

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 14/MP/2013**

**Sub:** Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Articles 13.2.(b) of the Power Purchase Agreement dated 07.08.2007 executed between Sasan Power Limited and the procurers for compensation due to unprecedented, unforeseen and uncontrollable depreciation of the Indian Rupees.

Date of Hearing : 10.10.2013

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

Petitioner : Sasan Power Limited, Mumbai

Respondents: : MP Power Management Company Ltd. & Others

Parties present : Shri J.J.Bhatt, Senior Advocate, SPL  
Shri Vishrov Mukherjee, Advocate SPL  
Ms. Ritika Arora, Advocate, SPL  
Shri P.Venkatarao, SPL  
Shri Arun Dhillon, SPL  
Shri N. K. Deo, SPL  
Shri Raj Verma, SPL  
Shri Sandeep S. Mysetty, SPL  
Shri Mayank Gupta, SPL  
Shri Srikant, SPL  
Shri Vivek Kejirwal, SPL  
Shri R.S.Johri, SPL  
Shri G.Umpathy, Advocate, MPPMC  
Shri M.G.Ramchandran, Advocate, HPPC  
Shri Poorva Saigal, Advocate, HPPC  
Shri Apoorve Karol, Advocate, HPPC  
Shri Padamjit Singh, PSPCL  
Shri T.P.S.Bawa, PSPCL  
Ms. Shobana Masters, Advocate, BRPL and BYPL  
Shri Himansu Chauhan, BRPL  
Shri Alok Shankar, Advocate, TPDDL  
Shri S.S.Barpanda, NLDC  
Ms. Jyoti Prasad, NLDC

## Record of Proceedings

Learned senior counsel for the petitioner submitted that this petition has been filed pursuant to invocation of the regulatory power by this Commission. Learned senior counsel further submitted that this Commission as well as the Maharashtra Electricity Regulatory Commission have taken the view that Regulatory Commission has a role to play as a regulator and in that role to regulate the price at which electricity should be sold. This does not fall within the change in law. This requires invocation of regulatory power of the Commission. The petitioner claims an increase in cost of the project as a result of exponential and unexpected increase in the value of dollar. When the petitioner decided to set up the plant, dollar was depreciating and rupee was appreciating. Now the depreciation in the value of rupees is very high as a result of which the petitioner's debt cap which was bought on the basis of certain dollars has completely gone haywire. The petitioner has already spent ₹20,000 crore and incurring further sum is becoming extremely difficult.

2. Learned senior counsel submitted that due to unforeseen, uncontrollable and unprecedented devaluation of the Indian Rupee vis-s-vis the US Dollar, the capital cost of the project has increased by about ₹2800 crore. Learned senior counsel submitted that as per the bid documents, the total debt amount is expressed in terms of Rupees and all debt denominated in foreign currencies are converted to Rupees at the Reference Exchange Rate, being the selling rate in Rupees for the foreign currency as on the relevant date. As on the date of submission of the bid in July 2007, the petitioner envisaged the total project cost at about ₹19,600 crore which was based on computation in USD and INR terms and factored in the foreign exchange exposure of the petitioner. The foreign exchange rate of USD at that time was ₹40.27 per USD. The petitioner factored in the 0.74% per annum depreciation of INR vis-à-vis USD as notified by the Commission in its Notification dated 4.4.2007 for evaluation of the bids and the exchange rate during the construction period worked out to approximately ₹40.99 per USD. The project cost of around ₹19,600 crore was funded at 74.23% debt and balance as equity. Accordingly, the total debt of the project was capped at ₹14,550 crore by the lenders based on the revenues generated on the basis of levellised tariff of ₹1.196/kWh.

3. Learned senior counsel submitted that as on the date of filing of the petition, the currency exchange rate stood at about ₹55 per USD which translates into depreciation of approximately 37% of the Indian Rupee vis-à-vis the US Dollar in the intervening period of 5 years from the bid submission date. The compounded annual rate of depreciation of the Indian Rupee has been about 6% per annum whereas the depreciation of Indian Rupee as projected in the Notification dated 4.4.2007 of the Commission was only 0.74% per annum. Learned senior counsel submitted that since the power plant is based on supercritical technology and project also involves developing large coal mines, the petitioner had to import mining equipment for the

project from the United States and power plant equipment from China, on account of shortage of manufacturing facilities for such equipment in India. The aggregate USD exposure of the project due to import of equipment is about USD 2.05 billion.

