

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

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

Petition No : 169/2011
Date of Hearing : 7.6.2012
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
Parties present : Shri Amit Kapoor, Advocate for petitioner
Miss Aproova Misra, Advocate for Petitioner
Miss Deepeika Kalia, Advocate for Petitioner
Shri Eamanuj Sharma, Advocate
Shri Vinay Kumar, Advocate
Shri Alok Roy, RPTL
Shri Anil Rawal, RPTL
Shri Anil K. Awasthi, RPTL
Shri C. Sudhakar, NKTCL
Shri Rakesh Prasad, PGCIL
Shri U.K.Tyagi, PGCIL
Shri Ramchandra, PGCIL
Shri N.K.Jain, PGCIL

Record of Proceedings

The learned counsel for the petitioner submitted that North Karanpura Transmission Co. Ltd. is an inter-State transmission licensee selected through competitive bidding for developing the Transmission System Strengthening in Northern and Western Regions for import of power from Northern Karanpura and also for power evacuation within Western Region. The petitioner has been constrained to file the present petition under section 79 (1) (c) and (f) of the Electricity Act, 2003 (the Act) since achieving the

Scheduled COD (both element wise and for the project) have been rendered unachievable due to various uncontrollable factors.

2. Learned counsel submitted that one of the factors is delay in grant of authorization under section 164 of the Act. The Transmission Service Agreement (TSA) defines "consents, clearance, permits" as all authorizations, licences, approvals, permits, waivers, privileges, acknowledgements, agreements, or concessions required to be obtained for the development, execution and performance of project. The authorisation under section 164 of the Act is one such approval which is essential for making available the Right to Way in order to commence the work and mitigate the risk of disruption of work. The petitioner pursued for grant of authorization under 164 of the Act with the Ministry of Power as per the procedure notified by Ministry of Power. The petitioner initiated the process by issuing a public notice on 9.7.2010 in the local newspapers with circulation in each of the four States involving right of way for the proposed transmission corridor. The approval under section 164 of the Act was accorded by Ministry of Power on 11.8.2011 and the same was received by the petitioner only on 7.9.2011, resulting in delay of 10 months. Learned counsel further submitted that in contrast, PGCIL was issued authorization by the Ministry of Power vide gazette notification dated 24.12.2003, within six months of coming into force of the Act. In the said notification, MOP confirmed that the notification was being issued "for proper coordination of works...". Learned counsel further submitted that the Act does not distinguish between a government player and private player. Learned counsel also submitted that equality before law means among the equals the law should be equal and should be equally administered and the like should be treated alike.

3. Learned counsel submitted that on 20.10.2011, revised procedure for grant of authorization under Section 164 of the Act was notified with a new requirement of affidavit to be sent to MOP, after the 60 days indicated in the Gazette Notification regarding receipt or otherwise of objections on the route alignment selected for the proposed line, clearly indicating how the objections were disposed. Though this procedure was announced as late as 20.10.2011, the same was made applicable in case of the petitioner on 31.5.2011 which delayed the process of authorization.

4. Learned counsel submitted that in the absence of authorization under section 164 of the Act, the petitioner is faced with the near impossible task of negotiating with owners/occupiers of the lands through which the 1000 Km transmission lines would pass and the task cannot be achieved within the given timeframe. An authorization under 164 of the Act is essential for availing the right to way in order to commence the work, for pre-empting and mitigating the risk of disruption of work and protracted litigation that may arise out of injunction or stay orders obtained by land owners and occupiers and also for the safety of the field personnel as they have to access, enter and work in privately owned lands. In support of the contention regarding the importance of sanction under section 164 of the Act, learned counsel relied upon certain judgments of the High Courts. Learned counsel submitted that realizing the importance of section 164 notification, the State Governments have issued notifications under the

said section and in this connection, referred to the section 164 notifications issued by Governments of Andhra Pradesh, Odisha and Tamil Nadu.

