

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 172/MP/2013
with I.A. No. 14/2015**

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

Date of Order: 7.8.2015

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Article 13 and 17 of the Power Purchase Agreement dated 10.9.2008 executed between Jharkhand Integrated Power Ltd. and Jharkhand SEB and 17 others for compensation due to 'Change in Law' during the Construction Period.

**And
In the matter of**

Jharkhand Integrated Power Ltd.
7th Floor, Raheja Point-I,
Jawaharlal Nehru Marg, Vakola Market, Santa Cruz (East)
Mumbai - 400005

....Petitioner

Vs

1. Jharkhand State Electricity Board
Engineering Building, HEC, Dhurwa,
Ranchi – 834004
2. Bihar State Electricity Board
Vidyut Bhawan, Bailey Road,
Patna – 800021
3. Punjab State Electricity Board
The Mall, Patiala – 147001
4. Paschimanchal Vidyut Vitran Nigam Ltd.
Victoria Park, Meerut – 250001
5. Purvanchal Vidyut Vitran Nigam Ltd.



Hydel Colony, Bhikharipur, Post – DLW
Varanasi – 221004

6. Dakshinanchal Vidyut Vitran Nigam Ltd.
220 kV Vidyut sub-station,
Mathura-Agra By-Pass Road,
Sikandara, Agra – 282007
7. Madhyanchal Vidyut Vitran Nigam Ltd.
4A, Gokhle Marg, Lucknow – 226001
8. Kanpur Electric Supply Company Ltd
KESA House, 14/71, Civil Lines KESCO
Kanpur – 208007
9. Madhya Pradesh Power Management Company Lt.d,
Shakti Bhawan Rampur, Vidyut Nagar,
Jabalpur – 482008
10. Jaipur Vidyut Vitran Nigam Ltd.
Vidyut Nigam, Jyoti Nagar,
Near Vidhan Sabha,
Jaipur – 302005
11. Ajmer Vidyut Vitran Nigam Ltd.
Hathi Bhatia, Jaipur Road,
Ajmer – 305001
12. Jodhpur Vidyut Vitran Nigam Ltd.
New Powerhouse, Industrial Area,
Jodhpur – 342003
13. Haryana Power Purchase Centre
Shakti Bhawan, C-7, Sector 8
Panchkula – 134109
14. Maharashtra State Electricity Distribution Company Ltd.
Prakashgad Anant Kankar Marg, Plot No G9,
Bandra (E), Mumbai – 400051
15. Gujarat Urja Vikas Nigam Ltd.
2nd Floor, Sardar Patel Vidyut Bhawan,
Race Course, Vadodara – 390007
16. North Delhi Power Ltd
Grid Substation Building,
Hudson Lines, Kingway Camp



Delhi – 110009

17. BSES Rajdhani Ltd
C Block, 2nd Floor,
BSES Bhawan, Nehru Place,
New Delhi – 110019
18. BSES Yamuna Ltd
Shakti Kiran Building, Karkardooma,
New Delhi – 110092
19. Government of Jharkhand
Through Principal Secretary,
Department of Energy,
Nepal House, Ranchi – 834004

.....Respondents

Parties Present

For Petitioner:

1. Shri J.J Bhatt, Senior Advocate
2. Shri Aditya Panda, Advocate
3. Shri Kamal Gupta
4. Shri N.K.Deo

For Respondents:

1. Ms Anushree Badhan, Advocate, HPPC, Rajasthan & GUVNL
2. Ms Poorva Saigal, Advocate, HPPC, Rajasthan & GUVNL
3. Shri Alok Shankar, Advocate, TPDDL
4. Shri Yashish Chandra, Advocate, TPDDL
5. Shri Rajiv Srivastava, Advocate, UPPCL
6. Shri Himanshu Shekhar, Advocate, JSEB
7. Shri G. Umopathy, Advocate, MPPMCL
8. Shri Aabhas Parimal, JUVNL

ORDER

The petitioner, Jharkhand Integrated Power Ltd. was selected through the tariff based competitive bidding under Section 63 of the Electricity Act, 2003 (Act) for implementation of the 4000 MW Tilaiya Ultra Mega Power Project (the Project) in the State of Jharkhand. The distribution utilities in various States,



impleaded as the respondents 1 to 18 in the petition, are the beneficiaries of the Project and have entered into a Power Purchase Agreement (PPA) dated 10.9.2008. The tariff of the project was adopted by the Commission under Section 63 of the Act vide order dated 26.4.2010 in Petition No. 281/2009.

