

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 38/MP/2016
With
I.A Nos. 6/2018 and 36/2019**

**Coram:
Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member**

Date of Order: 14th of February, 2020

In the matter of

Petition under Section 79 (a) (c) read with Section 79 (1) (f) of the Electricity Act, 2003, inter alia, seeking a declaration that the factors/events, namely delay in forest clearance of land for main plant, cancellation of allocated coal block to the Petitioner, non-signing of Fuel Supply Agreement, delay in acquisition/procurement of land for main plant, delay in approval of land for Ash Pond by State of Odisha, delay in clearance of railway line from Eastern Coast Railway, Odisha, delay in clearance for construction of dedicated transmission line from Ministry of Power in the construction of the 2x660 MW coal based thermal power plant located in Dhenkenal District, Odisha as force majeure events under BPTA dated 24.2.2010, seeking extension of time period for achieving the Commercial Operation Date of project and other consequential reliefs under the BPTA dated 24.2.2010.

And

In the matter of

Lanco Babandh Power Ltd.
Plot 4, Software Units Layout,
HITEC City, Madhapur, Hyderabad, Telangana

...Petitioner

Vs

Power Grid Corporation of India Limited
Plot No. 2, Saudamini, Sector 29, Gurgaon,
Haryana-122 001

..Respondent

The following were present:

Shri Deepak Khurana, Advocate for the Petitioner
Shri Vineet Tayal, Advocate for the Petitioner
Shri Aryaman Saxena, Advocate for PGCIL

ORDER

The Petitioner, Lanco Babandh Power Limited has filed the present Petition under Section 79 (1) (c), (f) and (k) of the Electricity Act, 2003 seeking declaration of factors/events, namely, delay in obtaining forest clearance of land for the generating station, non-signing of Fuel Supply Agreement, delay in obtaining clearance, delay in approval of land for Ash Pond by State of Odisha, delay in obtaining clearance of railway line by Eastern Coast Railway, Odisha and delay in obtaining clearance for construction of dedicated transmission line from Ministry of Power as *Force Majeure* events under BPTA and extension of period for achieving COD of the project.

Submission of the Petitioner

2. The Petitioner has mainly submitted as under:

(a) The Petitioner is setting up a 2 x 660 MW coal based Thermal Power Plant (Project) at village Kharagprasad/ Kurunti in Dhenkanal District in the State of Odisha. On 24.2.2010, the Petitioner entered into Bulk Power Transmission Agreement (BPTA) with Power Grid Corporation of India Ltd. (PGCIL) for 1600 MW, which was subsequently revised to 800 MW as per the Commission's order dated 8.6.2013 in Petition No. 118/MP/2012.

(b) As per the BPTA, the Scheduled Date of Commissioning of Unit 1 and Unit 2 was December, 2013 and April, 2014 respectively, subject to other terms and conditions of the BPTA. On 18.12.2014 in terms of the BPTA, the Petitioner and PGCIL entered into a Transmission Service Agreement (TSA).

(c) Due to delay in forest clearance, delay in signing in Fuel Supply

Agreement (FSA), delay in acquisition of land for the project, delay in approval of Ash Pond Land, delay in Railway Line Clearance, delay in obtaining permission for construction of Dedicated Transmission Line for the Project, cancellation of Rampia and Dip side of Rampia captive coal block by the Hon'ble Supreme Court and cancellation of allocated coal block, the project could not achieve COD within the timeline stipulated under the BPTA.

(d) On 6.5.2014 and 10.12.2014, the Petitioner gave notice regarding force majeure events under Clause 9 of the BPTA. In response, PGCIL vide its letters dated 8.7.2014 and 2.2.2015 intimated the Petitioner that reasons for delay mentioned are normal activities involved in establishing a thermal generation project and do not qualify as Force Majeure events. Therefore, the Petitioner shall be responsible for making payment of claims/ charges whatsoever, as may be applicable in line with BPTA signed between PGCIL and the Petitioner.

3. Against the above background, the Petitioner has made the following prayers:

“(a) Declare that the factors/events, namely, delay in obtaining forest clearance of land for main plant, cancellation of allocated coal block to the Petitioner, non-signing of Fuel Supply Agreement, delay in acquisition procurement of land for main plant, delay in approval of land for Ash Pond by State of Odhisa, delay in obtaining clearance of railway line from Eastern Coast Railway, Odhisa and delay in obtaining clearance for construction of dedicated transmission line from Ministry of Power as described in para-3.11 of the petition are force majeure events under Clause-9 of the BPTA dated 24.2.2010;

(b) Quash the letter dated 8.7.2014 (Annexure- P-23) and the letter dated 2.2.2015 (Annexure-P-25) issued by the Respondent to the Petitioner;

(c) Extend the scheduled date of commissioning of Unit-I and that of Unit-II keeping in view the force majeure events enumerated in para-3.1 1 of the Petition; and

(d) Exempt the Petitioner from fulfilling other obligations relating to payment of any claim including the payment of transmission/POC charges and or any penalties till the

date of commissioning of Unit-I and Unit-II of the petitioner.”

