 intimates the Appellant as regards the LTA operationalization of full quantum of LTA of 150 MW w.e.f. 16.12.2015. The operationalization of LTA is subject to signing of relevant Agreements and establishment of payment security mechanism as per the applicable Regulations of the Respondent No.1/ the Central Commission and directions issued from time to time and as per the terms and conditions specified in the intimation for grant;

(xvi) the Appellant vide its letter dated 17.12.2015, requests Respondent No.2 to close the MTOA and operationlise the LTA; however, contrary to the provisions of the Connectivity

Regulations and the conditions of the LTA grant, the Appellant requests for "waiver" of relinquishment charges arising out of closure/relinquishment of the MTOA;

(xvii) vide its letter dated 30.12.2015, Respondent No.2 clarifies that LTA has been granted subject to relinquishment of MTOA on payment of relinquishment charges and that there is no provision under the Regulations for exemption of relinquishment charges upon relinquishment of MTOA subsequent to the operationalization of LTA for the same quantum and same transaction;

(xviii) vide intimation dated 15.1.2016, Respondent No.2 operationalizes the full quantum of LTA of 150 MW granted to the Appellant w.e.f. 22.1.2016 for evacuation of power to TANGEDCO. Respondent No.2 also informs the Appellant that the MTOA granted for 150 MW on 22.7.2015 stands relinquished for full quantum w.e.f. 22.1.2016 and that the Appellant is required to pay applicable relinquishment charges in line with Regulation 24 of the Connectivity Regulations;

(xix) Respondent No.2 raises an invoice dated 9.6.2016 in the sum of Rs.21,471,750/- towards payment of relinquishment charges for the 150 MW MTOA relinquished by the Appellant;

(xx) instead of paying the aforesaid relinquishment charges, the Appellant files a Petition before the Respondent No.1/the Central Commission seeking a declaration that it is not liable to pay relinquishment charges as demanded by Respondent No.2 and for quashing of the invoice;

(xxi) Respondent No.2 files a detailed Reply to the said Petition, setting out the regulatory mechanism as also the grant of access rights made to the Appellant, submitting that the Appellant's Petition seeking the reliefs therein is not maintainable and is liable to be dismissed;

5.22 Vide the impugned Order dated 17.10.2017, the Respondent No.1 Commission observes and holds as under:

"17. ……. In our view, the language of Regulation 24 is couched in absolute terms and does not admit any conclusion/interpretation which partly or fully exempts the MTOA customer from payment of relinquishment charges, if the capacity covered under MTOA is utilized for LTA. Further, MTOA application and the LTA application of the Petitioner were independent of each other, though made for the same capacity. The Petitioner has applied for MTOA for the period of three years expecting that it might not get LTA for the said capacity before three years. Further, period of grant of MTOA has not been made subject to the date of operationalization of LTA. Grant of MTOA to the Petitioner is unconditional and therefore, no condition can be attached to the relinquishment of the said MTOA. Regulation 24 does not require the CTU to prove the losses for payment of relinquishment charges. Unlike the case of LTA, it is not linked to stranded capacity. Therefore, the condition of stranded capacity or losses suffered is not a pre-condition for payment for relinquishment charges under Regulation 24 of the Connectivity Regulations.

18. It is pertinent to mention that the Petitioner has been put on notice at every stage that it would be liable to pay the relinquishment charges, should it relinquish the MTOA before the expiry of the period of MTOA. These are listed as under: …….

Therefore, the Petitioner is well aware that it would be required to pay the relinquishment charges for relinquishment of the MTOA. In our view, the invoice raised by PGCIL for payment of relinquishment charges for

relinquishment of MTOA is in accordance with the applicable provision of the Connectivity Regulations.

19. The Commission through Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) (Sixth Amendment) Regulations, 2017 has amended the Connectivity Regulations as under:-

…….

This amendment was notified on 17.2.2017. The amendment is prospective in nature and cannot be operated retrospectively to exempt the Petitioner for payment of relinquishment charges. In our view, the Petitioner cannot be granted any relief in terms of the said amendment, as it will result in retrospective operation of the regulations which is not the intent of the amendment. Accordingly, we are not inclined to grant the first prayer of the Petitioner and hold that the Petitioner is liable to pay the applicable relinquishment charges as per Regulation 24 of the Connectivity Regulations.

