

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 155/MP/2012

Subject : Application under Section 79 of the Electricity Act, 2003 evolving a mechanism for Regulating including changing and/or revising tariff on account of frustration and/or of occurrence of force majeure (Article 12) and/or change in law (Article 13) events under the PPAs due to change in circumstances for the allotment of domestic coal by GOI-CIL and enactment of new coal pricing Regulation by Indonesian Government.

Petitioner : Adani Power Ltd.

Respondents : Uttar Haryana Bijli Vitran Nigam Limited and others

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 : 15.9.2016

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

Parties present : Shri Vikram Nankani, Senior Advocate, APL
Shri Amit Kapur, Advocate, APL and CGPL
Ms. Poonam Verma, Advocate, APL
Shri Gaurav Dudeja, Advocate, APL
Shri Malav Deliwala, APL
Ms. Shilpa Samant, APL
Shri Jatin Jalundhwala, APL
Ms. Ramni Taneja, Advocate, MSEDCL
Shri Nirav Shah, Advocate, MSEDCL
Shri Udit Gupta, Advocate, MSEDCL
Shri Satish Chavan, MSEDCL
Shri Paresh Bhagwat, MSEDCL
Shri M.G Ramachandran, Advocate, Prayas Energy
Ms. Ranjeetha Ramachandran, Advocate, Prayas Energy
Ms. Anushree Bardhan, Advocate, Prayas Energy
Shri Shubham Arya, Advocate, Prayas Energy
Shri Ashwini Chitnis, Prayas Energy
Shri S.K. Nair, Advocate, GUVNL
Shri Nitish Gupta, Advocate, GUVNL

Shri G. Umapathy, Advocate, HPPC & Rajasthan Discoms
Shri Anand K. Ganesan, Advocate, PSPCL
Shri Puneet Munjal, CGPL
Shri C.S. Vaidyanathan, Senior Advocate, CGPL
Shri Bijay Kumar Mohanty, CGPL
Shri Abhay Kumar, CGPL
Shri Abhishek Jaiswal, GMR
Shri Saurabh Srivastava, Tata Power

Record of Proceedings

At the outset, the Commission clarified that the hearing has been fixed to seek views of the petitioner and the respondents regarding confidentiality claimed in respect of certain documents submitted by Adani Global Pte in Petition No. 155/MP/2012 and CGPL in Petition No. 159/MP/2012.

2. Learned senior counsel for APL submitted as under:

(a) Adani Power has not claimed confidentiality as the petitioner is not the owner of the documents. M/s Adani Global Pte, the owner of the documents, has claimed confidentiality and has directly submitted the documents to the Commission.

(b) The Commission is conferred with powers under Regulations 60, 66 and 109 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 as amended from time to time to allow inspection of all the records of the Commission except for those parts/documents which are considered confidential by the Commission.

(c) Adani Power is required to submit all relevant documents which are in its possession. On request of Adani Power, Adani Global Pte agreed to share the information/documents with the Commission on the condition of confidentiality.

(d) The Appellate Tribunal has remanded the matter to the Commission for limited purpose of determination of the extent of impact of force majeure on account of Indonesian Regulation. Only the fuel cost is to be looked at. Adani Power has only sought the compensation to an extent of difference between the discounted price and purchase price or benchmark price, whichever is lower. As the promulgation of Indonesian Regulation does not allow sale of coal at a price lower than benchmark price, there is no case for over-invoicing.

(e) Adani Power has submitted all the FSAs in the previous round as Volume VI. All FSAs are consistent in terms of the price mentioned therein.

(f) The Commission may decide on the issue of confidentiality. However, it should not be used to delay the proceedings of the Commission.

3. Learned counsel for Prayas submitted as under:

(a) The Commission has to ensure transparency in the proceedings before it under Section 79 (3) of the Electricity Act, 2003. Adani Power cannot be an exception.

