

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram : Dr. Pramod Deo. Chairperson
Shri S. Jayaraman, Member
Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member

Date of hearing : 8.9.2011

Petition No.169/2011

Subject : Miscellaneous petition under Section 79 (1) (c) and (f) of the Electricity Act, 2003

Petitioner : North Karanpura Transmission Co. Ltd.

Respondents : Maharashtra State Electricity Distribution Co. Ltd. and others

Petition No.170/2011

Subject : Miscellaneous petition under Section 79 (1) (c) and (f) of the Electricity Act, 2003.

Petitioner : Talcher II Transmission Company Ltd.

Respondents : Tamil Nadu Electricity Board & others

Parties present : Shri Amit Kapoor, Advocate for petitioner
Ms. Deepika Kava, Advocate for Petitioner
Miss Kartika, Advocate for Petitioner
Shri Vishal Anand Advocate for Petitioner
Shri C.Sudhakar, NKTCL
Shri Prateek Sarda, NKTCL
Shri Kandeep Pandey, NKTCL
Shri Bhanu Gaddam, NKTCL
Shri Prashant, NKTCL
Shri Ramanuj Sharma, NKTCL
Shri MG Ramachandran, Advocate for GUVNL
Shri P.J.Jani, GUVNL
Shri N.S. Sodha, PGCIL
Shri R.K.Mehta, Advocate, CESC
Shri Antaryami Upadhyaya, Advocate for ECSC

Shri Suresh Tripathi, Advocate
Shri S.K. Gupta, TTCL
Shri Sunil Seth, HVPN
Shri Avinash M Pangi, Power Grid
Shri V. Tiyagrajan, Power Grid
Shri S.Vallinayagam, Advocate TANGEDCO
Shri S.Balaguru, S.E., TNEB

Record of Proceedings

The learned counsel for the petitioners submitted that in these petitions, six issues have been raised for the consideration of the commission which relate to implementation after award of the projects.

2. The learned counsel submitted that the petitioners were incorporated as special purpose vehicles by Rural Electrification Corporation for implementing the projects. After award of the projects to Reliance Power Transmission Limited (RPTL), the petitioners were fully acquired by RPTL on 20.5.2010. After the date of acquisition which is the recognized effective dates, the petitioners have taken several steps for timely implementation of the projects as enumerated in para 3 of the petitions. On 27.10.2010, the proposed execution plans were submitted to the Central Transmission Authority and the lead Long Term Transmission Customers. However, six issues have arisen for consideration as under:

- (a) Delay in grant of authorization under Section 164 of the Electricity Act, 2003: The petitioner started the process in July 2010 but the approval has come in the Gazette in August 2011. On account of the delay in grant of approval under section 164 of the Act and adoption of tariff by the Commission, difficulties have been faced by the petitioners to implement the projects beyond certain points.
- (b) Delays in appointing Sponsoring Authority to register import list for private Inter-State Transmission Projects under the Project import Regulations, 1986: Since the bids were predicated on the basis of the then existing concessional customs duty of 5%, that compliance requires certification by an authority. Though representations have been made, no authority has been appointed as yet. This has been causing some delay.
- (c) Change in law due to enhancement of Excise Duty from 8% to 10%: After award of the projects, the excise duty has been increased from 8 to 10 percent in February/March 2011. Though the Long Term Transmission Customers have been informed about the change in custom duty, no response has been received. This is a change in law

issue which is a pass through in terms of the TSA. However, consent from the LTTC is not forthcoming.

