

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 154/MP/2016

Subject : Petition under Section 79(1)(a) of the Electricity Act, 2003 for relief on account of Force Majeure events affecting the Farakka Super Thermal Power Station Stage-I and II (1600 MW) and Stage III (500 MW).

Date of hearing : 20.7.2017

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

Petitioner : NTPC Limited

Respondents : West Bengal State Electricity Distribution Co.Ltd. and Others

Parties present : Shri Sitiesh Mukherjee, Advocate, NTPC
Shri Gautam Chawla, Advocate, NTPC
Shri Deep Rao, NTPC
Shri Amit Kapur, Advocate, WBSEDCL
Shri Vishrov Mukherjee, Advocate, WBSEDCL
Shri Janmali. M, Advocate, WBSEDCL
Shri R.B. Sharma, Advocate, BRPL and GRIDCO
Shri Manish Garg, UPPCL
Shri R. Mansingh, GRIDCO
Shri S.R. Sarangi, GRIDCO

Record of Proceedings

At the outset, learned counsel for the petitioner submitted that the present petition has been filed seeking relief on account of Force Majeure event due to complete shutdown of the 2100 MW Farakka Super Thermal Power Station (FSTPS) due to non-availability of cooling water from the adjacent Ganga Feeder Canal. Learned counsel for the petitioner further submitted as under:

a). FSTPS is a thermal power generating station located in West Bengal comprising a total of six units with a cumulative capacity of 2100 MW, owned and operated by the petitioner. The petitioner entered into Bulk Power Supply Agreements/ Power Purchase Agreements (collectively referred to as the PPAs) with the respondents for the sale of power generated by FSTPS. The sole source of cooling water for the FSTPS is from

Ganga Feeder Canal. Adequate cooling water cannot be drawn by the FSTPS for operating the station at full load. In this regard, as a result of the fall in the quantum of water flowing from upstream areas and the diversion of 35,000 cusecs of water to Bangladesh under the Water Sharing Treaty dated 12.12.1996 entered into between the Government of India and Bangladesh, the level of water in the Ganga Feeder Canal fell drastically below 17.5 meters.

b). Due to the drastic reduction of cooling water in the Ganga Feeder Canal from February 2016 onwards, the petitioner was constrained to successively shut down each of FSTPS's six units during the periods of such unavailability. Once the cooling water became available in the Ganga Feeder Canal, the petitioner promptly restarted its units and resumed power generation.

c). The availability of the FSTPS dropped significantly on account of the uncontrollable shut-down of the units of FSTPS. Consequently, the annual fixed charges receivable by the petitioner for the financial year 2015-16 was reduced due to factors beyond the control of the petitioner. It would be unjust and unfair if the periods during which any unit of FSTPS was shut-down due to Force Majeure events were included in the calculation of Availability thereby diminishing the capacity charges receivable by the petitioner. The petitioner has unfairly suffered a cumulative loss of Rs. 26.91 crore as reduced capacity charges on this account during 2015-16.

d). The petitioner had conceived the construction of lift pumps at the Ganga Feeder Canal to counteract the reduction in the quantum of water. The Commission vide order dated 14.6.2012 in Petition No. 222 of 2009 had approved the installation of the said lift pumps. However, the installation of the lift pumps could not be carried out due to various issues faced during the construction process.

e). The flow of water in the Ganga Feeder Canal is controlled and operated by the Farakka Barrage Project Authority (FBA), Ministry of Water Resources, Govt. of India. In any event, at the request of the petitioner, the FBA carried out repairs on the gates at Farakka Barrage to prevent leakages and to ensure adequate quantity of water/water level in the Ganga Feeder Canal.

f). In March 2016, when water was diverted as per the Water Sharing Treaty, the water level in the Farakka Feeder Canal fell to level which is far below the requisite crest level of the existing intake structure at FSTPS resulting in a shutdown of the entire plant. Even if the lift pumps were installed, water level was too low even for lift pumps to enable drawal of cooling water.

g). Due to the unprecedented fall in the water levels coupled with the diversion of water to Bangladesh under the Water Sharing Treaty, both factors completely outside the petitioner's control, FSTPS was required to be shut down. Therefore, the unavailability of water is a Force Majeure event under the PPAs.

h). The unavailability of cooling water is an event squarely covered by the Force Majeure clauses as the said event is due to 'forces of nature' as specified in the force majeure clauses 9 and 8 of the PPAs dated 25.5.1993 and 13.11.2010 respectively. Therefore, the petitioner is entitled to claim relief under the force majeure clauses.

i). In compliance with the force majeure clauses under the PPAs, the petitioner served notice on 18.3.2016 to respondents for occurrence of the force majeure due to unavailability of cooling water and a copy of the same was forwarded to ERLDC and ERPC. The petitioner also raised the issue of said Force Majeure event at the 32nd Commercial Sub Committee Meeting of ERPC held on 10.6.2016 and the 33rd Meeting of ERPC held on 24.6.2016. However, ERPC did not accept the petitioner's plea for the exclusion of the periods during which FSTPS was under shut-down.

j). The inclusion of the periods during which FSTPS was under shut-down due to force majeure events in the calculation of Percent Plant Availability per month under Regulation 30 of the 2014 Tariff Regulations is unfair and unjust. Thus, the periods during which units of FSTPS were under shut-down ought to be excluded from the calculation of Percent Plant Availability. In support of his contentions, learned counsel relied upon the judgment of the King's Bench Division in the matter of Matsoukis Vs. Priestman and Co., [1914 M. 1495].