4. Learned senior counsel submitted that due to unprecedented and unforeseen depreciation of the INR vis-à-vis USD, the aggregate impact on the project on account of import of equipment has exceeded the project valuation of ₹19,600 crore by ₹2800 crore. Since the debt is capped at ₹14,550 crore, the petitioner can only fund the additional capital cost through equity unless the relief prayed for in the petition is granted. Learned senior counsel further submitted that since additional equity requirement was unforeseen at the time of submission of the bid, the additional cost on account of equity has not been built into the project and the return on additional equity is nil. Learned senior counsel submitted that since the requirement of infusion of additional equity is a direct consequence of depreciation of INR vis-à-vis USD, a suitable mechanism will have to be devised in order to provide reasonable return on equity to the petitioner. Learned senior counsel also went through the details of loans availed of the debt service outflow for the project and the details.

5. The petitioner took up the matter with the procurers in its letter dated 15.12.2012 which is in effect a notice under Article 17.2.1 of the PPA and all requirements of the said Article has been complied with. The procurers had called for a meeting on 27.2.2013 but did not take any decision with regard to the claims raised in the letter dated 15.12.2012. Since the period of 30 days prescribed under Article 17 of the PPA has expired without any amicable solution, the petitioner has approached the Commission in accordance with Article 17 of the PPA.

6. Learned senior counsel submitted that this Commission has the power to entertain this petition and grant relief to the petitioner due to the following reasons:

(a) Under section 79(1)(b) of the Act, the Commission has the power to regulate the tariff of the generating company of the petitioner which has a composite scheme to generate and sell power in more than one State.

(b) The Supreme Court has interpreted in a number of judgments that the term 'regulate' is wide and plenary. Therefore, the Commission's power to regulate is wider than the power to determine tariff under Section 62 and 63 of the Act.

(c) The Appellate Tribunal in Appeal Nos.106 and 107 of 2009 (BSES Rajdhani Power limited vs BSES Yamuna Power Ltd) has held that the Commission has the power to re-determine the tariff under Section 62 of the Act.

(d) The Commission has the power to review and revise the tariff under Regulation 92 of the Central Electricity regulatory Commission (Conduct of Business)

Regulations, 1999 which has been upheld by the Supreme Court in UP Power Corporation Limited vs NTPC Limited.

(e) PPA is a regulated contract and the Commission is obliged and empowered under section 79 read with sections 61 and 63 of the Act to regulate tariff whenever a situation arises warranting exercise of regulating powers to secure tariff principles even in tariff determined by competitive bidding process.

(f) This Commission can take into consideration the impact of unprecedented, unforeseeable and uncontrollable steep depreciation of INR vis-à-vis USD and other factors and regulate the tariff in such a manner that the increase in project cost is absorbed in tariff/supplementary bill and the petitioner is restored to the same economic position as existed prior to depreciation of INR.

(g) The depreciation of INR vis-à-vis USD is a force majeure event as per Article 12.3 of the PPA as the petitioner has no control over the depreciation of INR. The petitioner could not have foreseen such depreciation in the value of INR at the time of submission of the bid, and there is no mechanism in the PPA which provides for any adjustment on account of such unforeseeable and unprecedented depreciation in the value of INR. Learned senior counsel relied upon the judgments in Smt Sushila Devi and Another Vs. Hari Singh and Others [(1971) 2 SCC 288], Govindbhai Gordharnbhai Patel and others Vs. Gulam Abbas Mullah Allibhai and others [(1977) 3 SCC 179] etc. to highlight commercial hardship as the basis of force majeure.

7. In reply to a query of the Commission whether hedging of the loan in USD was done, learned senior counsel submitted that the petitioner did not hedge because the cost of hedging would have been higher. In reply to another query of the Commission whether the foreign debt component and domestic debt component as was assumed at the time of the bid remained the same, learned senior counsel replied in the affirmative. The Commission directed the petitioner to file the debt-equity ratio and the foreign and domestic loan components remained the same as at the time of submission of the bid.

8. The Commission further observed that the rate of depreciation of INR vis-a-vis USD over the past 30 years is on an average more than 2% which should have been taken into account at the time of submission of the bid. Moreover, repayment does not happen today but over a period of time and Rupee may further appreciate and come back to the same level. The Commission desired to know whether it is reasonable and appropriate to seek relief for depreciation for Rupee. Learned senior counsel submitted that in case of appreciation of Rupee, the procurers have a right to seek the relief.

9. The Commission further observed that in a competitive bidding, it is the portfolio of the supplier to make its assumptions including the components of foreign debt and domestic debt while making the bid whereas the consumers are concerned with the final price for supply of electricity and accordingly, they have entered into long term PPA.