20. We have held that the Petitioner is liable to pay the relinquishment charges as per Regulation 24 of the Connectivity Regulations. Since, the invoice has been raised by PGCIL in terms of Regulation 24 of the Connectivity Regulations read with relevant provision of the Sharing Regulations, we find no basis to interfere with the invoice issued by PGCIL."

In this manner and following the provisions of the Connectivity Regulations and taking into account the Appellant's unequivocal representations as regards relinquishing its MTOA right, the Respondent No.1/the Central Commission rightly rejects the Appellant's claim and directs payment of relinquishment charges as per the invoice raised by Respondent No.2. There is no infirmity in the impugned Order of the Respondent No.1/the Central Commission so as to warrant any interference from this Tribunal.

Factual matrix in Appeal No.16/2018 and the impugned Order dated 30.10.2017:

5.23 The relevant factual matrix in the above Appeal is as under:

(i) for evacuating power from its 1320 MW (2x660 MW) generating station, the Appellant applies for and is granted LTA by Respondent No.2 with target beneficiaries as Southern Region-1125 and Western Region-115 MW;

(ii) pursuant to the said grant, the Appellant executes a Bulk Power Transmission Agreement (BPTA) dated 24.12.2010 with Respondent No.2 for a period of 25 years. As per the LTA grant and as Annexure-1 to the BPTA, the start date of the LTA is January, 2014 from when the 1st unit of the Appellant's project is to be commissioned or availability of identified transmission system for grant of LTA, whose scheduled commissioning date is September, 2014;

(iii) the generation project as well as the associated transmission system gets delayed from their respective schedules. The 1st unit of the Appellant's project is commissioned in March, 2015 and the common transmission system is commissioned progressively from September, 2014 onwards with the last element being commissioned in December, 2015;

(iv) vide letter dated 30.7.2015, the Appellant applies to Respondent No.2 for grant of MTOA for 230.55 MW power from its power plant to the distribution company of Andhra Pradesh for the period from 1.1.2016 to 31.3.2017. Respondent No.2 processes the said application and based on the margins, grants the said MTOA to the Appellant vide

intimation dated 10.9.2015. The grant is made subject to signing of the requisite MTOA Agreement and fulfillment of other conditions as stipulated in the intimation and the Connectivity Regulations. One of the conditions of the MTOA grant is as under:

> *"iv. The granted MTOA is liable for termination/ downsizing with notice period of 01 month, if the LTA applications granted on target beneficiary basis firm up long term PPA and are operationalized during the period of MTOA."*

The aforesaid condition thus contemplates termination/ downsizing of the MTOA on operationalization of those LTAs which have been granted on target region basis and have subsequently firmed up long-term PPAs. The conditionality of termination/downsizing nowhere contemplates any termination/downsizing of MTOA upon operationalization of the Appellant's LTA. The Appellant already has a firm PPA qua which it has obtained the MTOA. It follows that when there is no termination/downsizing of MTOA on the happening of the event specified in condition (iv) of the MTOA grant made to the Appellant, then the matter falls within the realm of relinquishment and for which the Appellant is to be liable to pay mandatory relinquishment charges under the provisions of the Regulation 24 of the Connectivity Regulations;

(v) after the grant of MTOA, the Appellant enters into an MTOA Agreement dated 6.10.2015 with Respondent No.2 wherein it is reiterated in Recital D as under:

"D. The grant of MTOA is subject to the condition specified at Note no.4 of above mentioned intimation. The same is reproduced as below:"

Thus, contractually also, the Appellant agrees with Respondent No.2 that there can be a termination/downsizing of the MTOA in the event the LTA applications granted on target beneficiary basis firm up long-term PPAs and are operationalized during the period of MTOA. Like the MTOA grant intimation, the MTOA Agreement also nowhere contemplates or makes available an option to the Appellant to itself terminate/downsize the MTOA on operationalization of its own LTA of 1240 MW granted by Respondent No.2;

(vi) while the MTOA granted to the Appellant is in operation, the LTA is operationalized from 21.6.2016 based on its request and upon opening of the necessary letter of credit;

