

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**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

Date of hearing : 5.7.2016

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

Petitioner : Coastal Gujarat Power Limited.

Respondents : Gujarat Urja Vikas Nigam Limited and others.

**Parties Present:**

Ms. Pinky Anand, Senior Advocate, MSEDCL  
Ms. Ramni Taneja, Advocate, MSEDCL  
Ms. Kiran Gandhi, Advocate, MSEDCL  
Sh. Anil S. Luthra, Advocate, MSEDCL  
Shri Satish Chavan, MSEDCL  
Ms. Saudamini Sharma, MSEDCL  
Ms. Somya Rathore, MSEDCL  
Mr. C.S. Vaidyanthan, Senior Advocate, CGPL  
Shri Abhishek Munot, Advocate, CGPL  
Shri Kunal Kaul, Advocate, CGPL  
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. Poorva Saigal, Advocate, Prayas Energy  
Shri Shubham Arya, Advocate, Prayas Energy  
Ms. Swapna Seshadri, Advocate, PSPCL  
Shri Sandeep Rajpurohit, PSPCL  
Shri G. Umapathy, Advocate, Rajasthan Discoms  
Ms. R. Mekhala, Advocate, Rajasthan Discoms  
Shri B. L. Sharma, Executive Engineer, Rajasthan Discoms

## Record of Proceedings

Learned senior counsel for MSEDCL submitted as under:-

(a) MSEDCL has challenged the APTEL's Judgment dated 7.4.2016 before the Supreme Court, which may come up for hearing soon.

(b) APTEL has remanded the matter to the Commission to determine whether rise in price of fuel amounts to Force Majeure under the provisions of the PPA and if rise in price of fuel amounts to Force Majeure, then whether the case of Force Majeure is made out in the facts and circumstances of the present case.

(c) Learned senior counsel referred to Para 303, 304(6) and 304(12) of the Full Bench Judgment of Appellate Tribunal and submitted that declaration of Force Majeure is only with respect to Adani Power's case and not in CGPL's case. Appellate Tribunal has stated that, if the Commission comes to a finding that case of Force Majeure is made out by CGPL, then the relief, as available under the PPA, is to be given to CGPL.

(d) The Commission is therefore required to determine the following:

(i) Whether rise in price of fuel amounts to Force Majeure under the provisions of the CGPL PPA?

(ii) Whether the case of Force Majeure is made out by CGPL in the facts and circumstances of the present case?

(iii) Whether relief, if any, is available under the PPA? If yes, assess such relief and grant the same to CGPL.

(e) CGPL's submissions that relief can be moulded is erroneous. The relief has to be strictly given in terms of the provisions of the PPA. It is a settled position of law that, if an agreement exists, then such agreement must be constructed strictly. In support of the said proposition, learned senior counsel relied upon the following judgments:

(i) *State of Gujarat v. Variety Body Builders*, reported as (1976) 3 SCC 500 (Paras 8 and 37);

(ii) *United India Insurance Co. Limited v. M/S Harchand Rai Chandan Lal*, reported as (2004) 8 SCC 644 (Paras 6, 9, 13).

(f) Thereafter, learned senior counsel relied upon on the Judgment dated 2.7.2012 of Delhi High Court in the case of *Coastal Andhara Power Limited v. Andhara Central Power* and submitted that the Hon'ble Delhi High Court had analysed the issue of increase in price of coal on account of promulgation of Indonesian Regulation and after analysing the provisions of the PPA in the

said case (which is pari materia with PPA with CGPL's case), it was held that the promulgation of Indonesian Regulation does not constitute Force Majeure in terms of the provisions of the PPA. In this regard, learned senior counsel for CGPL submitted that the Judgment specifically states that the observations in the case are not to be made applicable in all cases.

(g) Learned senior counsel referred to the Force Majeure of the PPA and submitted that PPA does not provide that fuel should be imported from Indonesia alone. In fact, the flexibility has been given to CGPL to procure fuel from any place.

(h) CGPL has invoked the provision of Article 12.7(b) of the PPA for seeking a relief of restitution. The reliance placed on the said Article 12.7(b) by CGPL is misleading as:

(i) Relief under Article 12.7 of the PPA is available only when case of Force Majeure is made out.

(ii) At best, relief under Article 12.7 of the PPA can be related to extension of time and not the relief of restitution.

(i) With regard to the computational issues, learned senior counsel submitted as under:

(i) CGPL has not filed relevant information and documents required for assessing the impact of Force Majeure;

(ii) DRI has initiated investigation against the generating companies importing coal from Indonesia. At this juncture, learned senior counsel for CGPL interjected that this fact is misleading as CGPL's name is not included in the list mentioned in the said circular issued by DRI.

(iii) Relief to CGPL would be given only with respect to the non-escalable component of tariff. Further, only 3.2 MMTPA of coal is affected by Indonesian Regulation.

(iv) Since CGPL has been blending high CV coal with low CV coal, the benefit of blending is to be passed on the procurers.

(v) KPMG report suggests that price paid by CGPL for procuring coal is less than the HBA index. Therefore, there is no impact of Indonesian Regulation on CGPL.

(vi) Tata Power is holding 30% stake in the Indonesian coal mining companies. The additional mining profits earned by the Indonesian

Companies is required to be ploughed back to reduce the burden on the consumers. Further, CGPL should place Tata Power's Shareholders Agreement with the Indonesian Companies, so that any additional benefit accrued to Tata Power can be ploughed back. In support of the said submission, learned senior counsel relied upon the following judgments relating to unjust enrichment:

- *Indian Council for Enviro-Legal Action v. Union of India & Ors.* reported as (2011) 8 SCC 161 (Para 153);
- *Sahakakri Khand Udyog Mandal Limited v. Commissioner of Central Excise & Custom*, reported as (2005) 3 SCC 738 (Para 32)

2. Learned counsel for Rajasthan Discoms submitted that Rajasthan Discoms have filed a Civil Appeal against the APTEL's Judgment before the Hon'ble Supreme Court which is likely to be listed soon. Learned counsel further submitted as under:

(a) The submissions made on behalf of Haryana utilities in the present petition are adopted in case of Rajasthan Discoms.

(b) CGPL has not filed necessary documents.

(c) Relief is to be computed only in terms of Article 12.7 of the PPA. Article 12.7 of the PPA does not provide for a relief of restitution.

(d) In the absence of an amount being determined as due under the provisions of the PPA, there cannot be any interest or carrying cost.

(e) The additional mining profits earned by the Indonesian Companies is required to be ploughed back to reduce the burden on consumers.

(f) As per the Coal Sales Agreement, the relief is to be granted only with respect to 3.22 MMTPA quantum of coal.

3. After hearing the learned senior counsel for MSEDCL and counsel for Haryana Discoms, the Commission directed to list the matter for hearing CGPL on rejoinder submission on 26.7.2016 at 14.30 hrs.

**By order of the Commission**

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