

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 12/MP/2013

with

IA No. 3/2013

Coram

Shri V. S. Verma, Member

Shri M. Deena Dayalan, Member

Date of Hearing: 24.9.2013

Date of Order 21.2.2014

In the matter of

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

And in the matter of

Udupi Power Corporation Ltd
2nd Floor, Le Parc Richmond,
51, Richmond Road,
Bangalore – 560025

.....Petitioner

Vs

1. Power Company of Karnataka Ltd
KPTCL Building, Kaveri Bhawan,
K G Road, Bangalore – 560009

2. Bangalore Electricity Supply Company Limited (BESCOM)
Corporate Office, K.R. Circle,
Bangalore-560 001

3. Mangalore Electricity Supply Company Limited
Paradigm Plaza, AB Shetty Circle,
Mangalore-575 001

4. Gulbarga Electricity Supply Company Limited (GESCOM)
Station Main Road,
Gulbarga

5. Hubli Electricity supply Company Limited (HESCOM)
Navanagar, PB Road, Hubli

6. Chamundeswari Electricity Supply Corporation Ltd. (CESC)
No. 927, LJ Avenue Ground Floor,
New Kantharaj Urs Road,
Saraswatipuram,
Mysore-570 009

...Respondents



Parties Present:

For Petitioner:

Shri J.J. Bhatt, Senior Advocate, UPCL
Shri L. Vishwanathan, Advocate, UPCL
Shri A Ghosh, Advocate, UPCL
Shri R.Parthasarathy, UPCL
Shri R.A.Mulla, UPCL
Shri D.S.Murali, UPCL
Shri Soumyanarayanan, UPCL

For Respondents:

Shri M.G.Ramachandran, Advocate, PCKL & ors
Shri Anand Ganesan, Advocate, PCKL & ors
Shri V.G.Manjunath, PCKL
Shri Padamjit Singh, PSPCL

ORDER

The petitioner is aggrieved on account of demand of ₹731.38 crore raised by Respondent No. 1 under letter dated 11.12.2012 and has made the following specific prayers:

“(A) Allow the present Petition.

(B) to set aside the claim of ₹731.38 crores of the Respondents against the Applicant.

(C) as an interim relief, and during the pendency of this application stay the claim of ₹731.38 crores of the Respondents against the petitioner and to restrain the Respondents from making any deduction.

(D) direct the Respondent to pay all tariff invoices in full.

(E) direct the Respondent to pay costs.

(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, formerly known as Nagarjuna Power Corporation Limited, has set up a 1200 MW (2 x 600 MW) generating station in the State of Karnataka, though initially, the capacity envisaged was 1015 MW. In order dated 25.10.2005 in Petition No 40/2005, the Commission granted “in-principle” approval for capital cost of ₹4299.12 crore of the generating station. Unit 1 of the generating station has been commercially operational since 11.11.2010 and Unit II since 1.4.2012. The fuel

requirement of the generating station is stated to be about 3.63 million tonnes per annum (MTPA) of coal with gross calorific value of 5900 kCal/ kg as on received basis at Gross Station Heat Rate of 2400 kCal/kWh. The petitioner has stated that the generating station was designed considering that the entire requirement of coal would be met through import.

3. The petitioner proposed to sell 90% of power generated against initial capacity of 1015 MW to the distribution companies in the State of Karnataka, Respondent Nos. 2 to 6, and accordingly executed Power Purchase Agreement (PPA) dated 26.12.2005. The petitioner executed another PPA dated 29.9.2006 with Punjab State Electricity Board (PSEB) for sale of balance 10% capacity. The petitioner filed Petition No.160/GT/2012 for determination of generation tariff from the date of commercial operation of the respective units. The petition has been disposed by the Commission vide order dated 20.2.2014 by which the Commission has determined the tariff of the generating station for the period from the date of Commercial operation of the units till 31.3.2014.

4. The petitioner executed loan agreement dated 17.10.2006 with the financial institutions. Under the loan agreement, one of the conditions precedent to the initial draw down of the loan was that the petitioner ought to have entered into long-term agreements (not less than 10 years from the date of commercial operation) for fuel supply for the annual requirement at 80% PLF.

