

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 155/MP/2012

Sub: 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 Limited

Respondents: Uttar Haryana Bijli Vitran Nigam Limited and others.

Petition No. 159/MP/2012

Sub: 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 and others.

Date of hearing: 9.6.2016

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

Parties present : Shri Abhishek Manu Singhvi , Sr. Advocate, APL
Shri C. S. Vaidyanathan, Sr. Advocate, CGPL
M/s Poonam Verma, Advocate, APL & CGPL
Shri Amit Kapur, Advocate, APL & CGPL
Shri Apoorva Mishra, Advocate, APL & CGPL
Shri Abhishek Munot, Advocate, APL & CGPL
Shri Kunal Kaul, Advocate, APL & CGPL

Shri Akshat, Advocate, APL & CGPL
Shri Gaurav Dudeja, Advocate, APL & CGPL
Shri S.K.Nair, Advocate, GUVVNL
Shri Nitish Gupta, Advocate, GUVNL
Shri M.G. Ramachandran, Advocate, Prayas Energy
Ms. Ranjitha Ramachandran, Advocate, Prayas Energy
Ms. Anushree Bardhan, Advocate, Prayas Energy
Ms. Poorva Saigal, Advocate, Prayas Energy
Ms. Ashwin Chitnis, Prayas Energy
Ms. Swapna Seshadri, Advocate, PSPCL
Shri G.Umapathy, Advocate, HPPC
Ms. R. Mekhala, Advocate, HPPC
Shri Niraj Shah, Advocate, MSEDCL
Ms. Ramani Taneja, Advocate, MSEDCL
Shri Rakhi Banerjee, CGPL
Shri Jatin Jalundhwala, APL
Shri Malav Deliwala, APL
Shri MR Krishna Rao, APL
Shri Shashnk Kumar, APL
Shri Savan Path, APL
Shri Tanmay Vyas, APL
Shri K.K. Sharma, CGPL
Shri K.K.Sharma, CGPL
Shri B.Mohanty, CGPL
Shri Arun Srivastava, CGPL
Shri Saurabh Shankak, CGPL
Shri Ravi Jung, HPPC

Record of Proceedings

Learned counsels for the Rajasthan and Maharashtra requested for time to file their replies in Petition No. 159/MP/2012. The Commission directed the Rajasthan and Maharashtra to file their replies within one week with an advance copy to CGPL who may file its rejoinders, if any within a week thereafter.

2. Learned Senior Counsel for the petitioner, Adani Power Ltd. submitted that pleadings in Petition No. 155/MP/2012 have already been completed. Learned Senior Counsel submitted that the proceeding before the Commission is merely a remand proceeding where the only issue before the Commission is to decide the quantum/formula for relief to be provided to the petitioner. The Commission shall be required to assess the extent of impact of Force Majeure on the project of the petitioner and give such relief as available under the PPA. Learned senior counsel for the petitioner further submitted as under:

(a) Relying on the APTEL's Judgment dated 7.4.2016 ("Full Bench Judgment") it was submitted that a remand order by a superior authority has to be observed and followed in letter and spirit. Any remand by a superior hierarchical body has to be naturally binding.

(b) The scope of present proceedings before the Commission is limited to deciding 'how much' relief is required to be granted to the petitioner in view of Full Bench Judgment. All the issues have been adjudicated by APTEL and parties cannot re-agitate the same issues, directly or indirectly, before the Commission.

(c) The Commission should grant the relief to implement the spirit of the remand and the Full Bench Judgment. The remand by APTEL is not restricted to Article 12 of the PPA. The relief under PPA for Force Majeure event is not inflexible/ cast in stone but is an inclusive relief. The Commission is conferred with 'inherent powers' under Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 as amended from time to time which can be invoked to do full justice read with provisions of the PPA and in the light of the Full Bench Judgment.

(d) Prayas in its submission has submitted that no relief is admissible to Adani Power for Force Majeure event. It is clarified that remand by Hon'ble APTEL is not a futile remand. Not providing any relief to Adani Power would amount to nullifying the Full Bench Judgment since Hon'ble APTEL after holding that promulgation of Indonesian Regulation and short supply of domestic coal are Force Majeure events remanded the matter to the Commission to only assess the impact and grant relief to the petitioner. Therefore, holding that there is a Force Majeure event and not granting relief for the same is indirectly nullifying Full Bench Judgment. Prayas in its submissions has been constantly changing stands. It was earlier stated by Prayas that Compensatory Tariff could not have been granted in the absence of the Force Majeure and Change in law and that the revision in tariff can only be made within the terms of the PPA. However, after the Full Bench Judgment, Prayas in its reply has pleaded to deny to provide the relief even in the terms of the PPA.

(e) In case of Haryana Utilities, Prayas is raising the very issues, including the availability of domestic coal in case of PPAs with Haryana Utilities and Fuel Supply Agreements, which have been relied earlier in the proceedings before the Hon'ble Tribunal and the said issues stand decided by virtue of the Full Bench Judgment. Prayas also raised the same issues in the Clarification Application preferred before the Hon'ble Tribunal which was dismissed after hearing the parties. Prayas has once again raised the same issues in the reply to the submissions made by the petitioner. The said act of Prayas is barred by the concept of *Res Judicata* and constructive *Res Judicata*.