(vii) upon LTA operationalization, there are two bills for the month of August, 2016 which are raised by Respondent No.2 on the Appellant: Bill-1 towards the transmission charges for LTA and Bill-2 towards transmission charges for relinquishment of MTOA. There is no "double billing": one is for LTA charges and the other is for relinquishment compensation;

(viii) vide letter dated 9.8., the Appellant requests Respondent No.2 *"to confirm the termination of MToA as the LToA has been operationalized for the entire 1240 MW and AP Discoms are the identified beneficiary for 230.55 MW under the said Long Term PPA. However, if the same has not been done till date, we request you to relinquish the said MToA with immediate effect."* There is so even when there is no

"termination" of MTOA which can be said to have taken place upon operationalization of the Appellant's LTA. Moreover, there has been no firming up of target region beneficiaries and operationalization of their LTAs so as to attract condition (iv) of the MTOA grant. There can thus only be a relinquishment of MTOA for which the Appellant itself has made a request with immediate effect;

(ix) vide letter dated 6.9.2016 Respondent No.2 accepts the Appellant's request for relinquishment of MTOA and allows such relinquishment w.e.f. 9.9.2016 i.e. after expiry of 30 days' notice period (as provided in Regulation 24) from the date of receipt of the Appellant's request. Respondent No.2 also informs that the clause in MTOA grant stipulates in cases where number of LTAs has already been granted on target basis and in view of non-firming of the PPA, the transmission capacity already granted under LTA is being released under the MTOA, in line with the provisions of regulation/procedure. In such cases, the MTOA are liable for termination/downsizing if LTA customer with target basis firms up PPA and their quantum cannot be accommodated in available transmission capacity. However, this is not the case with the Appellant and accordingly, the Appellant is required to pay transmission charges for 230.55 MW for a period of 30 days in line with the Regulation 24 of the Connectivity Regulations;

(x) based on the above, Respondent No.2 raised the POC bill towards transmission charges on account of relinquishment of MTOA (PoC Bill-2) on the Appellant on 22.9.2016 amounting to Rs.89,456,167/-, which is in accordance with

the provisions of Regulations 24 of the Connectivity Regulations The said bill is towards the relinquishment charges and has no relation to the regular transmission charges bill for LTA or MTOA.

(xi) vide its letter dated 4.10.2016, the Appellant denies its liability to pay the POC/transmission charges as billed to it by Respondent No.2 and wrongly reiterates that there is no provision in the Connectivity Regulations to charge for termination of MTOA on account of operationalization of LTA for the same corridor/region and the same beneficiary;

(xii) Respondent No.2, vide letter dated 13.10.2016, reiterates that the MTOA has been relinquished based on the request of the Appellant and that under Regulation 24, there is no provision for non-levy or waiver of relinquishment charges even if the applicant secures LTA for the same region/corridor. As such, its request for withdrawal of relinquishment charges cannot be accepted. The question of any loss/damage that may have occasioned to Respondent No.2 on account of relinquishment of MTOA is inconsequential in view of the mandatory provisions of Regulation 24;

(xiii) instead of paying the relinquishment charges as per the bill raised for it, the Appellant file a Petition before the Respondent No.1/the Central Commission [being Petition No.242/MP/2016: seeking a declaration that no relinquishment charges are payable for termination of 230.55 MW of MToA granted to it by Respondent No.2 and for quashing of the invoice;

(xiv) Respondent No.2 files a detailed Reply to the said Petition setting out the terms of the MTOA grant and applicability of Regulation 24 of the Connectivity Regulations thereto and submits, inter alia, that the conditionality attached to the MTOA grant has been completely misconstrued by the Appellant to plead a case for termination of MTOA on account of operationalization of LTA, which cannot be permitted. The PoC bill raised on the Appellant is towards the relinquishment charges for MTOA in accordance with the provisions of Regulation 24 of the Connectivity Regulations and cannot be treated as “double billing”.