5. The petitioner sent a letter dated 22.9.2006 informing Karnataka Power Transmission Corporation Ltd, responsible for procurement power in the State of Karnataka at the relevant time which task is now performed by Respondent No. 1,

that it had received offers for coal supply arrangement through International Competitive Bidding process which had been evaluated by TCE Consulting Engineers. Under the said letter dated 22.9.2006 the petitioner claims to have sent the draft of the proposed Fuel Supply Agreement, explaining the salient features of the coal supply arrangements proposed. The petitioner has alleged that it did not receive any response to the letter dated 22.9.2006, despite follow up through reminders dated 21.11.2006, 29.11.2006 and 11.12.2006 and also personal discussions on several occasions.

6. The petitioner signed Coal Supply Agreement dated 26.12.2006 with Aditya Energy Resource Pte Ltd for annual supply of 0.5 MT of coal. The petitioner also executed agreements for supply of coal with other suppliers, namely Glencore (0.5 MT), PT Adaro (1.2 MT) and Banpu (0.5 MT). The petitioner wrote a letter dated 4.1.2007 informing Respondent No. 1 of the fact of its entering into the long-term Fuel Supply Agreements to meet the total annual requirement of coal at 80% PLF. The copies of the Fuel Supply Agreements were made available to Respondent No. 1 under the said letter dated 4.1.2007. The petitioner explained the background against which the Fuel Supply Agreements were signed; the relevant extracts are placed hereunder:

"As you are aware, the prices of coal finalised as per International Competitive Bidding is as per the PPA signed between the ESCOMs and NPC, and same is evident from the details attached.

Considering that the price of coal, freight and insurance finalised is much lower than the present market prices, it is thus very necessary that the supply contracts/agreements are concluded/signed before the suppliers withdraw their offer.

In fact one of the supplier, Louis Dreyfus Energy Services (LDES) has already withdrawn their offer considering the present market condition, where CIF Prices are ruling in the range of USD 70-75 against our CIF Prices in range of USD 50-51.

Considering that our FOB prices are FIRM for first five years of supply (January 2010 – End 2014) and ocean freight and insurance are Firm for 12 years (January 2010 –2021) it is very necessary that the coal supply contracts/agreements are signed and concluded to prevent any supplier from withdrawing from their offer/proposal. Any further delay with seriously jeopardise our present arrangement. "

7. The petitioner has averred that Respondent No. 1 issued letter dated 22.6.2007 providing its comments on the Fuel Supply Agreements. In response, the petitioner has claimed, vide its letter dated 2.7.2007, it again informed Respondent No. 1 of the circumstances leading to signing of the Fuel Supply Agreements and the fact of failure Respondent No. 1 to furnish its comments on the draft of the Fuel Supply Agreement sent on 22.9.2006. In the said letter dated 2.7.2007, the petitioner stated that reopening of the Fuel Supply Agreements and any of the terms thereof entails risk of reopening prices as well and in case Respondent No. 1 insisted on reopening of the Fuel supply Agreements in view of the issues raised, the risk of higher prices would be passed on to the buyers through tariff. The petitioner has averred that Respondent No. 1 did not respond to the letter dated 2.7.2007.

8. In accordance with clause 2.1 of the Fuel Supply Agreement executed between Aditya Energy Resource and the petitioner, the agreement was to continue, unless terminated earlier, to be in effect for twelve years from the date of commissioning of the generating station which was not be later than 31.12.2009. Clause 2.3 of the Fuel Supply Agreement specified that the agreement would come into full force on the date upon which the conditions precedent laid down therein were satisfied or waived by the parties with mutual consent. Clause 15.3 of the Fuel Supply Agreement empowered the parties to terminate the agreement for any supply year

during the term of the contract by giving two months notice. Clauses 2.1, 2.3 and 15.3 of the Fuel Supply Agreement are reproduced below:

*"2.1 **Terms of Agreement** . This Agreement shall become effective upon its execution and delivery by both Parties. Unless this Agreement is earlier terminated, this Agreement shall continue to be in effect from the commencement of commissioning of the Plant, which shall not be earlier than January 1 2009 and in any case not later than December 31, 2009, until the completion of 12 years from the commencement of commissioning of the Plant."*

*"2.3 **Conditions Precedent**. This Agreement shall come into full force and effect on the date (the Effective Date) upon which the following conditions have been satisfied or expressly waived or amended by mutual agreement between the Parties. Should any of the following conditions precedent fail to be satisfied this Agreement shall be cancelled. Purchaser shall inform the Seller in writing when each of the Conditions Precedent has been satisfied.*

(a) The Power Purchase Agreement has been duly executed between Purchaser and the Karnataka Power Transmission Corporation Limited or its successor or thereof prior to December 31, 2005.