2. The petitioner has filed the present petition with the following prayers:

“a) That this Hon’ble Commission may be pleased to hold that the Petitioner is entitled to be compensated through Monthly Tariff Payments on account of increase in the Capital Cost of the said Project (Tilaiya Ultra Mega Power Project), as if such increase has not happened, by reason of inter alia, the following:

- i. Increase in the Declared Price of Land;*
- ii. Increase in the cost of implementation of Resettlement and Rehabilitation package;*
- iii. Withdrawal of exemption in respect of Excise Duty on Cement and Steel;*
- iv. Withdrawal of exemption in respect of Customs, Additional, Auxiliary and Excise duties on mining and fuel transportation system required for the project;*
- v. Increase in the price of diesel;*
- vi. Increase in the cost of Geological Report;*
- vii. Increase in the cost of EPC (ISBL & OSBL) Contracts, Coal Mining and Fuel Transportation System by reason of increase in the Input Cost and Foreign Exchange Rate Variation;*

b) That this Hon’ble Commission may be pleased to hold that the formula set out in Article 13.2 (a) of the PPA to be applied during Construction Period does not compensate the Petitioner so as to restore the Petitioner to the same economic position as if such Change in Law had not occurred,



c) That this Hon'ble Commission may be pleased to stipulate an appropriate mechanism/methodology in place and instead of formula given in Article 13.2 (a) of the PPA in such a manner that the Petitioner is restored to the same economic position as if such Change in Law had not occurred,

d) That this Hon'ble Commission may be pleased to direct that costs relating to increase in the Declared Price of Land and increase in the R&R package be made payable through Monthly Tariff as fixed by this Hon'ble Commission within Two years from the Scheduled Commercial Operation Date of the Project,

e) That this Hon'ble Commission may be pleased to direct that for the purpose of escalation in Escalable Capacity Charge, November 14, the identified date for first unit COD, be deemed to be Zero date,

f) That this Hon'ble Commission may be pleased to direct that Commercial Operation Date of Units shall stand revised on day to day basis till commitment of Procurers as per Clause 3.1.2 (A) is not met in order to make the Tariff that has been adopted by this Hon'ble Commission applicable,

g) That this Hon'ble Commission may be pleased to direct the Procurers to comply with the conditions subsequent within such period as this Hon'ble Commission may deem fit in order to make the Tariff adopted by this Hon'ble Commission applicable,

h) For consequential reliefs,

i) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.”

3. The petition was admitted vide a detailed order dated 8.7.2014. The respondents were directed to file their replies to the petition. Replies to the



petition have been filed by the JSEB, HPPC, TPDL, BRPL, BYPL, Distribution Companies of Rajasthan, MPPMCL, Distribution Companies of UP and GUVNL.

4. After completion of the pleadings, the petition was listed for hearing on 12.3.2015. The petitioner vide its letter dated 9.3.2015 sought an adjournment on the ground that similar issues as raised by the petitioner in the present petition have been decided by the Commission in the order dated 21.2.2014 in Petition No. 21/MP/2013 relating to Sasan UMPP and since the petitioner has preferred an appeal before the Appellate Tribunal for Electricity against the said order, the hearing in the present petition be deferred. The Commission after consideration of the request of the petitioner adjourned the matter till further orders. The petitioner through its counsel submitted a letter dated 24.8.2014 for withdrawal of the petition without assigning the reasons. Subsequently, the petitioner filed the present IA seeking withdrawal of the petition on the ground of termination of PPA by the petitioner. Notice was issued to the respondents on the IA and the matter was listed for hearing on 28.5.2015.

5. The Distribution Companies of UP filed a joint reply dated 20.5.2015 opposing withdrawal of the petition by the petitioner on the ground of termination of the PPA. They have further submitted that the application for withdrawal of the petition on the ground of termination of PPA vide notice dated 28.4.2015, was filed before the Commission even before the notice terminating the PPA was served on the respondents. On the very next day i.e. on 29.4.2015, the petitioner has filed Civil Suit No. 1180 of 2015 before Hon`ble High Court of Delhi in which



the petitioner has prayed for declaration that the termination notice dated 28.4.2015 is valid and binding on the parties.