- (d) Imminent risk of lapse of approval under Section 68 of the Electricity Act, 2003: Approval under section 68 was granted on 8.12.2008 which effectively came into play for the petitioners on 20.5.2010. Since section 68 approval will expire in December, 2011, extension of approval under section 68 of the Act is required for implementation of the projects.
- (e) Force Majure: This is a provision in the TSA. The problems mentioned in (a) to(d) are beyond the control of the petitioners. In Dhanraj Mall's case, it has been held by the Supreme Court that where reference has been made to force majeure, the intention is to save the performing parties from the consequence of anything over which he has no control. Section 56 of the Indian Contract Act, 1870 provides that contract to do an act which after the contract is made becomes impossible becomes void. The intention of the petitioners was not to terminate the project but to find a solution to the problems. In that context, the petitioner would need a dispensation which will be practicable to implement the projects.
- (f) Change in law and its consequential impact: This is also provision in the TSA.

3. As regards the jurisdiction of the Commission, the learned counsel submitted that in a catena of judgements, it has been settled by the Supreme Court that where the power to regulate has been given, the domain is defined strictly. Within that domain, the powers including all unspoken and unwritten powers which are incidental or ancillary are to be read into the power of that authority. In the context of these petitions, the Commission has the power under section 79(1)(c) to find a balanced solution to the problem and if there is any dispute or difference of opinion, the Commission has power under section 79(1)(f) of the Act to adjudicate the dispute. He requested the Commission to issue notice to the LTTCs on whom the copies have been served.

4. Learned counsel appearing for Gujarat Urja Vikas Nigam Limited (GUVNL) submitted that the respondent has no objection to the jurisdiction of the Commission to admit the petition. Learned counsel further submitted the following:

- (a)The transmission system which is the subject matter of petition No. 169/2011 was conceived in connection with the evacuation of power from North Karanpura generating station. One thing the Nation apart from Gujarat cannot afford is a mismatch between the generating station

coming and transmission system not coming. Therefore, the time and cost overrun of the project needs to be considered from this point of view.

- (b) The petitioners have raised two aspects, namely, force majeure and change in law. If there is change in law within the meaning of Transmission Service Agreement having financial implications, the Commission may certainly take that into consideration. On the issue of force majeure, whether permission under section 164 granted on a particular date would amount to force majeure or whether the inability of the petitioners to get the registration done for concessional customs duty would amount to force majeure or change in law needs to be considered as per the provisions of the RFP and TSA.
- (c) The financial bids were submitted on 11.12.2009 on the basis of a RFP document fully disclosing what are the terms and conditions on the basis of which they are required to bid. RFP does not say that section 164 permission is condition for implementation of the project. RFP document only provides for section 68 permission and leaves it to the bidders to arrange for any other requirement for implementation of the project.
- (d) Since section 164 permission is not a precondition for execution of the project, so it cannot be said to be force majeure. Projects can be implemented under Works of Licensee Rules, 2006 without the requirement of section 164 permission.
- (e) Even the exclusions to the force majeure clause in the Transmission Service Agreement include unavailability, late delivery and change in the cost of materials, machinery and equipments, insufficiency of finances etc. Therefore, absence of permission under section 164 of the Act cannot be considered as force majeure.
- (f) Therefore, asking for extension of time at this stage for execution of the project is not maintainable.

5. The learned counsel for Tamil Nadu Electricity Board submitted that force majeure exclusions clearly provide for 'failure to comply' with the Indian law. Failure of the petitioners to get the permission under section 164 is clearly covered under exclusions. The representative of Madhya Pradesh Power Trading Company Limited adopted the arguments of learned counsel for GUVNL.

6. The learned counsel for the petitioners in his rejoinder submitted that since the jurisdiction of the Commission is made out under section 79 of Act, the Commission may issue notices to the respondents.

7. The Commission decided to admit the petitions and issue notices to the parties. The question of jurisdiction and maintainability of the petition would be decided at the stage of final disposal of the petitions. The petitioner was directed to serve complete copy of the petition on the respondents, if already not done, latest by 5.10.2011. The respondents may file their reply on affidavit latest by 20.10.2011, with advance copy to the petitioner. Rejoinder, if any, may be filed by the petitioners, latest by 31.10.2011.

6. The petitions shall be listed for hearing on 15.11.2011.

Sd/-
(T. Rout)
Joint Chief (Law)