The Commission desired to know as why should the consumers suffer on account of the assumptions of the supplier. Learned senior counsel submitted that over a period of time in various orders, it has come through that even in case of competitive bidding, the Commission has thought it fit to intervene in extraordinary circumstances. The petitioner has sought a mechanism whereby the benefits could also be given to procurers when the Dollar falls.

10. Shri Pushkar from KPMG made a presentation on behalf of the petitioner regarding hedging. The representative of KPMG submitted that KPMG has carried out an analysis of the Dollar Rupee volatility on the project and has considered the following:

- (a) The reason behind volatility during January 2002 to 2013;
- (b) The impact of the currency volatility on the project cost;
- (c) The risk mitigation measures that were available and that could have been taken;
- (d) Cost benefit analysis of various hedging strategies that were adopted.

He submitted that prior to 2007, Rupee was depreciating by about 2 to 5% and post 2007, Rupee was appreciating nearly 3% which was unprecedented and subsequently, Rupee depreciated by 4 1/2%.

11. The Commission observed that KPMG has considered the data of only 5 years i.e. from 2002 to 2007 whereas for the feasibility report of a project, the data for past 100 years is considered. KPMG should at least consider the volatility of Rupee for the past twenty years prior to the date of submission of the bid. The Commission directed the petitioner to consider the data for a period of twenty years prior to the submission of the bid to assess the volatility of rupees.

12. The representative of KPMG continued that at the time of bidding, the Dollar Rupee variation was at the lowest and there was an overwhelming expectation that Rupee would further appreciate. However, due to global financial crisis and unwinding of short dollar position, Rupee depreciated from 2008 onwards reaching to ₹ 51 in a very short time. As regarding hedging cost which was ruling at 1% in 2008 rose to 7% in 2011 in short term and became very expensive to hedge, especially for longer period. Various reputed agencies had given the forecast that value of Rupees would range from ₹ 33 to ₹41 per US Dollar upto 2011. Since the Rupee was appreciating at the time of the bid and there was expectation that Rupee would appreciate and considering the CERC index of 0.74% depreciation, quotation of the bidder on the basis of cost of the project for ₹19600 crore was reasonable which has gone up by ₹ 3100 crore. At this stage the Commission pointed out that CERC index is for bid evaluation and not for bid submission.

13. The representative of KPMG submitted that as risk mitigation measure, Sasan Power had the short term exposure and long term loan. For short term exposure, there was forward contract and option that could have been taken and for long term loan, there was forward option and SOPS. The conclusion of the analysis is that because of volatility, there would not have been any material difference had the hedging been taken since the cost of hedging was very high.

14. In response to the Commission's query as to whether any refinancing loan was taken, it was explained by the learned senior counsel for the petitioner that at the stage of bid submission what was contemplated was a mix of Rupees and Dollar financing. At the time of financial closure, because of slow down, dollar financing was not available and therefore, Sasan went for Rupee financing as a transit strategy. However, since the equipment procurement was in dollar term, financing in dollar was arranged subsequently. The Commission observed that since Rupee loan was replaced with dollar loan, Sasan has gone for higher risk and had Sasan continued with Rupee financing, the risk of volatility would not have been there. In response, learned counsel submitted that Sasan went for Dollar loan since the exposure was in dollar terms as any prudent project developer would have done. In reply to another query of the Commission whether the dollar loan was on fixed rate of interest or floating rate of interest, the representative of the petitioner clarified that loan from US EXIM Bank was on fixed interest while other loans are on floating rate of interest.

15. Learned counsel for MPPMCL submitted that as per para 4.3 of the competitive bidding guidelines, tariff should be designated in INR only and foreign exchange risk shall be borne by the seller. Article 12 of the PPA dealing with force majeure does not cover the foreign exchange risk. Learned counsel further submitted that as per the bid document as well as the PPA, the foreign exchange risk was to be borne by the seller himself. He further submitted that even if there is an unprecedented crisis in terms of foreign exchange variation, it is unreasonable for the petitioner to expect that the entire burden would be borne by the respondents. The petitioner should bear part of the burden by accepting lower rate of return.

16. The Commission desired to know whether MPPMCL was prepared to bear part of the burden of foreign exchange risk, learned counsel submitted that the respondent's main submission remained that foreign exchange risk is not admissible and in case, the Commission holds that the petitioner is entitled for it, then the entire burden should not be passed on to the procurers and should be shared by the petitioner.