(f) Learned senior counsel referred to the various paragraphs of Full Bench Judgment particularly, Paras 162, 163, 276, 277, 278, 279, 284, 289, 290, 291, 292, 293, 295, 300, 302 and 303 and submitted as under:

(i) Hon'ble APTEL, in the facts and circumstances in the petitioner's case, held that promulgation of Indonesian Regulation and short supply of domestic coal are Force Majeure events. Force majeure has been comprehensively and conclusively decided by Hon'ble APTEL. In response to the Commission's query regarding the extent to which a force majeure event fits into the PPA, learned senior counsel submitted that the force majeure event should broadly have a nexus with the PPA so much that it brings the affected party to the same economic position as if the force majeure has not happened at all.

(ii) The nature of Force Majeure event is such that it cannot be defined since the parties, at the time of drafting of agreement, cannot possibly envisage all the events that may occur in future.

(iii) On query from the Commission whether commercial impracticability is restricted to situations when parties become out of pocket, learned senior counsel replied that to be entitled for a relief under Force Majeure event, filing of winding up/bankruptcy is not a condition precedent. The affected party is only required to show that the substratum which the parties agreed to at the time of the Agreement has been wiped out or the bargain agreed between the parties has been eroded and the relief therefore is to be provided putting the Generator in such condition had there been no such eventuality. He further submitted that this was the sole reason to incorporate the article of force majeure event in the PPA. Had all the eventualities been known to the parties, there would not have been any occasion to incorporate the said clause.

(iv) On further query from the Commission whether ultimately the consumers will have to bear the increase in cost, learned senior counsel replied that in all situations, courts have to balance the equities. If only consumer interest (by keeping the tariff low) is kept in mind, then in no circumstances tariff will be increased. He then emphasised on the purpose of the Electricity Act, 2003 i.e. the financial viability of the sector and drew the attention of the Commission to the observations at Para 162 of full bench judgement of APTEL.

(v) The fact that the petitioner has been supplying electricity to Procurers even after promulgation of Indonesian Regulation does not mean that there is no Force Majeure event. The petitioner continued to do so with a hope that Force Majeure clause in the PPA will address the situation. Hon'ble APTEL precisely had noted this aspect while delivering the judgment.

(vi) PPAs are long term contracts and it is not possible to envisage all the risk over such a long period of contract. The intention behind including Force Majeure clause in the PPA is to save the performing party from the consequences of the Force Majeure.

(vii) No provision in the PPA prohibits variation in tariff in case of a Force Majeure event. Therefore, relief sought by the petitioner is within the PPA.

(viii) The force majeure events generally lead to two kinds of situations, viz., (i) invoking the PPA for force majeure or (ii) abrogation of the whole PPA. In the present case, it is a case of invoking of the PPA and not for abrogation. If the context of the remand by Hon'ble APTEL is not construed properly, and the end result of the remand is zero, it would result in nullity of the remand.

(ix) A statement was submitted by learned senior counsel to demonstrate that Prayas was seeking to re-agitate grounds which were already raised by Prayas before Hon'ble APTEL and were duly considered in the Full Bench Judgment as well as in the Clarification Application by the Hon'ble APTEL. He submitted that as per principles of constructive res-judicata, parties are barred to raise submissions which were raised and ought to have been raised before Hon'ble APTEL. In this regard, Leaned senior counsel relied upon the judgment in Ramadhar Shrivastava v. Bhagwandas : [(2005) 13 SCC 1].

(x) Learned senior counsel also referred to the judgments, namely (i) U.P. State Brassware Corp. Ltd. v. Uday Narain Pandey: [(2006) 1 SCC 479] (Para37) and (ii) Hindalco Industries Ltd. v. Union of India:[(1994) 2 SCC 594] (Paras 7 and 8) to show that courts can mould the relief in the facts and circumstances of the case to impart full justice.

(xi) The relief for Force Majeure is to restore/restitute the affected party to the position at the time of bid. In this regard he relied upon the judgment in Citibank N.A. v. Hiten P. Dalal & Ors. [(2016) 1 SCC 411] and submitted that the power of the courts are expansive and courts have inherent jurisdiction to order restitution so as to do complete justice between the parties.

(xii) Force majeure is recognized as an exclusive circumstance in the PPA. Force majeure will always have an impact on the price and quantity in the contract. Since force majeure involves both the above elements, it must involve some alteration of the PPA. The Force Majeure clause of the PPA is illustrative and therefore, clause providing relief under the PPA is an inclusive clause.

(xiii) Article 12.7(b) specifically use the term 'included but not limited to'. Articles 12.7(c) to (g) referred by Prayas are not applicable to facts of the case. They apply when the case of a party falls within the illustrative Force Majeure events enumerated in Article 12.3.

3. Learned senior counsel for APL submitted that Adani Power has already provided the formula and other relevant details in its submissions and craves liberty to rely upon the methodology and the figures in support of the submissions in the subsequent hearing.