(b) The financial closing date of the project has occurred prior to December 2006.

(c) Purchaser has delivered the Commencement Notice on or before January 1, 2009 or such other date as may be mutually agreed upon between the Parties. First delivery shall start no earlier than six (6) months and no later than twelve (12) months from the date of delivery of the Commencement Notice or such other date as may be mutually agreed upon between the Parties, failing which this Agreement shall be cancelled."

*"15.3 **Termination of Agreement**. Both Seller and Buyer reserve their right to terminate this Agreement for any supply year during the term of the contract by giving 2 months notice to the other party without assigning any reason."*

9. The petitioner has stated that it had taken all necessary steps towards meeting the conditions precedent laid down under clause 2.3 of the Fuel Supply Agreement. The petitioner states that it issued the commencement notice for supply of coal on 13.12.2008 and revised notice dated 19.12.2008 providing details of the amount of coal to be dispatched for the year 2009. The petitioner has submitted that implementation of the Project was interrupted on account of certain events of *Force Majeure* which delayed its commissioning too. The *Force Majeure* events narrated by the petitioner include delay by the respondents in arranging 220 KV transmission lines for provision of start-up and pre-commissioning power, delay in providing the Guarantee by the State Government of Karnataka, massive earthquake in China

during May, 2008 which affected supply of equipment and changes in the visa policies of the Central Government with respect to Chinese Experts working at the project site causing disruption of work. As a result of these events, synchronisation of Unit 1 could be achieved only on 18.7.2010 which became commercially operative on 11.11.2010.

10. The petitioner has submitted that Aditya Energy Resource in its letter dated 30.1.2009 while taking note of the progress of the construction activities of the generating station informed the petitioner that in the event of the petitioner failing to commence commissioning of the generating station by December 2009, they would take recourse to the remedies provided under the Fuel Supply Agreement. In view of the delay in commissioning of the generating station, the petitioner claims to have given notice of the *Force Majeure* under the Fuel Supply Agreement to Aditya Energy Resource vide its letter dated 23.12.2009, specifically informing of the *Force Majeure* events causing the delay in commissioning of the generating station. Nevertheless, the petitioner called upon Aditya Energy Resource to supply coal in terms of the Fuel Supply Agreement as per the delivery schedule agreed thereunder since the *Force Majeure* events did not affect the ability of the petitioner to accept delivery of coal.

11. The petitioner has stated that Aditya Energy Resource in purported exercise of power under the Fuel supply Agreement informed the petitioner under letter dated 26.4.2010 that the Fuel Supply Agreement stood terminated on account of the delay in commissioning of the generating station which was to commence before 31.12.2009, and that Aditya Energy Resource did not have any further obligation towards the petitioner under the Fuel Supply Agreement. Aditya Energy Resource by

letter dated 22.9.2010 further informed the petitioner that even if the Fuel Supply Agreement had not been terminated in terms of clause 2.3 thereof, Aditya Energy Resource had the right to terminate the Fuel Supply Agreement for any supply year with two months notice and accordingly issued notice of termination, purportedly under clause 15.3.

12. Respondent No. 1 by its letter dated 28.6.2011 directed the petitioner, *inter alia*, to take necessary action against Aditya Energy Resource to honour the terms of the Fuel Supply Agreement. The basis of the direction was the Government of Karnataka G.O. No. EN 45 PPC 2010 dated 3.9.2010. Accordingly, the petitioner has stated, in order to comply with the requirement of the said GO, it approached its lawyers for opinion but was advised that the Fuel Supply Agreement had been lawfully terminated by Aditya Energy Resource and as such no legal remedy was available to the petitioner. The petitioner accordingly informed Respondent No. 1 of the legal opinion received by its letter dated 29.9.2011 and did not take any further action in the matter.