6. During the course of hearing on 28.5.2015, learned senior counsel for the petitioner submitted that since the petitioner has terminated the PPA vide its Notice of Termination dated 28.4.2015, the present petition has become infructuous. Leaned senior counsel requested to grant permission to withdraw the present petition. *Per Contra*, learned counsels for UPPCL and MPPMCL submitted that the petitioner cannot take the ground of termination of the PPA for withdrawal of the petition as the issue of termination is *sub-judice* before the Hon`ble High Court of Delhi. Learned senior counsel for the petitioner submitted that if the suit filed in the Hon`ble High Court is decided against the petitioner and the PPA is held valid, then the interest of the petitioner be protected by granting liberty to re-approach the Commission for appropriate relief in accordance with the PPA. Learned senior counsel submitted that the Commission may grant liberty to the petitioner as in the case of CAPL in Petition No. 283/MP/2012. After hearing the learned senior counsel for the petitioner and the counsel for the respondents, the Commission directed the petitioner to place on record all relevant documents including a copy of appeal filed before the Hon`ble High Court of Delhi and further directed the petitioner and respondents to file written submissions.



7. Written submissions have been filed by the petitioner, GVUNL and MPPMCL which are discussed briefly as under:

(a) The petitioner in its written submission dated 20.7.2015 has submitted that the petitioner and Reliance Power Ltd. have filed Original Suit No. CS (OS) 1180 of 2015 before the Hon`ble High of Delhi for a declaration that the Termination Notice dated 24.4.2015 is valid and binding and PPA dated 7.8.2009 stands terminated pursuant to the Notice of Termination dated 28.4.2015 and for a decree of injunction restraining the respondents from enforcing the PPA including invocation of the Performance Bank Guarantee dated 5.8.2009 (as renewed from time to time). The petitioner has submitted that the Hon`ble High Court of Delhi vide its order dated 29.4.2015 restrained the defendants (respondents in the petition) from acting on the Performance Bank Guarantee till further orders. The petitioner has submitted that the lead procurer, Jharkhand State Electricity Board has also filed IA No. 11789 of 2015 in CS (OS) 1180 of 2015 with prayer to refer the disputes to the Arbitral Tribunal under Section 8 of the Arbitration and Conciliation Act, 1996, to be appointed in accordance with Indian Council for Arbitration Rules. The petitioner has submitted that notice has been issued on the IA which is listed for hearing along with main suit on 16.10.2015. The petitioner has submitted the following in support of its contention to withdraw the petition:

“12. That the provisions of Article 3.3.3A of the PPA clearly confer on the petitioner a right to terminate the PPA by issuing a Termination Notice in the event of delay by the Procurers in complying with their obligations under Article 3.1.2A. The said provisions also require the Procurers to purchase the entire



shareholding in the petitioner for the amount mentioned in Article 3.3.3A and immediately return the Performance Bank Guarantee furnished on behalf of the petitioner.

13. That in view of the aforesaid exercise of right to terminate the PPA, the petition filed by the petitioner before this Hon`ble Commission could not have been continued by the petitioner and, accordingly, the petitioner prayed for the liberty of the Hon`ble Commission to withdraw the petition.

14. That at the time of filing of the application for withdrawal, the petition filed by the petitioner was admitted by the Hon`ble Commission and there was no adjudication of entitlements of the petitioner or of the merits of the petitioner by the Hon`ble Commission. Thus, the application for withdrawal has been filed only for the reason of exercise of the right of termination of PPA by the petitioner.

15. It is submitted that the reasons of withdrawal is solely based on the fact that the PPA between the parties stand terminated. In these circumstances, it is fair, just and equitable that the petitioner be granted the liberty to re-approach the Hon`ble Commission in the event of any judicial finding against the termination of the PPA. The petitioner will gravely suffer if the relationship between the petitioner and procurers is ordered to be reborn without protecting the interests of the petitioner in the proceedings already pending before the Hon`ble Commission.

16. The Procurer`s submissions regarding their contest to the termination of the PPA or in respect of the validity of the Performance Bank Guarantees after termination of the PPA by the petitioner have no bearing on the present application. The matter of termination of the PPA is the subject matter of proceedings before the Hon`ble High Court of Delhi is Suit No. CS (OS) 1180 of 2015 and all the Procurers are party to the said suit proceedings.

17. It is respectfully submitted that this Hon`ble Commission may be pleased to allow the Applicant/Petitioner to withdraw the Petition No. 172/MP/2013 with a liberty to re-approach the Commission in the event of any judicial finding against the termination of the PPA.”