(xv) during the pendency of the above Petition, the Sixth Amendment to the Connectivity Regulations is notified by the Respondent No.1/the Central Commission. The regulatory position now is that MTOA relinquishment on account of LTA operationalizations, whether of the MTOA customer itself or otherwise, is no longer to carry the liability to pay relinquishment charges. However, MTOA relinquishment which has no bearing to any LTA operationalization, continues with the absolute liability of payment of relinquishment charges as per Regulation 24. The provisions of Regulation 15B and Regulation 24 thus co-exist harmoniously under the Connectivity Regulations where Regulation 24 lays down the general law regarding MTOA relinquishment and Regulation 15B governs specific situations of MTOA relinquishment. The fact that Regulation 24 has been left untouched, shows that the amendment is not an effort to cure any alleged irregularities or patent arbitrariness existing in Regulation 24 but only to provide a

specific regulatory regime for specific class of open access customers in the specific context or operationalization of target region LTAs. If the intention of the Respondent No.1/the Central Commission was to cure any irregularities or provide a declaration in reference to Regulation 24, it would have added a proviso or an explanation to the said Regulation; however, the Respondent No.1 /the Central Commission to insert a separate Regulation altogether covering a defined field of operation, making the legislative intention very clear. The amendment therefore cannot be construed to impliedly mean a "clarification" of Regulation 24 so as to constitute a "clarificatory amendment" as has wrongly been contended by the Appellant. The legislative intent ascertained from the amendment is to be given full effect to [Shanker Raju Vs. Union of India: (2011) 2 SCC 132, paras 34, 35]. Moreover, considering the clear and express provision for operation of the amendment from the date of its notification i.e. 17.2.2017 as stated in Regulation 1(2), any interpretation by way of necessary implication to ascertain the date of operation of the said amendment, is ruled out [Shri Ram Narain Vs. Simla Banking & Industrial Co. Ltd.: AIR 1956 SC 614, para 7]. Further, the prospective benefit granted to an open access customer under Regulation 15B does not necessarily depend on the antecedent fact that the LTA customer has availed MTOA pending operationalization of the LTA. In the Principles of Statutory Interpretation by Justice GP Singh (14th Edn., 2016, at p. 610), the following has been stated:

> *"….the fact that a prospective benefit under a statutory provision is in certain cases to be measured by or depends on antecedent facts does not necessarily make the provision retrospective…."*

The same principle also stands approved by the Hon'ble Supreme Court in the matter of Ramji Purshottam Vs. Laxmanbhai D. Kurlawala [(2004) 6 SCC 455]. Suffice it to say, Regulation 15B is an independent provision under the Connectivity Regulations providing for specific remedy under a specific situation, having prospective application, and therefore the same cannot be considered as a "clarificatory amendment", having retrospective application to the Appellant's case.

5.24 Vide the impugned Order dated 30.10.2017, the Respondent No.1/the Central Commission declines to interfere with the invoice for relinquishment charges raised by Respondent No.2 on the Appellant and disposes off the Petition of the Appellant holding that the Appellant is liable to pay the relinquishment charges as per Regulation 24 of the Connectivity Regulations:

> *"12. Regulation 24 provides for relinquishment of MTOA by a MTOA customer as under:*
> *…….*
> *As per the above provision, a Medium Term Customer relinquishing the MTOA either fully or partly, is required to give atleast a 30 days prior notice to the nodal agency. There is no provision for payment of any charges, if the notice period falls short of 30 days. It further provides that the Medium Term Open Access Customer relinquishing its right shall pay the applicable transmission charges for the period of relinquishment or 30 days whichever is lesser. In other words, if the period of relinquishment is more than 30 days, it will be required to pay the transmission charges*

equivalent to 30 days and if the period of relinquishment is less than 30 days, it will be required to pay transmission charges equivalent to the said period.

13. In our view, the language of Regulation 24 is couched in absolute terms and does not admit any conclusion/interpretation which partly or fully exempts the MTOA customer from payment of relinquishment charges, if the capacity covered under MTOA is utilized for LTA. Further, MTOA application and the LTA application of the Petitioner were independent of each other, though made for the same capacity or within the capacity. The Petitioner has applied for MTOA for the period of three years expecting that it might not get LTA for the said capacity before three years. Further, period of grant of MTOA has not been made subject to the date of operationalization of LTA. Grant of MTOA to the Petitioner is subject to compliance of the provisions of the Regulations and Connectivity Regulations.

……

17. We have considered the submission of the Petitioner and PGCIL. MTOA was granted to the Petitioner by PGCIL subject to compliance of the applicable Regulations. ……..

21. Even though the period of LTA overlaps with that of MTOA, Regulation 24 of the Connectivity Regulations does not admit any exception and in case of relinquishment of MTOA for operationalization of LTA, the MTOA customer shall be liable to pay the relinquishment charges.