13. Respondent No. 1 in its letter dated 11.12.2012 (**the impugned letter**) addressed to the petitioner has alleged that the reasons for the delay in commissioning of the generating station were attributable to the petitioner. Respondent No. 1 has accordingly stated that the cost of procuring 0.5 MT of coal from other suppliers would be a pass-through under Article 4.4 of the PPA executed between the parties. Respondent No. 1 informed the petitioner that and the respondents were not liable to pay price of the coal in excess of which Aditya Energy Resource had agreed for the term of the Fuel Supply Agreement. Respondent No. 1 has demanded the energy charges amounting to ₹731.38 crore be reimbursed by the

petitioner to Respondent Nos. 2 to 6. The petitioner has termed the demand raised by Respondent No. 1 as arbitrary and unilateral and has accordingly filed the present petition.

14. The respondents in their common reply have stated that the petitioner had invited bids for supply of coal during 2003. The bid of M/s Rio Tinto, a leading coal supplier, was accepted and the petitioner had issued Letter of Intent on 9.8.2004 for supply of 1.5 MTPA of coal of guaranteed GCV of 6200 kcal/kg. The respondents have stated that coal price and its specifications offered by M/s Rio Tinto were the basis of the PPA dated 26.12.2005. However, the respondents have alleged, the petitioner initiated a fresh bidding process during 2005 after cancelling the agreement with M/s Rio Tinto without any proper justification and consent/approval of the respondents. The respondents have submitted that during the process of fresh bidding, no details of the bidding documents or the bids received were provided to them. The respondents have admitted that the petitioner under its letter dated 22.9.2006 forwarded the evaluation report prepared by their consultant, TCE Consulting Engineers Limited. The respondents have alleged that there were discrepancies in the bidding process and the obligation of the petitioner towards the respondents. The respondents have listed the following discrepancies:

- (i) The petitioner in the fresh bidding reduced the guaranteed GCV value from 6200 kcal/kg to 5200 kcal/kg.
- (ii) Even though the term of the PPA was for 25 years, the petitioner invited coal supply for a period of 12 years only.
- (iii) The petitioner accepted the offers even though the coal specifications were not at par with the specifications under the PPA, though it was

incumbent upon the petitioner to follow the terms and conditions of the PPA including the coal specifications.

- (iv) In all the offers, purchase of coal was to commence after 1.1.2009 and before 31.12.2009, but the petitioner did not indicate about the consequences, if it fails to purchase coal in the stipulated period.
- (v) In case of PT Adaro, the validity of the offer was conditional and was linked to achievement of Financial Closure by 30.9.2006. Since, the petitioner achieved Financial Closure in October, 2006 the validity of PT Adaro's offer was to be clarified , which was not done.
- (vi) Since the FOB price was firm for 5 years and based on indexation for the rest of the period, indexation as provided by the Commission only were be considered.
- (vii) Annual minimum coal quantity to be off taken by the petitioner from each of the individual bidders, and penalty clauses if the same was not be adhered were not furnished.
- (viii) FOB price adjustment needed to be linked to coal specifications viz. Ash & Sulphur in respect of PT Adaro and Aditya Energy Resources.
- (ix) Procedures for coal sampling and its analysis was not furnished, which ought to have been done.

15. The respondents have stated that the issues were to be considered by them when the petitioner sought their views in regard to the evaluation of the coal bids received. However, according to the respondents, without providing sufficient time to the respondents to take a view and communicate its observations on the evaluation

report, the petitioner executed the Fuel Supply Agreements on 26.12.2006. The respondents have brought out that the terms and conditions of the coal supply agreements furnished by the petitioner were examined by Respondent No. 1 who by letter 22.6.2007 advised the petitioner to incorporate certain modifications and also to submit the supplemental Fuel Supply Agreements. The respondents have stated that the terms and conditions of the Fuel Supply Agreements were not forwarded to them by the petitioner prior to their execution. The respondents have asserted that the petitioner was required to incorporate the suggested modifications but did not do so and thus the petitioner had not acted in a bona fide manner. In the circumstances, the respondents have argued, the provisions in the Fuel Supply Agreements cannot be interpreted or applied in a manner prejudicial to their interest.