(b) GUVNL in its written submission has submitted that a party cannot unilaterally decide to terminate the contract by invoking force majeure



which is affecting him. The present dispute between the petitioner as a generating company and the procurers is subject to adjudication by the Commission and the issues of termination of the PPA and consequences thereof need to be adjudicated in an appropriate manner. In the event of such unilateral termination, the procurers are entitled to take appropriate legal action. GUVNL has further submitted that it is wrong on the part of the petitioner to proceed on the basis that it has allegedly terminated the PPA, or that the petition has become infructuous on account of such termination or that no prejudice is caused to the procurers by allowing the petitioner to withdraw the petition. GUNVL has submitted that the reliance by the petitioner on the proceedings in Petition No. 283/MP/2012 filed by Coastal Andhra Power Limited to claim parity of treatment in the present case and passing of similar order is totally misplaced. GUVNL has submitted that unlike the Coast Andhra Power Ltd. where the petition was first filed in the Hon`ble High Court of Delhi, in the present case the petition was filed by the petitioner before the Commission and that too, for enforcement of the PPA. GUVNL has submitted that in the circumstances, no liberty can be granted to the petitioner as sought for or otherwise. If the petitioner insists on the petition being withdrawn, it may do so at its costs and responsibilities.

(c) Madhya Pradesh Power Management Company Limited (MPPMCL) has submitted that upon perusal of the application for withdrawal, it is evident that the same is withdrawal simplicitor without any



prayer seeking any liberty and the prayer before the Commission is “to allow the petitioner to withdraw the present petition”. MPPMCL has further submitted that the matter relating to the PPA is before the Hon`ble High Court of Delhi and it is always open to the petitioner to seek appropriate relief before the Hon`ble High Court. MPPMCL has requested to allow the application for withdrawal without granting any liberty to the petitioner as prayed for during the hearing on 28.5.2015.

8. We have considered the submissions of the petitioner and respondents. In the IA No. 14/2015, the petitioner has stated that the petitioner has terminated the PPA vide its Notice of Termination dated 28.4.2015 and has sought liberty to withdraw the petition. The petitioner has prayed as under:

- “(a) Allow the Petitioner to withdraw the present petition; and
- (b) Pass such other and further orders as this Hon`ble Commission may deem fit.”

9. From the above, it is evident that the prayer of the petitioner is for withdrawal of the petition only. The petitioner has not sought liberty to approach the Commission at a subsequent date. During the hearing of the IA on 28.5.2015, learned senior counsel appearing for the petitioner sought parity of treatment with Petition No. 283/MP/2012 wherein the Commission was inclined to dispose of the said petition with liberty to the petitioner to approach the Commission after the disposal of the appeal before the Hon`ble High Court of Delhi. In the written submission, the petitioner has prayed to be allowed to withdraw the petition with liberty to re-approach the Commission in the event of any judicial finding against



the termination of the PPA. The respondents, UPPCL, GUVNL and MPPMCL have no objection to the prayer of the petitioner to be allowed to withdraw the petition but have objection to the prayer for the liberty being granted to the petitioner to re-approach the Commission. In the present case, the Commission admitted the petition and fixed the petition for hearing on the merit of the claims of the petitioner. The respondents have also filed their replies. The petitioner has through the IA sought to withdraw the petition on the ground of termination of the PPA. The petitioner has claimed that the PPA has been terminated and the petition has become infructuous. At the same time, the petitioner has filed an Original Suit before the Hon`ble High Court of Delhi seeking a decree/ declaration that the termination notice dated 28.4.2015 is valid and binding and the PPA dated 10.8.2009 stands terminated pursuant to the termination notice. Hon`ble High Court has issued notice on the suit while granting ad-interim injunction on the invocation of Bank Guarantee by the procures till further orders. The lead procurer, namely, Jharkhand State Electricity Board, has filed an IA in the main suit seeking a direction to refer the matter to arbitration. The main suit along with the IA are posted for hearing on 16.10.2015. The question of termination of PPA is *sub-judice* before the Hon`ble High Court. Therefore, the ground of termination of PPA taken by the petitioner to withdraw the petition cannot be accepted. Accordingly, we have treated the request as withdrawal simplicitor and accordingly, allow the petitioner to withdraw the petition. As regards the request of the learned senior counsel for the petitioner for grant of liberty to re-approach the Commission, it is clarified that the Commission had only admitted the petition and no decision on the merits of the claims of the



petitioner has been taken by the Commission. If the validity of the PPA is upheld by the Hon`ble High Court, then the petitioner is entitled to seek appropriate relief in terms of the PPA. Therefore, there is no requirement to specifically grant liberty to the petitioner as prayed for and if the petitioner approaches the Commission in future, the same will be considered in accordance with law.

10. The present petition along with IA is disposed of with the above.

Sd/-
(A.S.Bakshi)
Member

sd/-
(A. K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson

