

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.12/MP/2013 With I.A.No. 3/2013

Coram:

- 1. Dr. Pramod Deo, Chairperson**
- 2. Shri V.S. Verma, Member**

Date of Hearing: 7.3.2013

Date of Order : 12.3.2013

In the matter of

Petition under Section 79 (1) of the Electricity Act, 2003 read with Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999

And

In the matter of

Udupi Power Corporation Limited, Bangalore

Petitioner

Vs

Power Company of Karnataka Limited, Bangalore

Bangalore Electricity Supply Company Limited, Bangalore

Mangalore Electricity Supply Company Limited, Mangalore

Gulbarga Electricity Supply Company Limited, Gulbarga

Hubli Electricity Supply Company Limited, Hubli

Chumundeshwari Electricity Supply Company Limited, Mysore . **Respondents**

Following were present:

Shri L.Viswanathan, Advocate for the petitioner

Shri Narendra Naik, Advocate for the petitioner

ORDER

The petitioner, Udupi Power Corporation Limited (UPCL) has filed the present petition for the following reliefs:

- (a) Allow the present petition;

- (b) To set aside the claim of ₹731.38 crore of the respondent against the applicant;
- (c) As an interim relief, and during the pendency of application stay of claim of Rs. 731 crore of the respondents against the applicant and to restrain the respondents from making any deduction.
- (d) Direct the respondent to pay all tariff invoices in full;
- (e) Direct the respondents to pay costs; and
- (f) Pass such further or other orders as this Hon`ble Commission may deem fit in the facts and circumstances of the case and thus render justice.

2. The petitioner has submitted that it has set up a 2X600 MW capacity generating station at Udipi Taluka of Udipi district of Karnataka as a mega power project. The generating station is designed to be operated on 100% imported coal. The actual dates of the commercial operation of Units I and II of the generation station are 11.11.2010 and 1.4.2012, respectively. The petitioner has submitted that it has entered into a Power Purchase Agreement (PPA) on 26.12.2005 with Respondent Nos. 2 to 6 (Karnataka Discoms) for sale of 90% of the power generated from the generating station and a PPA dated 29.9.2006 with Punjab State Electricity Board for sale of the remaining 10% of the power.

3. The petitioner has submitted that it has also filed Petition No. 160 /GT/2012 for determination of generating tariff for Unit-I from 11.11.2010 to 31.3.2014 and for Unit-II from 1.4.2012 to 31.3.2014 in terms of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter "2009 Tariff Regulations") and the Commission vide its order dated 24.12.2012 has granted the provisional tariff. The final tariff of the generating station is in the process of

determination by the Commission.

4. The petitioner has submitted that the project has been designed considering the entire fuel requirement to be met from imported coal. The petitioner has submitted that the project requires about 3.63 million tons of coal per annum (MTPA) for tariff of 85% availability in line with the norms specified under the 2009 Tariff Regulations. The petitioner is stated to have held a discuss with the fuel supplier and informed the Respondent No. 1 in its letter dated 22.9.2006 about the offers received for coal supply arrangements through international competitive bidding and the process has been evaluated by TCE consulting engineers. The petitioner has submitted that respondent no. 1 despite being under notice dated 22.9.2006 and subsequent reminders dated 21.11.2006, 29.11.2006, 11.12.2006 did not give its recommendation on the coal supply arrangements. Since, as per the loan agreement, one of the conditions precedent for initial draw down of loan is the existence of long term agreement for fuel supply for annual requirements of 80% of the PLF. Since no comments on fuel supply agreements was received from the Respondent No. 1 for over 3 months, the petitioner vide its letter dated 4.1.2007 informed the Respondent No. 1 that it had entered into long term coal supply agreement with Aditya Energy Resources Pvt. Ltd., Singapore on 26.12.2006 for supply of 0.5 MTPA of coal for the generation station. Subsequently, on 26.12.2007 (6 months after signing the fuel supply agreement) the Respondent No. 1 issued letter to the UPCL providing comments on the fuel supply agreement. In response, the petitioner vide its letter dated 2.7.2007 clarified that any reopening of the fuel supply agreement and any of the terms of the said contract, would carry risk of reopening prices and any

price increase would be attributable to the power producers.