16. The respondents have submitted that termination of the Fuel Supply Agreement by Aditya Energy Resource, allegedly in terms of clause 2.1 of the agreement, was on account of failure of the petitioner to commission the generating station by 31.12.2009. However, the respondents have further urged, there is no provision in clause 2.1 for termination of the Fuel Supply Agreement if the generating station was not commissioned by 31.12.2009 as, according to them, this clause only specifies the term of the agreement and not the effective date. As such, according to the respondents, the term of the agreement would have been up to 31.12.2021, if the generating station had been commissioned on 31.12.2009 and in case the date of commissioning was delayed beyond 31.12.2009, the tenure of the agreement would get reduced and will in any case expire on 31.12.2021, irrespective of the date of commissioning. The respondents have submitted that the conditions precedent were satisfied within the stipulated time and thereby, the Fuel Supply Agreement became

effective and could not be said to have been terminated on the alleged ground of non-satisfaction of the conditions precedent.

17. Further disputing the correctness of the plea of termination of the Fuel Supply Agreement under clause 15.3, the respondents have argued that the agreement could be terminated for any one year by giving 2 months notice but could not be terminated for the entire term under this clause. Therefore, it has been argued, the notice of termination of the agreement for all supply years under the agreement is contrary to the terms thereof. The respondents have claimed that Aditya Energy Resource acted in manner contrary to the terms of agreement and thus the petitioner had the right under clause 14.2 to recover from Aditya Energy Resource the excess amount (Difference between prevailing market price and FOB price of US\$ 33.4/MT). Since the petitioner of its own did not to take any legal action for recovery of the additional cost and expenditure, the Government of Karnataka vide GO dated 3.9.2010 directed the petitioner to take necessary legal action against Aditya Energy Resources as per the provisions of the Fuel Supply Agreement. The petitioner has not initiated any legal action against Aditya Energy Resources despite being so advised by Respondent No. 1 vide letter dated 28.6.2011 based on legal opinion stating that no legal remedy was available to the petitioner as per the provisions of the Fuel Supply Agreement, which in itself shows lack of bonafide on the part of the petitioner.

18. The respondents have pointed out that the petitioner has not placed on record the copies of the letters dated 30.1.2009, 5.5.2010, 7.7.2010, 15.7.2010, 15.9.2010, 8.10.2010 and 17.12.2010 addressed by Aditya Energy Resource to the petitioner and the replies of the petitioner to Aditya Energy Resource to these letters. Based

these averments, the respondents have alleged that the petitioner is suppressing facts and is not entitled to any relief under law or in equity.

19. The respondents have denied that the commissioning of the generating unit was delayed on account of delay in providing the start-up power as the PPA does not stipulate any deadline for providing start-up/commissioning power by the respondents. In the absence of such contractual obligation, there cannot be any claim of default against the respondents. On the issue of delay in executing Guarantee by the State Government, the respondents have clarified that, during the meeting held on 7.2.2006, the issue regarding signing of Government Guarantee was discussed and the petitioner was informed that since Government had already issued an order approving the grant of Government Guarantee, signing of a guarantee did not serve any purpose at that stage. Thus, according to the respondents, the contention raised that the delay in signing the Govt. Guarantee was also one of the factors responsible for delay in commissioning of the unit is misconceived.

Analysis and Decision

20. We have heard learned counsel for the parties who have filed their written submissions in support of their respective claim. We have examined the submissions of the petitioner and the respondents based on the material available on record. At this stage itself it may be observed that there is no dispute between the parties as regards the basic facts.

21. At the outset it may be mentioned that the Fuel Supply Agreements were terminated by all the four coal suppliers; Glencore vide letter dated 14.1.2010, PT

Indominco Mandiri vide letter dated 26.3.2010 and Aditya Energy Resource vide letter dated 26.4.2010 on the ground of delay in commissioning of the generating unit having beyond 31.12.2009, though termination letter in case of PT Adaro is not available on record. The Fuel Supply Agreements with PT Adaro, PT Indominco Mandiri and Glencore were again reinstated through Addendum and Amendments dated 28.1.2011, 24.9.2010, 15.6.2011 and 2.11.2010 with FOBT price delivered in each delivery year subject to adjustment to contractual GCV of 5200 kcal/kg after renegotiation with the coal suppliers by a team which included senior officers of the State Government. Therefore, the issues raised in the present petition are in connection with the Fuel Supply Agreement dated 26.12.2006 executed with Aditya Energy Resource.