(b) Adani Enterprises Ltd. is the ultimate parent company. Adani Global Pte is a subsidiary of Adani Enterprises Limited. All the Adani companies including Adani Power are connected to each other and therefore, Adani Power cannot claim confidentiality to produce these documents while claiming compensation from the

Commission. Adani Global Pte or Adani Enterprises are affected by Indonesian Regulation and if they are different then there is no Force Majeure in this case.

(c) The Commission should direct the petitioner to share the documents with other parties. If Adani Power does not share these documents, the Commission should return the documents and draw adverse inference. In this context, learned counsel for Prayas relied upon the judgments, namely (i) [(2012) 8 SCC 148], (ii) [(2014) 4 SCC 693], (iii) [(2010) 2 SCC 114] and (iv) [2013 SCC Online Kar 9885]

(d) Learned counsel referred to certain invoices filed along with affidavit dated 4.8.2016 and submitted that the invoices do not show the GCV of the coal being procured. The invoices have been raised by different companies (Kowa, AMPL, etc.) other than Adani Enterprises Ltd.

(e) Adani Power did not submit underlying invoices even to KPMG. KPMG report also highlighted that Adani Power imported coal of GCV 3000 kCal/kg. Adani Power has not produced HBA index for Bunyu coal. HBA index submitted by Adani Power is for coal of GCV above 4000 kcal/kg.

4. In his rebuttal, learned senior counsel for APL submitted as under:

(a) Adani Power had submitted calculation for the month of March 2016 along with substantiating documents which contains relevant HBA index along with Auditor's certificate.

(b) The argument of transparency cannot be applied without considering the 'relevance' of the documents. Any judicial authority must determine if the documents are relevant for adjudication of the issues involved.

(c) Adverse inference cannot be drawn against Adani Power as it has submitted all the documents sought by the Commission.

(d) With the promulgation of Indonesian Regulations, all the long term contracts have become null and void and the petitioner has to procure coal from spot market. Learned senior counsel referred to the affidavit dated 4.8.2016 and submitted that the invoice shows country of origin as Indonesia and the Bill of Lading contains a declaration that goods are in conformity with the invoice. The certificate of analysis/quality report also shows the GCV of coal. Therefore, all the desired information is available in the documents submitted.

(e) As regards invoice raised by Adani Power Maharashtra Ltd on Adani Power, Learned senior counsel clarified that it is a High Sea Sale Agreement. Adani imports coal for its various power plants. However, to maintain the coal availability at different plants, in certain cases, shipment which is being imported for one plant is transferred to other power plant.

(f) Adani Power is not claiming confidentiality and it is the prerogative of the Commission to decide whether these documents should be shared with the parties or not.

5. The Commission observed that the documents submitted by Adani Global Pte are relevant for assessing the extent of impact of force majeure as directed by the Appellate Tribunal and directed Adani Power to take up the matter with Adani Global Pte to waive the condition of confidentiality so that documents can be shared with the parties to the petition.

Otherwise, the Commission will take a view on the claim of confidentiality in respect of documents submitted by Adani Global Pte.

6. Learned senior counsel for CGPL submitted that confidentiality has been claimed in respect of the Shareholders Agreement between Tata Power Limited and the other Shareholders of the Indonesian Coal Company, namely PT Kaltim Prima Coal (KPC). Learned Senior Counsel submitted that CGPL intends to file an affidavit containing the extracts of the shareholders Agreement which are relevant to the adjudication of the issue in the present proceedings relating to CGPL which can be shared with the respondents including Prayas. Learned Counsel for the respondents and Prayas had no objection to the suggestion of the learned senior counsel for CGPL.

7. The Commission directed APL and Prayas to file written submissions latest by 20.9.2016. The Commission further directed CGPL to file the affidavit by 20.9.2016 after serving copy on the respondents including Prayas.

8. On receipt of written submission from APL, the Commission will take a view and issue an order with regard to the confidentiality claimed by Adani Global Pte/Adani Power Ltd.

9. Subject to the above, hearing before the Commission in both petitions were closed and orders reserved.

By order of the Commission

(T. Rout)
Chief (Law)