5. The learned counsel further submitted that there has been inaction on the part of long-term transmission customers in assisting the petitioner to obtain authorization under section 164 of the Act, despite having knowledge of the delay vide letter dated 12.1.2011 and notice dated 14.6.2011. Learned counsel submitted that occurrence of any events including the ones listed under 11.3 of the Transmission Services Agreement (TSA), which is beyond the control of the petitioner constitutes a force majeure event under the TSA. The delay in the grant of authorization under 164 of the Act was beyond the reasonable control of the petitioner which resulted in the delay in the implementation of the project. The definition of the force majeure event under the TSA is an inclusive definition. Under Section 56 of the Indian Contract Act, 1872, the contract to do an act which is impossible to perform after it is made on account of circumstances beyond the control of the parties, is void.

6. He submitted that the delay in grant of authorization under section 164, delay in grant of order for adoption of tariff and lack of clarity, rendered timely performance impossible. The circumstances beyond the control of the petitioner attracts force majeure clause. He further submitted that the petitioner is entitled for relief on account of force majeure event after complying with the procedure set out in the Transmission Services Agreement (TSA). Learned counsel also relied on the order of the Commission dated 31.12.2010 in Petition No.296/2010 and submitted that the Commission in the said order has accepted delay in section 164 approval as a force majeure event.

7. Learned counsel submitted that the petitioner applied to the MOP on 18.2.2011, seeking designation of a sponsoring authority for availing of concessional customs duty under section 157 of the Customs Act, 1962 read with Heading 9801 of the First Schedule to the Customs Tariff Act, 1975 and Project Import Regulations, 1986. The petitioner is constrained in proceeding with the import in spite of placing the EPC contracts on 27.10.2010. There is no notified sponsoring authority in terms of the Project Import Regulations for inter-state transmission projects being implemented by private entities. He further submitted that the petitioner has not evaded or denied any responsibility for obtaining consents, clearances or permits. However, if such consent, clearance or permit is denied for the reason not in direct or indirect control of the petitioner, it has to seek relief as per the recourse available.

8. Learned counsel submitted that on 26.2.2010, Ministry of Finance, Department of Revenue, Government of India increased the rate of excise duty from 8% to 10%. The petitioner informed the beneficiaries by its notice dated 14.6.2011 about the increase in excise duty and requested them to provide suitable compensation on account of the increase in excise duty.

9. Learned counsel submitted that the delay in granting section 164 approval by the MOP resulted in lapse of approval under section 68 of the project. The prior approval

under section 68 granted by MOP on 8.12.2008 came into effect on 24.3.2011 i.e. 28 months late i.e. after receipt of the copy of the transmission licence.

10. Responding to the concern expressed by MPPTCL in its reply that delay in implementation of the transmission project will lead to mismatch between the generating station and the transmission system, learned counsel submitted that as per the information available in the public domain, North Karanpura STPP is embroiled in a dispute with the Ministry of Coal as to the location of the plant. There seems to be lack of clarity when the said power project would be commissioned. Since the generation project is delayed, no prejudice would be caused to the beneficiaries if the COD of the transmission project is extended by the Commission as prayed in the petition.

11. Learned counsel submitted that two aspects need to be considered by the Commission, the extension of time and cost implications as a result of delay and both are within the jurisdiction of the Commission as the Commission has been vested with the power to regulate inter-State transmission of electricity.

12. The Commission desired to know from the learned counsel for the petitioner the following:

(a) Whether any study of the transmission projects has been carried out to find out when section 68 and section 164 approval have taken place? Whether section 68 approval is sufficient or section 164 approval is a must for execution of the project;

(b) Why the Transmission Service Agreement has section 68 and not the section 164 approval as a condition precedent and whether it is a tacit understanding that section 164 approval would not be necessary?

(c) Whether section 164 approval has ever been refused in any project?

13. Learned counsel for the petitioner submitted that an analysis of the various projects in the light of the queries of the Commission would be filed. Learned counsel further added that when any contract is signed, parties are obliged to implement the law as it stands. Whether section 164 approval is a condition precedent or not, the various notifications of the MoP clearly state that such approval is imperative for effective implementation. Where time becomes fundamental issue for performance, the imperatives - penalty could be imposed or license could be terminated or project could be taken over- become very critical. Learned counsel further submitted that the Commission may consider the difficulties that a private entity which does not have the perspective of a public entity would face to construct transmission lines transcending 2400 villages and 1098 kms in the absence of section 164 approval. Learned counsel also submitted that the decision of the Commission in the present case would have a salutary effect on guiding the private sector for execution of the transmission projects.