22. The question of delay in commissioning of the generating station has been examined in the order dated 20.2.2014 in Petition No.160/GT/2012 filed by the petitioner for approval of tariff. It has been held that the reasons for the delay cannot be attributed to the petitioner and the delay was on account of the 'Force Majeure' events. We do not have to anything to add to the conclusion already reached by us. The relevant part of the conclusion arrived at in the said order dated 20.2.2014 is extracted below:

"44. As regards 'Force majeure' due to Earthquake, it is noticed that DEC, China (sub-contractor) in its letter dated 15.7.2008 addressed to LITL (EPC contractor) has informed that due to change in configuration from 507.5 MW to 600 MW, there would not be any change in the supply schedules. Also, as stated by the respondents, the amendment to the agreement entered in to by LITL with the petitioner on 3.10.2008 did not make any change in the commissioning schedule of Units I and II even though the agreement was entered into subsequent to the earthquake. In this background, the reason as to why DEC had not sought extension of time for supply of equipment's as per schedule in case they were affected by earthquake in May 2008, remain unanswered and therefore we are of the view that the petitioner has not put forth sufficient reasons for condonation of delay due to earthquake in China. However, the delay of 8.5 months due to earthquake is subsumed in the period of delay in land acquisition which has already been condoned and therefore, does not materially affect the commissioning of Unit-I.

45. As regards the Change in Visa policy by the Government of India for Chinese nationals, it is observed that the Ministry of Commerce and Industry, GOI, by its letter dated 20.8.2009 had issued clarification on the requirement of Visa for foreign nationals engaged in execution of projects/ contractual work in India. Subsequently, by letter dated 25.9.2009 further clarification was issued by the Ministry of Home Affairs, GOI, on this issue.....

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47. We find force in the submission of the petitioner. In our view, the absence of sufficient number of experts from OEM, who are Chinese nationals, during peak project activities, has had a direct impact on the progress of the project leading to the delay in the completion of the project. Clause 10.1(b) of the PPA, provides that any event, circumstances or the combination of events which have the effect upon the performance of any of the contractors/suppliers of the seller shall constitute an event of Force Majeure. Applying the same principle in this case, we conclude that the change in Visa policy by the Govt. of India has affected the entry of Chinese personnel thereby affecting the commissioning and testing activities of the petitioner, which constitutes an event of Force Majeure. Accordingly, for the above considerations, we hold that the delay of 6 months in the completion of the project due to Change in Visa policy was beyond the control of the petitioner and accordingly allow the same"

23. The respondents have alleged that the petitioner while signing the Fuel Supply Agreements overlooked the provisions of the PPA regarding the Calorific Value of the coal. The respondents have also alleged that the petitioner did not allow sufficient time for examination of the bid documents evaluated by TCE Consulting Engineers Limited, the consultants engaged by the petitioner for the purpose. It is an undisputed fact that the evaluation report prepared by the petitioner's consultants was sent to Respondent No.1 on 22.9.2006 for comments. Respondent No. 1 however did not apprise the petitioner of its views in the matter despite continuous follow up. The execution of agreements for supply of fuel (coal) was centric to the initial draw down of the loan. In its anxiety to achieve timely financial closure, the petitioner waited for more than three months after sending the evaluation report and ultimately executed the Fuel Supply Agreements on 26.12.2006, the copies of which were supplied to Respondent No. 1 under letter dated 4.1.2007. It also bears notice that normally prices offered by the bidders against International Competitive Bidding, have a definite validity period. In a volatile coal market holding the price validity for long period is not expected. Therefore, the bidders may not necessarily agree to the

price after the expiry of validity period. In case the agreements are not executed within the period of validity of the bids, the whole process may have started from the scratch, causing delay in execution of works. In the circumstances, the petitioner cannot be accused of having acted in haste or in an unreasonable manner.

