

**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 UrjaVikas Nigam Limited and others.

Date of hearing : 1.7.2016

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

Parties Present:

Shri Abhishek Manu Singhvi, Sr. Advocate, APL
Shri Vikram Nankani, Sr. Advocate, APL
Shri Amit Kapur, Advocate, APL & CGPL
M/s Poonam Verma, 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 L.N. Sharma, APL
Shri S. Kalita, APL
Shri Malav Deliwala, APL

Shri Jatin Jalundhwala, APL
Shri Bijay Kumar Mohanty, CGPL
Shri Abhay Kumar, CGPL
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
Shri Shubham Arya, Advocate, Prayas Energy
Shri Ashwin Chitnis, Prayas Energy
Ms. Pinky Anand, Senior Advocate, MSEDCL
Ms. Ramni Taneja, Advocate, MSEDCL
Ms. Kiran Gandhi, Advocate, MSEDCL
Shri A.S. Chavan, MSEDCL
Shri Satish Chavan, MSEDCL
Ms. Saudamini Sharma, MSEDCL
Ms. Somya Rathore, MSEDCL
Shri Anand K. Ganesan, Advocate, PSPCL
Shri Sandeep Rajpurohit, PSPCL
Shri G. Umopathy, Advocate, HPPC & Rajasthan Discoms
Ms. R. Mekhala, Advocate, HPPC & Rajasthan Discoms
Shri B. L. Sharma, Executive Engineer

Record of Proceedings

Learned senior counsel for Adani Power Ltd. (APL) Shri A. M. Singhvi, tendered a written note on rebuttal and submitted as under:

(a) Article 12, 13 and 17 of the PPA shows that PPA contemplates price adjustment in certain given circumstances. Moulding of tariff is inherent in the PPA.

(b) Any interpretation of the PPA that it does not provide for any relief for Force Majeure in facts and circumstances of the case amounts to nullifying the Full Bench Judgment dated 7.4.2016 passed by Appellate Tribunal. If PPA did not provide for any relief, then Appellate Tribunal would have simply observed the same in its judgment rather than remanding the matter to this Commission for assessing the impact and granting the relief.

(c) Submission of Prayas that Appellate Tribunal did not examine or consider 12.7 (b) while remanding the matter before this Commission, negates the observations of the Appellate Tribunal in paras 283 and 293 of the Full Bench Judgment.

(d) Article 12.7 (c) to (f) are illustrative reliefs to be granted in certain circumstances and they do not control the main clause (Article

12.7). Force Majeure cannot have exhaustive definition or exhaustive clause regarding the relief to be provided for Force Majeure.

(e) Grant of restitution is inherent while exercising adjudicatory powers. Unless prohibited by a higher court, any court can mould the relief for doing complete justice.

(f) PPA is a commercial contract and principles of Section 70 of the Contract Act can be applied to grant the relief to an affected party. It is common ground that Adani Power continued supplying electricity despite Force Majeure. Procurers having received electricity are liable to reconstitute Adani Power.

(g) Full Bench Judgment directed this Commission to grant relief to Adani Power in accordance with law. Law includes Statutes, Rules/Regulations and then terms of the PPA. PPA does not contain any clause that tariff will remain same even after Force Majeure Event. In fact, PPA provides flexibility for adjustment in tariff.

2. In response to the submissions made by Prayas, learned senior counsel for APL submitted as under:

(a) Submission of Prayas that no relief should be provided to Adani Power is contrary to its own submissions before Appellate Tribunal (recorded in para 123) that in case of Force Majeure, tariff may be re-opened. Full Bench Judgment has held the Force Majeure issue in favour of Adani Power.

(b) Prayas has suggested two different methodologies one for Adani Power and other for CGPL, for computing relief to be granted for the impact of the same Force Majeure event i.e. promulgation of Indonesian Regulation without any basis. Different methodologies can only be applied on the basis of intelligible differentia. In present case, there is no differentia, much less intelligible differentia.

(c) Full Bench judgment observed that the consolidated Coal Supply Agreement dated 26.7.2010 provided for supply of 10 MMT of coal per annum at CIF USD 36/MT for a period of 15 years from the scheduled COD of last unit of Phase IV of the project.

3. Learned senior counsel for APL, Shri Vikram Nankani, made submissions regarding the quantum of relief to be granted to Adani Power and submitted as under:

(a) Adani Power had filed the present Petition claiming relief on the basis of three grounds (i) Force Majeure; (ii) Change in Law; and (iii) Regulatory Powers. This Commission in first round while rejecting

Force Majeure and Change in Law granted the relief in exercise of regulatory powers. Appellate Tribunal has allowed the relief by upholding a different ground i.e. Force Majeure. The question that remains to be answered in the present proceeding is the quantum of relief to be provided to Adani Power and not whether relief is to be provided to Adani Power or not. Not providing any relief to Adani Power would amount to reviewing the Full Bench Judgment.