Submission of the Respondent

4. Power Grid Corporation of India Ltd. has filed reply dated 13.7.2016 to the Petition and has mainly submitted as under:

(a) The Petitioner vide its letters dated 6.5.2014 and 10.12.2014 informed PGCIL about the delay in commissioning of its project due to *force majeure* events and sought extension of time in achieving COD and exemption from payment of transmission charges. However, the Petitioner neither gave the time line of occurrence of *Force Majeure* events nor enclosed any letters to show that the Petitioner took necessary steps for commissioning the project. In response, PGCIL vide its letters dated 8.7.2014 and 2.2.2015 informed the Petitioner that the reasons for delay claimed are not clear and the alleged *force majeure* events are common in the projects of such nature. PGCIL also informed the Petitioner that the Hon'ble Supreme Court, vide its judgment dated 24.9.2014, has deferred the cancellation of Coal block till 31.3.2015 in order to maintain continuity in coal mining operations and minimizing any impact on the power utilities including the Petitioner. Therefore, the order of the Hon'ble Supreme Court is not *Force Majeure* event.

(b) PGCIL vide its letter dated 17.7.2015, requested the Petitioner to open Letter of Credit for Rs. 36.01crore in terms of the BPTA read with the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 (Sharing Regulations). On 27.8.2015, the Petitioner requested PGCIL to postpone the opening of LC.

(c) On 9.10.2015, PGCIL served notice to the Petitioner with the final opportunity to open LC within 7 days from the receipt of the notice. PGCIL in its letter stated that as per Sharing Regulations read with BCD Procedures and TSA, LTA customer is bound to open Letter of Credit for an amount equivalent to 2.10 times of the average monthly billing as provided in the BCD Procedures, one month prior to the effective date of the LTA.

(d) The Petitioner vide its letter dated 5.10.2015, informed PGCIL about the Scheduled COD of Unit-I and Unit-II i.e. January, 2017 and April, 2017, respectively and maintained the same commissioning schedule in the JCC meeting for Eastern Region held on 16.2.2016. PGCIL stated that neither in the communication dated 5.10.2015 nor in the JCC meeting held on 16.2.2016, the Petitioner had eluded *force majeure*.

(e) As per the BPTA, irrespective of the scheduled commissioning of the generating units, the Petitioner is liable to pay the transmission charges to PGCIL from the scheduled COD of the generating units.

(f) At the time of entering into the BPTA, the Petitioner was well aware of the various clearances required for the Project and time taken in obtaining the same. Therefore, it is clearly evident that there is no *force majeure* under which the Petitioner can avoid its liabilities assumed under the BPTA.

(g) Cancellation of coal blocks on account of arbitrary allocation as per the Hon'ble Supreme Court's order dated 24.9.2014 in *Manohar Lal Sharma v.*

The Principle Secretary, is not the change in Law under Article 9 of the BPTA.

(h) The Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access and Medium Term Open Access in inter-State Transmission and related matters) Regulations, 2009 read with Detailed Procedure does not provide any exception for non-payment of transmission charges and the *force majeure* cannot override the Regulations and exempt the Petitioner of transmission charges under the Regulations.

(i) As per Article 1.0 of the TSA, Letter of Credit or “LC” means a confirmed unconditional, irrevocable, revolving Letter of Credit opened by a DIC in favour of the CTU with any scheduled bank. As per Article 2(d) of the BPTA, the Petitioner is required to open an LC for 105% of estimated average monthly billing for transmission charges and would provide security in the form of irrevocable BG in favour of PGCIL and this requirement was later subsumed by the TSA. Accordingly, the Petitioner is bound by the obligation for payment of transmission charges and related obligation in terms of Article 3.4 of the TSA. However, the Petitioner, instead of opening LC, has filed the present Petition on the ground of *force majeure* to escape its obligation under the LTA Agreement and the Petitioner should be held liable for non-compliance of the extant regulations, the breach of its obligations under the TSA, non-operationalization of the LTA and abandonment of the Project.

