

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 159/MP/2012

Subject : Petition under Sections 61, 63 and 79 of the Electricity Act, 2003 for establishing an appropriate mechanism to offset in tariff the adverse impact of the unforeseen, uncontrollable and unprecedented escalation in the imported coal price due to enactment of new coal pricing Regulation by Indonesian Government and other factors.

Petitioner : Coastal Gujarat Power Limited

Respondents : Gujarat Urja Vikas Nigam Limited & Others

Date of hearing : 26.7.2016

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

Parties present : Shri C.S. Vaidyanatha, Senior Advocate, CGPL
Shri Apoorva Misra, Advocate, CGPL
Shri Abhishek Munot, Advocate, CGPL
Shri Kunal Kaul, Advocate, CGPL
Shri Bijay Kumar Mohanty, CGPL
Shri Abhay Kumar, CGPL
Ms. Ramni Taneja, Advocate, MSEDCL
Shri Satish Chavan, MSEDCL
Shri S.K. Nair, Advocate, GUVNL
Shri Nitish Gupta, Advocate, GUVNL
Shri G. Umopathy, Advocate, HPPC and Rajasthan Discoms
Shri B.L. Sharma, Rajasthan Discoms
Shri Anand K. Ganesan, Advocate, PSPCL
Shri Sandeep Rajpurohit, Advocate, PSPCL
Shri M.G Ramachandran, Advocate, Prayas Energy
Ms. Ranjeetha Ramachandran, Advocate, Prayas Energy
Ms. Anushree Bardhan, Advocate, Prayas Energy
Ms. Poorva Saigal, Advocate, Prayas Energy
Shri Shubham Arya, Advocate, Prayas Energy
Shri Ashwini Chitnis, Prayas Energy

Record of Proceedings

Learned senior counsel for CGPL submitted that the Hon`ble Appellate Tribunal for Electricity (Appellate Tribunal) in its Full Bench Judgment dated 7.4.2016 has specified the scope of the present remand before the Commission. In this regard, Para 307 of the Appellate Tribunal's Judgment is noteworthy which provides that the scope of the present remand is to assess the impact of promulgation of

Indonesian Regulations on CGPL's Mundra UMPP and grant such relief as available to CGPL under the PPA read with the Judgment dated 7.4.2016. Learned senior counsel further submitted as under:

(a) The relief for Force Majeure is provided in Article 12.7 of the PPA. The relief provided in Article 12.7 of the PPA is not an exhaustive list of relief but merely provides the illustrative list of relief for Force Majeure. Article 12.7(b) is an inclusive clause and does not restrict the scope of relief to the reliefs mentioned in Article 12.7. It is noteworthy that Force Majeure is an event which is unforeseeable. The parties to the contract were conscious of the fact that various events may occur during the term of the PPA which may have an impact on PPA. If the parties to the PPA cannot foresee the events which would constitute Force Majeure, then it is logical that the parties cannot also foresee the reliefs which could be available for Force Majeure. It is in this light, the parties have not restricted the scope of relief under Article 12.7(b). Accordingly, relief can be fashioned in facts and circumstances of the case.

(b) The Commission has the power to fashion a relief. The arguments of the Respondents are premised on the fact that the performance is not affected as CGPL has continued to perform its obligations under the PPA. This issue has been addressed by the Appellate Tribunal that the CGPL was performing its obligations under the PPA with the hope that the Force Majeure clause would take care of hardship which is being faced by CGPL. In any case, the performance of obligations does not mean only supply of electricity and/ or physical supply of electricity. It means supply of electricity at a contracted rate. The Appellate Tribunal has returned the findings that the said performance of CGPL has been hindered to supply at the contracted rate. Therefore, the relief which is to be given to CGPL would be to restore the CGPL to same economic condition as if force majeure has not occurred.

(c) The Respondents in their arguments before the Commission have taken a view that there is no relief available to CGPL, while on the other hand, some of the Respondents have challenged the Appellate Tribunal's Judgment dated 7.4.2016. If no relief was available to CGPL, then there is no reason for filing Civil Appeal before the Hon`ble Supreme Court.

(d) Appellate Tribunal in para 162 and 163 of the Judgment dated 7.4.2016 has observed that if a case of force majeure or change in law is made out, relief provided under the PPA can be granted under adjudicatory power. Since, Force Majeure has been made out, CGPL is entitled to a relief of revision in tariff which would negate the impact of Force Majeure event.