2. In its rebuttal, learned counsel for WBSEDCL submitted as under:

a). The petitioner was aware of the Treaty between the Government of the People's Republic of Bangladesh and the Government of the Republic of India on Sharing of the Ganga Water at Farakka dated 12.12.1996.

b). Diversion of water from the Ganga Feeder Canal is undertaken by Government of India to Bangladesh in accordance with the Water Sharing Agreement in force since 1996. The drop in water level was clearly contemplated and to the knowledge of the petitioner, which can neither be treated as unprecedented nor uncontrollable. It is a settled position of law that no person can take advantage of its own wrong.

c). The shut down was due to the petitioner's failure to construct the lift pumps in spite of receiving the Commission's approval for lift pump in 2006 and award of the contract on 12.6.2007 as also capex approval by the Commission on 14.6.2012. The petitioner has been aware of the necessity of water pumps and had awarded the contract for construction of lift pumps in 2007, as per its evaluation of the prudent requirements to offset lean water levels while adjusting for water diversion to Bangladesh pursuant to the Water Sharing Agreement.

d). The design of the water pumps as well as the risk and consequence of installing the water pumps is on the petitioner. The petitioner cannot contend at this stage that even if the water pumps were constructed and ready, the quantum of water in the Ganga Feeder Canal would still be inadequate for cooling water purposes.

e). The petitioner has chosen the design parameters for the lift pump i.e. operating at a minimum level of RL (+) 16.6 M of water. Subsequently, it cannot be contended that since water level has fallen below RL (+) 16.6 M of water, it would qualify as a force majeure event. The design risk of the lift pumps is entirely on the petitioner and the petitioner is required to bear any consequences as a result of the same.

f). Events qualifying as force majeure ought to be outside the control of the affected person, being unplanned, undersigned and un contemplated. In the present case, the petitioner was aware well before 2007 that there was a need to install lift pumps. Yet, the petitioner failed to complete the installation in time. The non-availability of water and consequent shut-down of the project was due to the petitioner's failure to complete the lift pumps in spite of lapse of 10 years. Therefore, the petitioner's claim for force majeure is untenable.

g). The petitioner ought to be estopped from taking the remedy of Force Majeure due to shortage of water from the Ganga Feeder Canal, given that the same was within its control and the petitioner could have taken steps to mitigate the risk. Instead the petitioner completed and commissioned Stage III of the project.

h). In terms of Regulation 30 of the 2014 Tariff Regulations, PAF is computed on the basis of declared capacity. There is no provision for exclusion of period for which the plant is shut down on account of unavailability of water in computation of PAF. In the absence of such a provision, the relief claimed by the petitioner is not tenable under law.

i). If the petitioner's claim is allowed, WBSEDCL would incur a financial impact of Rs. 10.71 crore per annum. The consumers of WBSEDCL ought not to be burdened for failure of the petitioner in ensuring that there is adequate cooling water available for the project. In support of his contentions, learned counsel relied upon the following judgments:

- i. Ind-Bharath Energies Ltd. Vs. MSEDCL, [2011 SCC APTEL 152];
- ii. PGCIL Vs. CERC and Others, [2011 ELR (APTEL) 0158];
- iii. NTPC Limited Vs. CERC [Appeal No. 110 of 2012, APTEL judgment dated 30.4.2013]; and
- iv. Penna Electricity Ltd. Vs. Tamil Nadu Electricity Board, 2013 ELR (APTEL) 1224.

3. Learned counsel for BRPL and GRIDCO adopted the submissions made by the learned counsel for WBSEDCL and submitted as under:

a). The present case is not a case of unavailability/non-availability of the cooling water but at best can be described as low availability of cooling water. Even the low generation at this generation station may or may not be attributable to low availability of cooling water. The event narrated by the petitioner does not fall within the definition of 'Force Majeure'. The event is not even sudden and unexpected as the petitioner was facing such problems in the past as well and could have taken due precautions.

b). The petitioner should have foreseen /anticipated the shortage of water for their Stage-I and Stage-II Units of power Plant and could have taken the proactive measures to overcome such scarcity of water. Instead, the petitioner has gone for construction of Stage-III units despite knowing the impending scenario of shortage of water. Now, the petitioner is trying to pass on the consequential financial implication arising out of its dereliction of duty to the beneficiaries.

c). The petitioner took the investment decision to add further 500 MW generation under Stage-III at Farakka much after the Treaty between the Governments of Bangladesh and India in 1996 on the sharing of Ganga/Ganges waters at Farakka. It was thus, to the satisfaction of the petitioner that the adequate water will be available for the operation of the thermal plant. If the petitioner had failed to exercise due care and attention while approving the investment decision, it cannot blame anybody else but himself and bear the risk of imprudent decision.

d). The petitioner has also made ERPC and ERLDC as respondents in the petition stating that both these statutory bodies have to compute Percent Plant Availability Factor (PPAF) for each month. Both these bodies are statutory bodies and strictly function under the legal frame work. ERLDC does not calculate the PPAF for FSTPS which is calculated by ERPC based on the Declared Capacity (DC) declaration made by the generation station on the basis of the DC sent to it by ERLDC.

4. The representative of UPPCL adopted the submissions made by the learned counsels for WBSEDCL, BRPL and GRIDCO and submitted that the stoppage of generating station at Farakka on account of inadequate water level is not an 'Act of God' but an 'Act of Man', as the issue of receding water level could have easily been managed and therefore, the event claimed is not a force majeure event.

5. After hearing the learned counsels and the representative of the parties at length, the Commission reserved the order in the petition.

By order of the Commission
Sd/-
(T. Rout)
Chief (Legal)