4. Shri C.S. Vaidyanathan, Senior Advocate for Coastal Gujarat Power Limited (CGPL) made the following submissions on behalf of CGPL:

(a) The relief sought by CGPL is to restore CGPL to the same economic position as if the Force Majeure event had not taken place.

(b) CGPL is entitled to relief under Article 12.7 of the PPA whose scope is larger than the relief granted by the Commission in order dated 21.2.2014.

(c) The Commission can grant relief under Article 12.7 read with its adjudicatory powers under Article 17.3 of the PPA and Section 79(1)(f) of the Electricity Act, 2003.

(d) Intention of having Force Majeure clause in the PPA is to save performing party from consequences of Force Majeure. In the present case, Indonesian Regulation obliterated the coal price agreed by the Generating company with the coal supplier. Therefore, generating company should be put to same economic position as if the generating company would have continued getting coal at negotiated price.

(e) Article 12.7(b) is an inclusive clause which entitles the affected party for the relief. The relief to restoring affected party can be seen from other clauses like Article 12.7 (c) to (f).

(f) The intention of the parties to restore the affected party from hardship is evident from Article 13 which provides for restoring affected party to the same economic position. Change in Law is nothing but a facet of a Force Majeure. If there would not have been separate clause of Change in Law then

the change in law events would have been covered under Force Majeure clause.

(g) By the Full Bench Judgment, APTEL has also, like the Commission's orders, held that CGPL is entitled to relief. APTEL has only modified the source under which relief is to be granted to CGPL.

5. Learned counsel for Prayas submitted as under:

(a) In the present proceedings, Prayas is not challenging that promulgation of Indonesian Regulation is not a Force Majeure event. The Full Bench Judgment is final for proceedings before the Commission. Prayas has filed an Appeal before the Supreme Court challenging the Full Bench Judgment, which has not yet been listed.

(b) The impact of force majeure needs to be considered only for the cases where the Fuel Supply Agreements provide for discounted price.

(c) The Commission needs to go into the details of (i) Coal Supply Agreements and the supply received; (ii) HBA index price from time to time. Full Bench Judgment has not decided the issue regarding to what extent generators have been impacted.

(d) PPA dated 7.8.2008 is substantially premised on domestic coal availability which is at around 80% of coal required by Adani Power for supplying electricity under the PPA. In this context, learned counsel relied upon Adani Power's affidavit dated 8.5.2015 and statement of Adani Power's representative in RCCC meeting. In the affidavit dated 8.5.2015, Adani Power has agreed that it is receiving 80% of domestic coal.

(e) In case of PPAs dated 7.8.2008 with Haryana Utilities, there has hardly been any need to import coal from Indonesia and consequently any impact of promulgation of Indonesian Regulations. Even if Adani power had to import some quantum of coal from Indonesia at times, the quoted energy charges under the PPAs dated 7.8.2008 of the relevant years till date was more than adequate to cover the total quantum of coal which Adani Power claims that it is required to import from Indonesia. The bid for Haryana utilities was submitted in November 2007 and thereafter, the tariff quoted by Adani Power was based on circumstances existing on such date. At such time, Adani Power did not have any Fuel Supply Agreement for procurement from Indonesian mines, let alone at a discounted price. Therefore, Adani Power had not considered Indonesian coal as the basis for the bid for Haryana utilities and therefore, there is no impact of force majeure event of Indonesian Regulations in so far as the PPA with Haryana Utilities is concerned.

(f) Adani Power has not brought on record the basic facts required to claim the relief.

(g) Adani Power is required to produce month-wise documents in support claim for the relief sought by Adani Power.

(h) As per Full Bench Judgment, relief is required to be provided only as per the PPA. Article 12.7 is an exhaustive clause providing relief for Force Majeure. Therefore, other provisions cannot be relied upon by Generating Companies to seek relief.

(i) The generators have submitted that they are not claiming relief under Article 12.7 (c) to (g) and confining the relief under Article 12.7(b). Article 12.7(b) does not provide for variation in tariff. It provides relief only with regard to obligation of the party. Obligation of Adani Power is to supply electricity. Therefore, Adani Power cannot seek relief for variation in tariff.

(j) Relief under Article 12.7(c) to (g) is restricted to Debt Service Obligation or Capacity Charge only and therefore the generating companies cannot claim bigger relief than under Article 12.7(b). Learned counsel requested the Commission to rely upon the computation done by Prayas in the case of Adani Power and CGPL.

6. The Commission observed that if there would have been no relief for Force Majeure at all, then APTEL would not have pronounced such detailed order and remanded the matter to the Commission.

7. Due to paucity of time, the Commission directed to list the matter for hearing on 15.6.2016 to hear learned counsel for Prayas, on 27.6.2016 for submission on behalf of Madhya Pradesh, Haryana and other Respondents, on 1.7.2016 at 2:30 p.m. for rejoinder submissions of Adani Power and on 7.7.2016 at 2:30 p.m. for rejoinder submissions of CGPL.

8. The Commission will issue a supplementary Record of Proceeding seeking certain information from APL and CGPL.

By order of the Commission

(T. Rout)
Chief (Legal)