Interlocutory Application No.6/2018

5. The Petitioner has filed an Interlocutory Application No.6/2018 seeking direction to PGCIL to deposit Rs.40 crore wrongfully collected from IDBI Bank Ltd.,

and to restore the Bank Guarantee issued by the Petitioner till the disposal of the present Petition.

Interlocutory Application No.36/2019

6. The Petitioner has filed an Interlocutory Application No. 36/2019 to amend the pleadings/ prayers in the main Petition and also to bring subsequent facts on record in the present proceedings. The Petitioner has made the following prayers in the IA:

“(i) Set-aside and quash the Respondent’s letter dated 27.11.2018 and 10.12.2018 issued to the Petitioner by which the Respondent has terminated the Transmission Service Agreement dated 18.12.2014 and BPTA dated 24.2.2010 and revoked 800 MW LTOA granted to the Petitioner under the BPTA dated 24.2.2010 respectively.

(ii) Declare that the factors/events described in Para 17 of the Petition are force majeure events under clause 9 of the BPTA dated 24.2.2010.

(iii) Extend the scheduled date of commissioning of Unit-I and that of Unit-II keeping in view the force majeure events enumerated in para 17 of the Petition; and

(iv) Direct PGCIL to refund the Bank Guarantee of Rs. 40 crore wrongfully invoked.”

Reply of PGCIL

7. PGCIL, vide its reply to IA No. 36/2019 for amendment of the Petition, has submitted that since the Petitioner did not open the LC, TSA has been terminated in terms of the Commission’s order dated 8.3.2018 in Petition No. 229/RC/2015 in which the Petitioner was also party. In the said order dated 8.3.2018, the Commission held that the establishment of a payment security mechanism is a statutory requirement and failure to establish the requisite payment security mechanism attracts termination of the TSA. PGCIL, vide letters dated 17.7.2015 and 9.10.2015 requested the Petitioner to open LC in favour of PGCIL towards payment security mechanism under the Connectivity Regulations. However, the Petitioner instead of opening the LC filed the present Petition before the Commission on the

grounds of Force majeure events. Since, the failure to open the LC is an event of default, PGCIL was constrained to terminate the TSA vide letter dated 27.11.2018. PGCIL has submitted that the contention of the Petitioner that the invocation of its construction BG followed by termination of TSA and revocation of LTA were actions taken surreptitiously without any provocation of the Petitioner, is wrong. Each day of the Petitioner's default in ensuring the various regulatory compliance including non-opening of LC, delay in construction of generation project and dedicated transmission line, etc., gives rise to a fresh or continuous cause of action for appropriate action in terms of applicable Regulations, Procedure and Agreements.

Analysis and Decision

8. We have heard the learned counsels for the Petitioner and Respondent, PGCIL. During the course of hearing on 21.1.2020, learned counsel for PGCIL submitted that since the LTA granted to the Petitioner has already been relinquished and TSA has been cancelled, the Petition has become infructuous. In response, learned counsel for the Petitioner submitted that NCLT has passed the order regarding liquidation of the Petitioner Company and sought time to file Vakalatnama on behalf of Liquidator. Accordingly, the Petitioner was directed to file Vakalatnama on behalf of Liquidator.

9. During the course of hearing on 12.2.2020, learned counsel for the Petitioner submitted that during the pendency of the present Petition, National Company Law Tribunal (NCLT) Hyderabad, vide order dated 29.8.2018 admitted the application of the lender, namely ICICI Bank, filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) against the Petitioner. Pursuant to the said order, NCLT passed the order regarding liquidation of the Petitioner Company.

Learned counsel for the Petitioner submitted that vide emails dated 15.1.2020, 20.1.2020, 25.1.2020 and 7.2.2020, the Liquidator, Shri Goyal was informed regarding hearing of the matter before this Commission and sought Vakalatnama and instructions from the Liquidator. However, no Vakalatnama or instructions have been received from the Liquidator despite repeated reminders. In this circumstances, learned counsel for the Petitioner sought permission to be discharged from representing the Petitioner in the present Petition.

10. Considering the submissions of the learned counsel for the Petitioner, we discharge the learned counsel for the Petitioner from representing the Petitioner in this Petition. It is further noted that despite repeated communications sent by the learned counsel for the Petitioner, the Liquidator is not represented either in-person or through any counsel. Accordingly, the Petition is dismissed for non-prosecution of the matter.

11. Petition No. 38/MP/2016 and IAs No. 6/2018 and 36/2019 are disposed of in terms of the above.

Sd/-
(I.S.Jha)
Member

sd/-
(P.K. Pujari)
Chairperson