(b) Appellate Tribunal in its judgment dated 7.4.2016 has provided sufficient guidance as to how the relief to be provided to Adani Power should be quantified. Appellate Tribunal has held that rise in price of coal has made the performance of the obligation under the contract impracticable and it is towards this obligation, Adani Power should be compensated.

(c) Force Majeure event is not the result of fault of any party. Force Majeure means party who has suffered should be compensated.

(d) For grant of relief, the Commission needs to consider the price at which coal was available to Adani Power prior to Indonesian Regulations and price at which Adani Power is procuring coal subsequent to Indonesian Regulations.

(e) Learned senior counsel tendered the compilations on computation and took the Commission through the impact of Force Majeure events (i.e. increased cost of fuel) for the month of March, 2016. Learned senior counsel submitted that each figure in the calculation is backed by either statutory auditors or third party report. He added that Adani Power will provide all these data and documents for relevant month at the time of raising the invoice.

(f) The relevant CIF price prior to Indonesian Regulation was USD 36 per MT, as per Coal Supply Agreement dated 26.7.2010, which translates into USD 25.7 per MT after reducing Ocean and Freight charges from the same. He added that CSA dated 26.7.2010 has been recognised in paragraph 231 of the Full Bench Judgment.

(g) Further, the price of USD 45 / MT mentioned in the FSA dated 8.12.2006 corresponds to GCV of 6000 kcal/ kg which is equivalent to the rate applicable under Consolidated FSA dated 26.7.2016 at 36 USD / MT for GCV of 5200 kcal/kg.

(h) Adani Power is not claiming Foreign Exchange Rate Variation. The difference between the prevailing price and negotiated price (prior to Indonesian Regulation) is required to be considered at the prevailing exchange rate since the same is the impact of Indonesian Regulations only.

(i) With regard to coal received from MCL, learned senior counsel submitted that bid was based on 70% domestic coal and 30% imported

coal. He added that linkage was granted to Adani Power towards 70% of 1980 MW and not for capacity tied up with Haryana only. However, by affidavit dated 8.5.2015, Adani Power has offered that it will consider domestic coal received upto 5.13 MTPA towards supply of electricity to Haryana. If the quantum of coal received is more than 5.13 MTPA, then the coal received over and above the said quantum cannot be considered for supply of electricity to Haryana. Doing that will amount to changing the basis of the bid, which according to Prayas is sacrosanct and cannot be changed.

(j) Adani Power has been using low grade GCV coal for Techno-commercial reasons so as to meet the design GCV of 4500 kcal/kg and in order to reduce the impact on overall cost of generation.

(k) Prayas' submission that since Adani Power has been held to have a composite scheme, the net impact should be considered for grant of compensation. Submission of Prayas is erroneous because of the following reasons:-

(i) Terms and conditions agreed by generator with two different Procurers under different PPAs are mutually exclusive of each other, and therefore, the extent of relief to be granted for each of these PPAs need to be decided independently based on the terms and conditions of the respective PPAs.

(ii) The submission of Prayas that the surplus tariff available in one PPA is to be off-set against losses of other, and therefore PPA has no legal basis and unwarranted. The said submission of Prayas was also objected to by Haryana.

(l) Pursuant to Force Majeure Event, Adani Power is entitled to get relief to the consequential additional costs which shall include (i) the incremental FOB costs for the Indonesian coal i.e. difference between the FOB cost applicable post Indonesian Regulation and the FOB cost applicable as per FSA, (ii) cost of alternate coal (imported coal) used for meeting the shortfall in domestic coal supply (applicable only for Haryana PPA), and (ii) the other associated carrying cost incurred for sustaining the operations from date of occurrence of force majeure event to the date of getting relief.

4. The Commission desired to know whether separate books of accounts are being maintained for each phase of Mundra Power Project. Learned senior counsel submitted that only consolidated books of account for the entire project is being maintained.

5. After hearing the learned senior counsels for APL, the Commission observed that since quantification has been argued by Adani Power, the respondents will now make their submissions in reply with regard to quantification. Besides, the Commission also observed that for assessing the impact, the petitioner shall be required to submit all details as called for.

6. Learned counsel for Prayas submitted that the petitioner should submit the calculation for the entire period affected by Force Majeure.

7. The Commission directed to list CGPL's case on 5.7.2016 for submissions of MSEDCL and Rajasthan and on 21.7.2016 at 14.30 hrs for rejoinder submissions of CGPL.

By order of the Commission

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