14. The Commission further made the following queries to the learned counsel for the petitioner:

- (a) As per the petitioner, section 164 approval is critical for access to 2400 villages to lay the transmission line. The project was awarded on the basis of a tender and as per the terms and conditions of tender, the parties were expected to survey and assess the volume and difficulties of work before they submit the tender. If section 164 approval is critical, whether the petitioner has indicated in the tender documents or during the bid process disclosed to the Bid Process Coordinator that the total timeline indicated is subject to the approval under section 164 of the Act or some timeline has been assumed for section 164 approval and the same has been accepted by the Bid Process Coordinator?
- (b) As regards the claim for compensation against concessional customs duty, whether the petitioner had mentioned and disclosed in the tender documents that the bid price was based on the assumption of availing the concessional customs duty?
- (c) As regards the Commission's order dated 31.12.2010 in Petition No. 296/2010, the Commission had allowed extension of time for execution of the project as the petitioner therein had undertaken that there was no price implication whereas the petitioner in the present case has been asking for compensation which has price implication for transmission charges.

15. The Commission directed the representative of the Power Grid Corporation of India Ltd (PGCIL) to explain whether approvals under sections 68 and 164 of the Act are preconditions for putting up the projects. The representative of the PGCIL clarified that section 68 approval is sought from the MoP for each project but section 164 approval has been granted to PGCIL as general notification.

16. Learned counsel for the petitioner submitted that if the bid conditions and overarching framework is clear that right of way is important, section 164 is critical and implementation of the project is linked to it, there was no reason to doubt that section 164 approval would not be given in time. In reply to another query regarding the implications if the section 164 approval is not given, learned counsel submitted that section 164 approval is essential to commence the work, pre-empt and mitigate the risk of disruption of work, and the safety of the field personnel to access, enter and work in privately owned land. In reply to another query of the Commission whether section 164 is necessary for right of way, learned counsel for the petitioner submitted that section 164 approval is vital, as otherwise the petitioner would have to negotiate with thousands of villagers which cannot be done within the specified time schedule. Learned counsel referring to the order of the Commission at page 417 of the petition regarding proposal to issue transmission licence submitted that the said order clearly

mentions that since the effective date is 20.5.2010, the commissioning schedule shall reckon from that date. Learned counsel further submitted that the bar chart at page 423 of the petition is a revised schedule for implementation of the project and at the footnote of the bar chart, it is clearly indicated that the schedule is "subject to timely receipt of licence, section 164 approval." In reply to the query of the Commission that the bar chart was given after the award of the project, learned counsel confirmed the same and submitted that the bidder is not allowed to submit conditional bids which would result in rejection of the bids.

17. The Commission enquired whether there was an original bar chart since the letter dated 20.10. 2010 spoke about revised tentative bar chart. The learned counsel submitted that the said chart was submitted at the time of submission of the bids. Learned counsel clarified that he would check the records and make submission in this regard. The Commission directed the petitioner to demonstrate on the basis of original bar chart and revised bar charts that section 164 approval was a critical requirement for execution of the project and the timeline assumed for such approval.

18. The representative of the petitioner submitted that section 164 approval was considered so critical that MoP at the time of granting approval for the first private sector project (i.e. WRRS Scheme) took nine months to finalize and publish the procedure. The petitioner had no doubt that the said procedure would not be followed by MoP in case of subsequent projects. In reply to the query of the Commission as to how much time was assumed by the petitioner for 164 approval, the representative of the petitioner replied that 3 to 4 ½ months were expected. The representative of the petitioner also sought permission to place on record the normative timeline the MoP has cast for itself for section 164 approval. The request was allowed.

19. Learned counsel submitted that petition No.170/2011 involves the similar issues as in the present petition and requested that both petitions should be listed together.

20. The Commission directed the petitioner to place on affidavit the information sought in para 12, 14 and 17 above with copies to the respondents by 6.7.2012.

21. The Commission directed to list the petition alongwith petition No.170/2011 on 10.7.2012 for further hearing.

(By Order of the Commission)

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Joint Chief (Law)