24. Respondent No. 1 furnished comments on the bidding process and the Fuel Supply Agreements under its letter dated 22.6.2007, asking the petitioner to execute supplementary Fuel Supply Agreements in the light of the comments. The petitioner promptly responded to the communication received from Respondent No. 1 through letter dated 2.7.2007 and forewarned Respondent No. 1 of the risks involved in reopening the terms of the Fuel Supply Agreements. The petitioner apprehended that reopening of the issues on which the comments were made available by Respondent No. 1 could lead to reopening the price agreed and if that happened the increase in price would have to be passed on to the buyers of electricity. Respondent No. 1 did not insist on signing of the supplementary Fuel Supply Agreements thereafter and matter rested there as Respondent No. 1 kept silent. From narration of these facts two inferences can be easily drawn. Firstly, there was no reluctance on the part of the petitioner to renegotiate the terms of the Fuel Supply Agreements provided the risk of higher coal price, if it happened, was borne by the respondents. Secondly, Respondent No. 1 accepted the terms of the Fuel Supply Agreements, probably based on the views communicated by the petitioner. Further, the respondents have called upon the petitioner to take appropriate legal action against Aditya Energy Resource for enforcement of the terms of the Fuel Supply Agreement and claim damages. This also amounts to express acceptance of the Fuel Supply Agreements by the respondents. The respondents at this stage cannot be heard to

make any grievance regarding the terms and conditions of the Fuel Supply Agreements.

25. The respondents have urged that the Fuel Supply Agreement was illegally terminated by Aditya Energy Resource since, according to the respondents, termination was not covered either under clause 2.1 or clause 2.3 or clause 15.3 and thus termination was *de hors* the Fuel Supply Agreement. The State Government of Karnataka under G O dated 3.9.2010 directed the petitioner to initiate legal action for recovery of damages for unlawful termination of the Fuel Supply Agreement. The petitioner obtained legal opinion and was advised against any legal recourse. The petitioner acting upon the legal opinion, under its letter dated 29.9.2011 informed the respondents of futility of resorting to legal action. When the matter so rested, Respondent No. 1 issued the impugned letter calling upon the petitioner to refund an amount of ₹731.38 crore on account of excess energy charge based on the surmise that termination of the Fuel Supply Agreement was unlawful. We agree with the contention of the petitioner that action of the respondents is unilateral and impugned letter smacks of arbitrariness on their part. Whether or not termination of the Fuel Supply Agreement dated 26.12.2006 was lawful can be decided by an appropriate legal forum. The respondents who are third party as regards the said Fuel Supply Agreement dated 26.12.2006 do not have any authority to decide the validity of termination thereof. We refrain ourselves from expressing any opinion on validity of termination because the Aditya Energy Resource is not amenable to regulatory jurisdiction of the Commission and is also not a party before us. Therefore, the respondents' contention that the Fuel supply Agreement was illegally terminated by

Aditya Energy Resource is untenable at this stage, without any finding to that effect by a judicial forum having sanctity of law.

26. On the representation of the petitioner dated 3.4.2010, the State Government of Karnataka under its order dated 9.4.2010 constituted a high level Committee headed by Managing Director, Karnataka Power Transmission Corporation Ltd with Managing Directors of the distribution companies in the State as the members of the Committee for re-negotiations of the coal contracts. From the Preamble to the State Government of Karnataka order dated 3.9.2010 it is seen that the Committee in its report to the State Government, recommended adoption of negotiated coal rates for PT Adaro and PT Indominco. It is further noticed from the Preamble that the Committee carried out re-negotiation with Glencore as well and made certain recommendations. However, the Preamble to the order is silent as regards Aditya Energy Resource. The Government order, however states that since Aditya Energy Resource had not supplied any coal as per the existing contract, has directed the petitioner to take necessary legal action in accordance with the Fuel Supply Agreement. The State Government in its order dated 29.10.2010 accepted the offer of Glenco for the rates as applicable to PT Adaro and PT Indominco in case of supply of coal from Indonesian mines. The State Government order permitted Glenco to link price of coal with New Castle Global Coal Index in case the supply of coal was made from any other country. The State Government further directed that long-term tender for supply of coal as per the given specification be called. The State Government directive makes it clear that the respondents were duly involved in the negotiation with the coal suppliers, except Aditya Energy Resource. It appears that the high level Committee excluded Aditya Energy Resource from negotiation, the

reason for which is not known. In case re-negotiations were carried out with Aditya Energy Resource, the present situation could have been avoided.

27. Lastly, it may be pointed out that Respondent No 1 has not given any basis and details in support of its claim for ₹731.38 crore.

28. In view of foregoing discussions, the petition is allowed and the impugned letter is set aside with a direction that the petitioner is not liable to pay the amount of ₹731.38 crore claimed by the respondents. There shall be no order as to costs.

Sd/-
(M. Deena Dayalan)
Member

Sd/-
(V. S. Verma)
Member