…….

23. We have already decided that MTOA application and the LTA application of the Petitioner were independent of each other, though made for the same capacity or within the capacity. Accordingly, the Petitioner is liable to pay relinquishment charges in terms of Regulation 24 of the Connectivity Regulations."

Applying the provisions of the Connectivity Regulations as set out aforesaid, the Respondent No.1/the Central Commission rightly holds that the liability of the Appellant to pay relinquishment

charges for the relinquished MTOA is absolute and that the Appellant is liable to pay the same.

5.25 On the applicability of the Regulation 15B of the Connectivity Regulations as inserted vide the Sixth Amendment to the Appellant's case, the Respondent No.1/the Central Commission as under:

> *"This amendment was notified on 17.2.2017. The amendment is prospective in nature and cannot be operated retrospectively to exempt the Petitioner for payment of relinquishment charges. In our view, the Petitioner cannot be granted any relief in terms of the said amendment, as it will not only result in retrospective operation of the regulations which is not allowed, but also result in demand from similarly placed Medium Term Open Access Customer who have paid the relinquishment charges on operationalization of the same capacity for LTA."*.

6.0 The issue and facts of the case and the submissions of the Appellant and the Respondents in Appeal No. 363 of 2017 are similar to that in Appeal No. 16 of 2018, except for the dates of various orders and, therefore, for the sake of brevity we shall take up the issue and facts of the case and the submissions of Appeal No. 363 of 2017 and, therefore, a common judgment is being rendered.

6.1 We have heard learned counsel Mr. Hemant Singh appearing for the Appellant in Appeal No. 363 of 2017, learned senior counsel Mr. Sanjay Sen in Appeal No. 16 of 2018 and learned counsel Ms. Suparna Srivastava appearing for the contesting Respondent "PGCIL/2nd Respondent" in Appeal No. 363 of 2017 and Appeal

No. 16 of 2018 at considerable length of time and we have gone through the written submissions carefully and also taken into consideration the relevant material available on records, and after careful consideration of the reasoning given in the Impugned Order and pleadings available on the file, the core issue arises for our consideration as it is:-

"Whether the Central Commission has erred in holding that the Appellant is liable to pay relinquishment charges for surrendering the Medium-Term Open Access (MTOA) dated 22.7.2015 upon operationalization of the long-term access (LTA) dated 22.7.2017."

7. **Our considerations and analysis:**

In both the Appeals the issue is regarding payment of relinquishment charges by the Appellants upon relinquishment of their respective MTOAs when the LTA granted in their favour have been operationalised by the Respondent No.2. The case of the Appellant is that MTOAs were sought due to non-availability of LTAs. Once the LTAs have been operationlised the same power will be transmitted using the same transmission infrastructure to the same beneficiary. As such there is no relinquishment of criteria by the Appellant and it is only switchover/migration from Medium Term Open Access to Long Term Open Access and therefore there is no case for relinquishment charges.

In this case following points emerge for our consideration:

i) The Central Commission notified the CERC (Open Access in Intra State Transmissions) Regulations, 2004 where detailed provisions for grant of access to ISTS were made. The transmission customers under the said Regulations were divided into two categories namely Long Term customers and Short Term customers.

ii) The persons availing or intending to avail access to ISTS for the period of 25 years or more were to be the Long Term customers and all transmission customers other than long term customers were to be Short Term customers. Provided that the duration for each short term access would be allowed at a time was not to exceed one year.

iii) The criteria for allowing transmission access was that while long term access could be allowed in accordance with the transmission planning criteria, short term access can be allowed by utilising the margins. The ISTS was thus to be utilised primarily for transmission of power through Long Term Access while Short Term Access could be for all available margins.

iv) The allotment priority of long-term customers was to be higher than reservation priority of short-term customers.

v) Subsequently the Central Commission notified CERC (Grant of Connectivity, Long Term Access and Medium Term Open Access in Intra State transmission and related matters) Regulations, 2009 ("Connectivity Regulations"). Under the said Regulations (which are presently in force), the Central Commission has created a new

category namely Medium Term Open Access ("MTOA"). MTOA is for a period exceeding three months but not exceeding three years.