17. Learned counsel for HPPC submitted as under:

- (a) Para 4.3 of the competitive bidding guidelines provides that tariff shall be designated in Indian Rupees and foreign exchange risk if any shall be borne by

the supplier. The only exception is that the foreign exchange rate variation will be permitted in payment of energy charges for the fuel increase if the procurer mandates the use of imported coal for case 2 bidding. Sasan not being a coastal project is not covered under this provision.

(b) The petitioner is in a competitive environment and the procurers are not concerned with the loan portfolio of the petitioner or the impact of foreign exchange rate variation on such loan. Learned counsel relied upon Supreme Court judgment in the matter of Transport Corporation of Andhra Pradesh Limited and Another Vs. Sai Renewable Power Private Limited [(2011) 11 SCC 34] and submitted that circumstance obtaining at the time of bidding has not changed.

(c) The case of Sushila Devi relied upon by the petitioner is not applicable in the present case.

(d) Reliance of the petitioner on the orders in Adani Case (Petition No.155/MP/2012) and CGPL Case (Petition No.159/MP/2012) regarding compensatory tariff is not applicable in the present case as the Commission has not dealt with foreign exchange variation in those cases.

(e) Commercial impossibility as the basis for force majeure has been rejected by the Commission in Adani case and CGPL case.

18. The representative of PSPCL submitted that Reliance Power has quoted on the basis of the extant guidelines which required the submission of bids in INR only. The petitioner has also admitted in the petition that the tariff quoted by the petitioner did not have any foreign exchange element. The petitioner has quoted very aggressively to get this project and having bagged the project, the petitioner cannot be allowed to claim the relief which the petitioner has not factored in the bid.

19. Tata Power Distribution Company submitted that the developer is in the best position to take care of the foreign exchange risk. Neither the procurers nor their authorized representative made any representation on the estimated cost of the project and therefore, any risk associated with the cost of the project is the responsibility of the petitioner.

20. Learned counsel for BRPL and BYPL supported the claims of the petitioner.

21. The Commission sought a clarification from the learned senior counsel for the petitioner that since the petitioner was aware that tariff is to be quoted in Indian Rupees, it should have taken care to ensure that equipment are taken from the Indian manufacturer and the loans are taken from the domestic sources in order to avoid foreign exchange exposure. Learned senior counsel submitted that the petitioner is within its rights to take reasonable risk and if the risk is unprecedented, then in the light of the decision in Adani and CGPL case, the petitioner can approach the Commission for invocation of the regulatory power of the Commission. As regards the procurement of equipment from domestic manufacturers, learned senior counsel submitted that due to non-availability of supercritical technology equipment and mining equipment in India, the petitioner had no option but to import the equipment and incur expenditure in US Dollar. Learned senior counsel further submitted that the petitioner got an offer from BHEL but there also 45% of the cost had to be paid in US Dollar.

22. In response to the submission of learned counsel for MPPMCL regarding non-applicability of force majeure in the present case, learned senior counsel submitted that force majeure has been defined in Article 12.3 of the PPA as “any event or circumstances or combination of events circumstances including those stated below which wholly or partly prevents or unavoidably delays the aggrieved party from performance of its obligations under the agreement.” What have been enumerated below are illustrative and the petitioner is not covered under any of them but under the main definition of force majeure as it is prevented on account of unprecedented depreciation in INR to complete the project. Learned senior counsel submitted that the judgment of the Supreme Court in the Transmission Corporation of Andhra Pradesh is not applicable in the case of the petitioner. Learned senior counsel relied upon the judgment of Supreme Court in **Tarapore and Company Vs. Cochin Shipyard Ltd. and Another [(1984) 2SCC 680]** in support of the petitioner’s case for relief.

23. Learned senior counsel for the petitioner submitted that the project requires immediate funding. Learned senior counsel submitted that the Commission may consider to grant interim tariff to the petitioner or permit the petitioner to file a proposal for interim tariff, pending issue of final orders in this petition and other related petitions. The Commission declined to grant any interim relief since the arguments in the petitions are complete and orders will be issued shortly.

24. The Commission directed the petitioner to confirm on affidavit for how much time the generating station has run on supercritical technology excluding the time for testing.

25. After hearing the learned senior counsel for the petitioner, learned counsels/representatives of the respondents present, the Commission directed the petitioner and the respondents to file the required information as directed in this record of proceeding on affidavit and their written submissions within one week.

14. Subject to the above, the Commission reserved order in the petition.

**By order of the Commission**

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