

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 315/MP/2013

Subject : Petition for adjudication of disputes arising out of the open access approval granted to the petitioner for evacuation of electricity and the terms and conditions of the bulk power transmission agreement dated 24.12.2010.

Date of hearing : 9.12.2014

Coram : Shri Gireesh B. Pradhan, Chairperson
Shri M. Deena Dayalan, Member
Shri A.K. Singhal, Member
Shri A.S. Bakshi , Member

Petitioner : PEL Power Limited

Respondent : Power Grid Corporation of India Limited

Parties present : Shri Anand K. Ganesan, Advocate, PEL Power
Shri S.M. Malik, PEL Power
Shri Jagam Mohan Rao, PEL Power
Shri A.M. Pavgi, PGCIL
Shri Swapnil Verma, PGCIL
Ms. Sunidhi Saran

Record of Proceedings

Learned counsel for the petitioner submitted as under:

- (a) The present petition has been filed for seeking direction to PGCIL to return the bank guarantee of ₹ 49.35 crore furnished at the time of execution of BPTA.
- (b) The petitioner had planned to establish 1050 MW thermal generating station in the Nagapattinam district in the State of Tamil Nadu and has taken various steps and invested substantial amounts in excess of ₹ 300 crore.
- (c) The petitioner had applied for long term open access to PGCIL on 20.10.2008 for a capacity of 987 MW which was granted on 10.12.2010.

(d) The petitioner has obtained all clearances including CRZ clearance and coal linkage, etc. However, due to non-availability of Consent for Establishment (CFE) from Tamil Nadu Pollution Board, the petitioner is prevented from proceeding with the construction of the generating station as envisaged.

(e) In the 6th Joint Co-ordination Committee meeting held on 9.9.2011, non-availability of CFE was informed to PGCIL which was further reiterated in the subsequent meeting held 2.12.2011.

(f) The petitioner has taken all reasonable steps possible for grant of CFE. The petitioner informed PGCIL that due to force majeure event, it is not in a position to establish the generating station which was scheduled for commissioning on April, 2014 and the petitioner also expressed its inability to sign the Transmission Service Agreement.

(g) Clause 9 of the BPTA provides for the force majeure, which is any event beyond the reasonable control of the parties. The non-availability of CFE fall within the scope of the said clause.

(h) Without prejudice to the above, the petitioner vide letter dated 16.12.2011 informed the respondent that due to non-availability of CFE, the petitioner be not considered for the pooling station and its requirement be deferred. It was also informed that as and when the project comes up, the petitioner be considered as a part of the second pooling station which is planned. By this communication, the petitioner had invoked the force majeure clause.

(i) While the petitioner had in December 2011 stated that it be not considered for the pooling station and only for the second pooling station as and when it is proposed, the respondent took even the approval of Board for investment only in January 2013. Till January 2013, the petitioner did not even take the first steps for the pooling station, which is the investment approval.

(j) The pooling station was proposed, approvals taken and is in the process of being established by the respondent with the full knowledge that the generating station of the petitioner is not being established.

(k) As per the information available on PGCIL's website, in December, 2013 the PGCIL had only incurred a cumulative expenditure of ₹ 4.86 crore for the transmission lines in question.

(l) The petitioner had sought various information on the investment made by PGCIL on the project in December, 2011 whether PGCIL had disclosed in the petition filed for regulatory approval of the petitioner not requiring the pooling station etc. to which PGCIL has not responded. The information being in the

exclusive possession of PGCIL and PGCIL do not wish to disclose the same, adverse inference need to be drawn.

(m) Bank guarantee is only a security provided and there is no provision for payment of liquidated damages to the extent of the bank guarantee. The respondent by threatening to invoke the bank guarantee is seeking to recover damages not even proved by the respondent.

(n) The quantum of damages is to be determined as on the date when the breach occurred. In this regard, learned counsel for the petitioner relied upon the judgment of the Hon`ble Supreme Court in Fateh Chand Vs Balkishan Dass {(1964)1 SCR 515:AIR 1963 SC 1405} (para 15) and submitted that the respondent cannot rely on subsequent actions taken and expenditure incurred by it claim the same as damages from the petitioner.

2. Learned counsel for the respondent submitted as under:

(a) The affidavit seeking direction to PGCIL regarding the status of the project and expenditure incurred up to December, 2011 was filed by the petitioner after the petition was reserved for order.

(b) The non-availability of Consent for Establishment (CFE) from Tamil Nadu Pollution Board cannot be treated as a force majeure event. The frustration is self induced. The Board made a reference to Govt. of Tamil Nadu for relaxation of G.O. 127 dated 8.5.1998 and CRZ Clearance from MoEF, which were lacking in the petitioner's application. No action has been taken by the petitioner to expedite the matter.

(c) The communications/representations of the petitioner only indicate that the generation project is likely to take-off soon and the petitioner did not write to withdraw from the LTA. Therefore, PGCIL was not in doubt about its materialization.

3. After hearing the parties, the Commission reserved the order in the petition.

By order of the Commission

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