vi) LTA has been modified for a period exceeding 12 years but not exceeding 25 years. Planning for augmentation of transmission system for transmission access has continued to be linked to long term access only. Both MTOA and STOA can use the available margins in the Inter State transmission capacity and hence no transmission system is required to be augmented for such type of short term or medium term open access.

vii) Regulations 24 of the Connectivity Regulations make provisions for relinquishment of MTOA as under:

> ***"24. Exit option for medium-term customers***
> *A medium-term customer may relinquish rights, fully or partly, by giving at least 30 days prior notice to the nodal agency:*
>
> *Provided that the medium-term customer relinquishing its rights shall pay applicable transmission charges for the period of relinquishment or 30 days whichever is lesser."*

Use of the word "shall" occurring in Regulation 24 shows that the payment of relinquishment charges are mandatory in nature and are thus necessarily to be complied with.

viii) In the meeting for processing of LTA and MTOA applications held on 15.7.2015, the Appellant requested for grant of MTOA as per

the application made in the month of November, 2013 and it would relinquish MTOA rights and pay the applicable relinquishment charges in line with the Commission's regulations as and when the LTA for the application made in December, 2013 is operationalized. Relevant portion of minutes of meeting dated 15.7.2015 is extracted as under:

> "11.0 CTU stated that GMR EMCO Energy Ltd. has applied MTOA for 150 MW in Nov, 2013 and also applied LTA for 150 MW in Dec, 2013 and enclosed same PPA in both the referred applications. Towards this, the representative of GMR stated that as per the directions given in the CERC order, the applications shall have to be processed sequentially i.e. the MTOA application of Nov, 2013 shall have higher priority than the LTA application received in Dec, 2013. He accordingly requested that MTOA may be granted as per their applications made in the month of Nov 2013 and they shall relinquish MTOA rights and pay the applicable relinquishment charges in line with the CERC regulations as and when the LTA for the application made in Dec 2013 is operationalized."

ix) The liability to bear charges for relinquishment of MTOA under Regulation 24 was also a condition of the LTA intimation dated 22.7.2015 issued by PGCIL which contained the following condition:

"As decided in the meeting held on 15.7.2015 for processing of pending LTA & MTOA applications received in Nov' 13 & Dec' 13,

the above grant of LTA shall not be operationalized until the earlier granted MTOA of 150 MW for the same PPA against the application made in Nov' 13 is relinquished."

x) The Appellant vide its letter dated 13.1.2016 requested PGCIL to operationalize 150 MW LTA by foreclosing the corresponding 150 MW under MTOA and gave consent for payment of relinquishment charges as per the applicable regulations, rules and guidelines. The said letter is extracted as under:

"We are in receipt of your letter dated 30th December, 2015 (Ref No. 8 above) received by us on 08.01.2016, wherein you had sought our consent for payment of relinquishment charges prior to operationalization of the LTA of 150 MW. We would like to reiterate that vide our letter dated 17th December, 2015 we had only sought for conversion of our MTOA of 150 MW to LTA of 150 MW for purpose of meeting our commitment for supply of power to TANGEDCO on long term basis. As such there is no relinquishment of open access capacity of 150 MW per se but the same capacity which is presently under MTOA will get converted to LTA. We will therefore, continue to utilize and seek scheduling of 150 MW in accordance with extant rules and regulations. Your reliance on Regulation 24 of the CERC Regulations for connectivity and open access 2009 is, therefore, misplaced and not applicable as there is neither any relinquishment of the capacity allocated to us nor will PGCIL suffer any loss as we will continue to avail open access of 150 MW.

We would like to draw your kind attention to our earlier letter dated 30th Oct'"15 cited at 6 above under numbered para 2 our MTOA in existence as on that date of operationalizing the LTA, may be short closed for the balance period of grant". This in our view suffices the requirement of prior notice for foreclosure of MTOA especially in the circumstance in the instant case where the same transaction of dispatch would be converted to LTA.

In view of the above, it is requested to immediately operationalize the LTA of 150 MW by closing the corresponding 150 MW under MTOA.