(e) In Para 194(e), (g), 196, the Appellate Tribunal has held that the scope of Force Majeure is broader than the scope of Section 56 of the Indian Contract Act. Further, the purpose of the PPA is to have continuous supply of electricity. The purpose of the Force Majeure event is to protect the affected party from the event over which it has no control. In this regard, learned senior counsel relied upon the Hon'ble Supreme Court's Judgment in the case of DDA v. Kenneth Builders & Developers Ltd. and submitted that the relief of compensation can be granted in case of Section 56 of the Contract Act.

(f) Learned senior counsel referred to para 283 and submitted that the Appellate Tribunal has returned the findings that change in cost of fuel is not within the reasonable control of the parties and are consequences of an event of Force Majeure, they would be covered under Force Majeure. Therefore the relief to be given to CGPL is difference in the cost of fuel with reasonable return.

(g) Appellate Tribunal in Para 292 has returned the findings that CGPL's performance to supply electricity at the contracted rate has been hindered on account of Indonesian Regulations. Under Article 12.7(b) of the PPA, relief is to be given with respect to the obligation affected/ hindered by Force Majeure event. CGPL's obligation to supply at the contracted price has been affected and therefore the relief to be given to CGPL is the difference in cost of fuel with reasonable returns.

(h) The Appellate Tribunal in Para 293 has returned the findings that CGPL's performance has been affected by Force Majeure, despite that CGPL has continued to perform its obligations. The Indonesian Regulations has affected the economic viability of the said project. Therefore, the relief is to be given to CGPL which would restore the viability of the project.

(i) The submissions of the respondents relating to CSA is misplaced. The submissions relating to Coal Sales Agreement and escalable and non-escalable component in tariff, are beyond the scope of the present remand as the same has already been argued, considered and decided by Appellate Tribunal in its Judgment dated 7.4.2016. The Appellate Tribunal, in Para 293, 295, 300 and 301 of its Judgment, has returned the following findings:

(i) It is clear from the events surrounding the relevant PPAs and the correspondence exchanged between the generators and the authorities that:-

-The Indonesian Regulation impacted the economy of the generators;

-The generators had to pay exorbitantly high cost for import of coal from Indonesia making the fulfillment of their contractual obligations commercially impracticable; and

-The Indonesian Regulation wiped out the fundamental premise on which the generators had quoted their bids thereby making their project commercially unviable.

(ii) CGPL took all reasonable care to assess the situation in Indonesia before executing contracts with Indonesian mining companies. In such a situation, relief available in the PPA can be granted to the generators, on the ground that their case falls in Force Majeure.

(iii) On account of promulgation of Indonesian Regulations and escalation in international coal prices, CGPL is supplying power to the procurers by purchasing coal at a higher price than what was agreed in the fuel supply agreements without any adjustment of tariff.

(iv) The unforeseeable and unprecedented increase in coal prices due to promulgation of Indonesian Regulations was not foreseen by any bidder and has completely wiped out the basis on which the Bid was submitted by CGPL. There is no doubt that the promulgation of the Indonesian Regulations which required the sale price of coal in Indonesia to be aligned with the international benchmark price has, prima facie, altered the premise on which the energy charges were quoted by Tata Power in its bid. The bid submitted was based on the prevalent economic situations in Indonesia to enter into a long term fuel supply agreement at competitive prices with discounts to the prevailing market conditions. CGPL would have continued to supply power at this price had the Indonesian Regulations not made it mandatory for sale of coal from Indonesia at international benchmark prices. Therefore, the competitive advantage of securing coal at lower prices that CGPL was enjoying by acquiring mining rights in Indonesia or by entering into long term CSAs with the coal suppliers in Indonesia appears to have been fundamentally altered/wiped out after the coal sales from Indonesia are required to be aligned with international benchmark prices of coal.

(j) With regard to the issue relating to DRI, learned senior counsel submitted that the circular relied upon by MSEDCL does not include CGPL's name and no notice has been issued to CGPL.

2. The Commission clarified that CGPL would be required to submit the information relevant for consideration of its claim for which a Supplementary ROP has been issued.

3. After hearing the learned senior counsel for CGPL, the Commission directed that the matter shall be listed for hearing, if required after receiving the relevant information from CGPL and its response from the respondents, as mentioned in the Supplementary ROP.

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

By order of the Commission

Sd/-

(T. Rout)

Chief (Law)