

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 419/MP/2014

Subject : Petition on behalf of Raichur Sholapur Transmission Company Limited under Transmission Service Agreement dated 4.8.2010 read with section 79 (1) (f) of the Electricity Act, 2003.

Date of hearing : 15.1.2015

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

Petitioner : Raichur Sholapur Transmission Company Limited

Respondents : Powergrid Corporation of India Limited and others

Parties present : Shri G. Sai Kumar, Advocate, RSTCL
Shri Varun Pathak, Advocate, RSTCL
Shri Nitish Gupta, Advocate, RSTCL
Shri Birender Kumar Singh, RSTCL
Shri Kunj Rajgarif, RSTCL
Shri S. Mukherjee, RSTCL
Shri Sandeep Bajaj, Advocate, MSEDCL
Shri Ekank Mehra, Advocate, MSEDCL
Shri Swapnil Verma, PGCIL

Record of Proceedings

Learned counsel for the petitioner argued at length and referred various provisions of the PPA. Learned counsel for the petitioner further submitted as under:

(a) The Scheduled COD of the project was 7.1.2014. However, the petitioner in Petition No. 331/SM/2013 informed the Commission that the COD of the project as per the certificate issued by POSOCO is 4.7.2014.

(b) As per Article 2.1 of the TSA, the effective date was 6.1.2011. However, as per schedule 3 of the TSA, the project was contemplated to be completed within a period of 36 months. Under the TSA, the time period was divided in a manner wherein 6 months were earmarked for the purposes of obtaining transmission licensee, adoption of tariff under Section 63 of the Act and for achieving financial closure and 30 months were earmarked for the purpose of construction. Article 3

of the TSA clearly provides that the conditions subsequent shall be fulfilled by the petitioner (TSP). Therefore, within 6 months of the effective date, the transmission licence should have been granted to the petitioner in order to enable it to proceed with the construction of the line.

(c) The application for grant of inter-State transmission licence was filed before the Commission on 10.1.2011. However, the licence was granted by the Commission on 24.8.2011 with delay of approximately three months.

(d) There was a three months delay in obtaining approval under Section 164 of the Act and Appellate Tribunal for Electricity in its judgment dated 2.12.2013 in Appeal No. 139/2012 has held that the delay in obtaining the Section 164 approval from the Government of India is to be construed as a force majeure event.

(e) As per Article 3.2.1 of the TSA, LTTCs are under an obligation to provide within 6 months from the effective date an irrevocable letter to the lenders, which was only done on 18.9.2012 by MSEDCL, which also resulted in delay in financial closure. This delay was completely attributable to the LTTCs and also attributed and resulted in the delay in completion of the project as per the scheduled COD. Accordingly, in terms of the Article 3.3.4 of the TSA, the petitioner is entitled to 3 months. The period is not required to be calculated on day wise basis. Therefore, the petitioner is entitled to the period prescribed under Article 3.3.4 of the TSA without any problem.

(f) In the event that TSP is prevented from performing its obligations due to fault of Long Term Transmission Customers or in case of delay due to force majeure, the COD shall be extended on "day for day" basis, for a maximum period of 180 days in terms of Article 4.4.2 of the TSA.

(g) The procedure under Article 16.2 for amicable settlement is not mandatory. The petitioner was left with no choice but to approach the Commission when MSEDCL threatened the petitioner to invoke the contract performance guarantee and demanded liquidated damages.

(h) During the pendency of the Petition No. 331 of 2013, the Central Electricity Authority was being regularly informed and updated with respect to the blockade and other issues faced by it. During the hearing before the Commission, notices were issued to all stakeholders including MSEDCL and therefore, there was no further requirement of a notice for force majeure under the TSA.

(i) The definition of force majeure under the TSA is inclusive and not exhaustive in nature. The petitioner is entitled to relief for the period where difficulties were being faced by the petitioner. It was impossible for the petitioner to execute and continue with the performance of the tasks necessary for the completion of the project.

(j) The contention of MSEDCL that bank guarantee is an independent contract and injunction against the invocation of a bank guarantee cannot be issued is completely erroneous. The TSA is a statutory agreement and has been approved by the Commission and the contract performance guarantee has been issued by the petitioner in terms of the TSA.

(k) During execution of the project, the petitioner encountered various difficulties and therefore, the petitioner is not liable for the delay caused in achieving COD and as such, the bank guarantee issued to the long-term beneficiaries should be returned to the petitioner.

2. Learned counsel for MSEDCL submitted as under:

(a) The force majeure as defined under Article 11.3 (a) of the TSA, does not include the adverse weather condition. It is not even the case of the petitioner that the weather conditions were exceptionally adverse and in excess of the statistical measures for last hundred years. Further, other reasons stated by the petitioner cannot be covered under the non anticipated events. While relying on a force majeure clause, the petitioner ought to show that it has taken all reasonable steps to avoid the event or events concerned. However, in the present case, no such case has been made by the petitioner.

(b) As per Article 11.5 of the TSA, the party is required to give notice to the procurers of any event of force majeure as soon as reasonably practicable, but not later than seven days after the date on which such party knew or should reasonably have known of the commencement of the event of force majeure. Therefore, in the absence of any such written notice, the petitioner cannot claim any relief of force majeure.

(c) The petitioner has pleaded that CEA was regularly informed about the difficulties being faced by it while executing the project. However, no such notice required under Article 11.5 of the TSA were sent by the petitioner to any other party under TSA. Therefore, the petitioner cannot claim delay in COD of the project. The petitioner has not complied with the direction of CEA and the delay in COD is due to lack of efforts by RSTCL. In this regard, learned counsel relied upon the judgment of Supreme Court in Rajasthan State Road Transport Corporation and another V Bajrang Lal in [(2014) 4 Supreme Court Cases 693] submitted that in the absence of necessary pleading and supporting evidence, the court is not under an obligation to entertain the pleas.

(d) The petitioner relied upon the Judgment of Appellate Tribunal of Electricity dated 2.12.2013 in Appeal No. 2.12.2013 wherein the Tribunal held that delay in grant of permission under Section 164 is the force majeure event. Even the notice has not been sent by the petitioner in terms of Article 11.5 of the

TSA, the reliance of the petitioner on the said judgment is totally wrong which is liable to be rejected.

(e) Learned counsel relied upon the judgment of Supreme Court in Vinitec Electronics Private Ltd. Vs HCL Infosystem Limited [(2008) 1 Supreme Court Cases 544] and submitted that the law relating to invocation of such bank guarantee is settled law now. In the course of commercial dealings an unconditional bank guarantee is given, the beneficiaries are entitled to release such a bank guarantee in terms of the contract irrespective of any pending disputes. Therefore, calling for an order of injunction to restrain enforcement of bank guarantee is incorrect.

(f) The delay in COD is attributable to the sole conduct of the petitioner and it is liable to pay for the liquidated damages as provided under TSA.

3. In response, the learned counsel for the petitioner submitted that judgments relied upon by the learned counsel for MSEDCL are not applicable in the present case. This Commission has been granted wide powers under Section 94 (2) of the Act which empowers the Commission to pass such interim order as it may deem appropriate in the any proceedings before it. The Commission has also power under Regulation 68 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 to issue interim order.

4. After hearing the learned counsels for the parties, the Commission directed the petitioner to file the copy of the letters sent to Ministry of Power and CEA by 30.1.2015 with regard to delay in execution of the project.

5. The Commission directed the petitioner and respondents to file their written submissions by 30.1.2015.

6. The Commission directed that due date of filing the information and written submissions should be strictly complied with. The information and written submissions filed after due date shall not be considered.

7. Subject to the above, the Commission reserved order in the petition.

By order of the Commission

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