

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 12/MP/2013

Subject: Application filed under Section 79 (I) of the Electricity Act, 2003 read with the Central Electricity regulatory Commission (Conduct of business) Regulations.

Date of Hearing: 24.9.2013

Coram: Shri V.S. Verma, Member
Shri M. Deena Dayalan, Member

Petitioner: Udupi Power Corporation Ltd, Bangalore

Respondents: PCKL, Bangalore & 5 others

Parties Present: Shri J.J. Bhatt, Senior Advocate, UPCL
Shri L. Vishwanathan, Advocate, UPCL
Shri A Ghosh, Advocate, UPCL
Shri R.Parthasarathy, UPCL
Shri R.A.Mulla, UPCL
Shri D.S.Murali, UPCL
Shri Soumyanarayanan, UPCL
Shri M.G.Ramachandran, Advocate, for Discoms of Karnataka
Shri Anand Ganesan, Advocate for Discoms of Karnataka
Shri V.G.Manjunath, PCKL
Shri Padamjit Singh, PSPCL

RECORD OF PROCEEDINGS

During the hearing, the learned counsel for the respondent, PCKL filed written submissions on the issue of fuel cost and mainly submitted as under:

- (i) The petitioner initiated a fresh bidding process during 2005 by cancelling the Coal agreement with M/s Rio Tinto without any proper justification and consent/approval of the respondents. No details of the bidding documents or the bids received were provided to the respondents, only the evaluation reports prepared by their consultants were furnished.
- (ii) The respondents were not given sufficient time to communicate its observations before the petitioner executed the FSA (Fuel Supply Agreement) on 26.12.2006 with four coal suppliers.
- (iii) The energy charges are to be computed considering the firm FOB rates for 5 years contained in Annexure-10 of PPA and in accordance with the formula under the 2009 Tariff Regulations.
- (iv) The fuel supply under each of the FSA did not commence due to breach committed by the petitioner in adhering to the commissioning schedule as per Article 2.1 of the FSA. No effective steps to enforce its rights against the fuel suppliers were taken by the petitioner.

- (v) There is no provision under Clause 2.1 of FSA for termination if the generating station is not commissioned by 31.12.2009.
- (vi) No documents or correspondences which the petitioner made with M/s Aditya Energy Resources have been produced by the petitioner including the letters and replies received in response.
- (vii) The fact that UPCL did not dispute the termination or take any legal action establishes that UPCL is not entitled to force majeure conditions to claim additional tariff.
- (viii) The communication of M/s Aditya Energy Resources under Clause 15.3 of FSA to terminate the agreement for all supply years is contrary to the terms of the agreement. No such provision exists in Clause 15.3 to terminate the agreement for all supply years, rather it provides termination of specific supply years.
- (ix) Failure by M/s Aditya Energy Resources to deliver coal shipments to the petitioner amounts to seller event of default. As per Clause 14.2 of the FSA the petitioner had the right to recover the excess amount from M/s Aditya reasonably paid over the amount otherwise payable by the petitioner had the shortfall not occurred.
- (x) The additional cost for the power is solely due to the failure of the petitioner to commission the plant on time and hence the respondents would be entitled to collect damages from the petitioner towards the difference in price of coal. Accordingly the claim of `731.38 Crs has been made against the petitioner.
- (xi) The petitioner and its group companies also own substantial coal mines in various places including Australia. The efforts taken by the petitioner to obtain coal from such places which may be cheaper than the present coal price claimed has not been furnished by the petitioner.
- (xii) Two coal suppliers namely M/s PT Adaro and M/s PT Indominco are supplying coal to the plant as per agreements dated 25.10.2005 and 25.1.2006 which are different from the agreement produced before the Commission. The other agreements referred to in the invoices were neither submitted to the respondents nor disclosed before this Commission.
- (xiii) Even if the change in Indonesian Regulation is accepted, due to inaction on the part of the petitioner in terminating the offer of M/s Rio Tinto has led to procuring coal by the petitioner from Indonesian market at a higher rate. This cannot be passed on to the respondents.
- (xiv) Under these circumstances, there is no justification for any higher payment by the respondents for energy charges to the petitioner and the petitioner is liable to compensate the respondents for higher energy charges owing to cancellation of FSA for breach by the petitioner.
- (xv) The issue of Force Majeure and the delay in commissioning of the plant had already been argued by the respondents in the tariff petition (Petition No 160/GT/2012). This may also be considered.

2. The representative of the respondent, PSPCL submitted that if the petitioner had purchased the Australian coal mine during 2011 (as reported in The Hindu) then coal should be supplied at the lowest rates for the plant of the petitioner. The Commission may direct the petitioner to submit the details of the rate and the commitment as regards supply of coal by the petitioner, as owners of the mine.

3. In response to the above, the learned senior Counsel for the petitioner UPCL clarified that copies of the correspondences/letters exchanged by the petitioner by M/s Aditya have been served on the respondents. He further submitted copies of the proceedings of the Government of Karnataka (GOK) to demonstrate the active participation of the GOK in accepting the recommendations of the committee after negotiation with the coal suppliers. The learned senior Counsel mainly submitted as under:

- (a) The written submissions filed on 10.8.2013 shall be considered.
- (b) The circumstances leading to cancellation of coal agreement with M/s Rio Tinto has been explained in page 34 of the TCE Report enclosed with our submission dated 24.5.2012.
- (c) The petitioner has several discussions with the fuel suppliers for supply of coal as per terms of FSA. However, due to change in Indonesian law the coal suppliers did not adhere to the provisions of FSA. This was brought to the notice of the respondents and thereafter GOK formed committee to renegotiate the terms of FSA as per its order dated 9.4.2010. The recommendations of the negotiation committee for reconsideration of the terms of contract were placed before the GOK which were accepted by GOK.
- (d) After the GOK advised the petitioner to initiate legal action against M/s Aditya, the petitioner consulted its legal advisors who examined the terms of the contract and suggested that M/s Aditya had the right to terminate the FSA by giving two months notice and hence no legal remedy was available to the petitioner.
- (e) The termination of FSA applies to all the supply years and would not be restricted to a specific supply year as contended by the respondents. Copy of the Supreme Court Judgement in (Shri Balaganesan Metals V. M.N Shanumugham Chetty and others) was referred to.
- (f) Documents available on record (including Petition No. 160/GT/2012) along with the submissions made by the petitioner in this matter may be considered by the Commission.

4. The learned counsel for the respondent PCKL submitted that the petitioner may be directed to submit the other agreements referred to in the invoices, failing which application for adverse inference would be filed by the respondents. The learned senior counsel for the petitioner clarified that all documents related to the petition has been filed. He however, submitted that the Commission may permit the petitioner to file clarification on this issue, on affidavit.

5. The Commission accepted the prayer of the learned counsel of the petitioner and directed to file clarification within 7.10.2013 with copy to the respondent PCKL who may file its response within 14.10.2013. Subject to this, order in the petition was reserved.

By order of the Commission

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