5. The petitioner has further submitted that clause 2.1 of the Fuel Supply Agreement (FSA) provides that the FSA shall become effective upon its execution, unless the same has been terminated earlier and shall continue to be in effect from the commencement of commissioning of the power plant which shall not be later than 31.12.2009 and until the completion of the 12 years from the commencement of commissioning of the power plant. Clause 2.3 of the FSA further provides that it shall come into force and on the date upon which certain conditions precedent are specified or waived which are (a) execution of PPAs with Karnataka Disoms prior to 31.12.2005, (b) financial closing of the project prior to December 2006, and (c) commencement notice to the seller for fuel supply of the coal under FSA to be issued before 1.1.2009. The petitioner has submitted that steps towards meeting the conditions precedent of FSA as mentioned were taken by the petitioner. Clause 15.3 of the FSA provides that both the petitioner and the seller reserved their right to termination of FSA for any supply year during the term of FSA by giving two months notice to other parties without assuring any reason whatsoever. The petitioner had issued the commencement notice to the seller for supply of coal under FSA on 13.12.2008 and later revised notice on 19.12.2008.

6. The petitioner has submitted that Unit-I of the generating station was originally scheduled to be declared under commercial operation during April, 2010. However due to massive earthquake in China during 2008 and due to change in visa policies of Government of India and due to non-readiness of 220 kV transmission line, which was responsibility of Respondents No. 1 to 6, the project could not be declared under

commercial operation only on 11.11.2010. The petitioner has claimed that the delay in commercial operation of the unit-I of the generation station is as *force majeure* which is pending for to be considered before the Commission at the time of final determination of tariff in Petition No. 160/GT/2012.

7. The petitioner has submitted that in response to notice of *force majeure*, the seller vide their letters dated 26.4.2010, 22.9.2010 and 25.2.2011 informed that since the commissioning of the power plant did not commence before 21.2.2009, the FSA stands terminated and the seller has no further obligations towards the petitioner under the FSA. Subsequently, thereafter, the Respondent No. 1 vide its letter dated 11.12.2012 informed that since the termination of the FSA is attributable to the petitioner, the cost of procuring 0.5 MT of coal from other suppliers would be a pass through under Article 4.4 of the PPA with Karnataka Discoms and he is entitled to collect damages from the petitioner for ₹731.38 crore as difference in price of coal on which the seller (Aditya Energy Resources Pvt. Ltd.) has agreed to sale at the prevailing market price of coal for the period of the FSA.

8. Learned counsel for the petitioner submitted that the letter dated 11.12.2012 from the respondents No.1 demanding for payment of ₹ 731.38 crore is in utter disregard to the proceedings in Petition No. 160/GT/2012 wherein the issue of *force majeure* resulting in the delay in commercial operation of Unit-I is being considered by the Commission. The unilateral decision is making demand for claim is in total derogation to its contractual and legal obligations.

9. Learned counsel for the petitioner submitted that an I.A. has also filed for grant of interim relief and requested to stay the claim of ₹731.38 crore of Respondent No. 1. Learned counsel further requested to restrain the respondents from making any deduction in relation to the amount so claimed.

10. We have considered the issues raised in the petition. The tariff petition filed by the petitioner is pending before the Commission for final determination of tariff. One of the contentious issues raised in the tariff petition is the time overrun and the liabilities of the parties connected therewith. In the present petition, the dispute is with regard to the high cost of power purchase on account of the cancellation of the fuel supply agreement between the petitioner and Aditya Energy Resource Pvt. Ltd. due to time overrun of the project. It is noticed that both petitioner and respondent No. 1 are blaming each other for time overrun of the project and consequent cancellation of the fuel supply agreement. It is noted that the issue of time overrun is being considered by the Commission while determining the final tariff of the generating station which is fixed for hearing on 19.3.2013. In our view, no prejudice will be cost to the Respondent No. 1 if a direction is issued to Respondent No. 1 not to take coercive measure till the next date of hearing. Accordingly, we direct that Respondent No. 1 shall not take any coercive measure to recover the amount of ₹731.38 crore till the next date of hearing.

11. We direct issue of notice to the respondents on the petition and the I.A. The petitioner is directed to serve copy of the petition and the I.A. on the respondents immediately, if not already served. The respondent shall file their replies to the petition

by 15.3.2013.

12. The matter shall be listed for hearing on 19.3.2013 along with Petition No. 160/GT/2012.

sd/-
(V.S.VERMA)
MEMBER

sd/-
(Dr. PRAMOD DEO)
CHAIRPERSON