Further as required by you vide your letter dated 30th December, 2015 we consent to payment of any relinquishment of charges as per applicable regulations, rules and guidelines."

xi) The grant of MTOA to November, 2013 application and grant of LTA to December, 2013 application was made with the consent of the Appellant and with the clear understanding that whenever the LTA got operationalized for full quantum, the MTOA was to be relinquished along with payment of relinquishment charges.

xii On the other hand, the Appellant has submitted that since there is no stranded capacity and the capacity earlier covered under the MTOA is being utilized for LTA, Regulation 24 should be read not to include the case of the Appellant and no relinquishment charges are payable.

xiii) The Appellant has applied for MTOA for the period of three years expecting that it might not get LTA for the said capacity before three years. Further, period of grant of MTOA has not been made subject to the date of operationalization of LTA. Grant of MTOA to the Appellant is unconditional and therefore, no condition can be attached to the relinquishment of the said MTOA. Regulation 24 does not require the CTU to prove the losses for payment of relinquishment charges. Unlike the case of LTA, it is not linked to stranded capacity. Therefore, the condition of stranded capacity or losses suffered is not a pre-condition for payment for relinquishment charges under Regulation 24 of the Connectivity Regulations.

xiv) The Central Commission has observed in their Impugned Order that the language of Regulation 24 is couched in absolute terms and does not admit any conclusion/interpretation which partly or fully exempts the MTOA customer from payment of relinquishment charges, if the capacity covered under MTOA is utilized for LTA.

xv) The Central Commission through Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) (Sixth Amendment) Regulations, 2017 has amended the Connectivity Regulations as under:-

"15B. Firming up of Drawl or Injection by LTA Customers:

(1) The Long Term Access Customer who has been granted long term access to a target region shall, after entering into power

purchase agreement for supply of power to the same target region for a period of not less than one year, notify the Nodal Agency about the power purchase agreement along with copy of PPA for scheduling of power under LTA:

Provided that scheduling of power shall be contingent upon the availability of last mile transmission links in the target region:
Provided further that on receipt of the copy of the PPA, CTU shall advise concerned RLDC for scheduling of power at the earliest, but not later than a period of one month:

Provided also that if the capacity required for scheduling of power under LTA has already been allocated to any other person under MTOA or STOA, then MTOA or STOA shall be curtailed in accordance with Regulation 25 of these Regulations corresponding to the quantum and the period of the PPA:

Provided also that where capacities under existing MTOA are curtailed for considering scheduling of power under the PPA of the Long term Access Customer, such MTOA customer shall be permitted to relinquish its MTOA without any relinquishment charges.

(2) An LTA Customer who is availing MTOA on account of non-operationalization of LTA granted to it, shall not be required to pay relinquishment charges towards relinquishment of MTOA if the LTA is operationalized during the subsistence of MTOA."

xvi) This Sixth Amendment was notified on 17.02.2017 and is prospective in nature and cannot be operated retrospectively to exempt the Appellant from payment of relinquishment charges.

The above aspects have been dealt with by the Central Commission in detail in its Impugned Orders and as such we do not find any error, material irregularity or legal infirmity in the Impugned Order dated 17.10.2017 and Impugned Order dated 30.10.2017 passed by the 1st Respondent/the Central Commission in Petition No. 153/MP/2016 and Petition no. 240/MP/2016 respectively. The Impugned Order is well founded, well reasoned, hence does not call for interference by this Tribunal.

In view of above, we are of the considered view that there is no need to consider the other issues raised by the Appellant like interpretation of relinquishment and effectiveness of the amendment from the back date.

ORDER

Having regard to the facts and the circumstances of the case as stated above, the instant Appeals being Appeal No. 363 of 2017 and Appeal No. 16 of 2018 filed by the Appellants are hereby dismissed as devoid of merits.

The Impugned Order dated 17.10.2017 and Impugned Order dated 30.10.2017 passed by the 1st Respondent/the Central Commission in

Petitions being No. 153/MP/2016 and no. 240/MP/2016 respectively are hereby upheld.

In view of the Appeal No. 363 of 2017 and Appeal No. 16 of 2018 on the file of the Appellate Tribunal for Electricity, New Delhi being disposed of, on account of which, the reliefs sought in IA No. 976 of 2017 does not survive for consideration and, hence, stands disposed of.

No order as to costs.

Pronounced in the Open Court on this **11th day of April, 2019.**

(Ravindra Kumar Verma)
Technical Member

(Justice N. K. Patil)
Judicial Member

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REPORTABLE/NON-REPORTABLE

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