

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 312/MP/2015

Subject : Petition under Section 79(1)(f) of the Electricity Act, 2003 qua adjudication over payment of transmission charges and other liabilities under the Bulk Power Transmission Agreement between Meenakshi Energy Private Limited, a generating company and Power Grid Corporation of India Limited, the Central transmission Utility.

Date of hearing : 13.7.2017

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

Petitioner : Meenakshi Energy Private Limited (MEPL).

Respondent : Power Grid Corporation of India Limited.

Parties present : Shri Buddy Ranganathan, Advocate, MEPL
Shri Himanshu Mishra, Advocate, MEPL
Ms. Samiron Borkataky, Advocate, MEPL
Ms. Suparna Srivastava, Advocate, PGCIL
Shri A.M. Pavgi, PGCIL
Ms. Jyoti Prasad, PGCIL

Record of Proceedings

Learned counsel for the petitioner submitted that the present petition has been filed seeking exemption from payment of transmission charges and other liabilities under the Bulk Power Transmission Agreement (BPTA) on account of force majeure events. Learned counsel further submitted as under:

a). On 24.2.2010, the petitioner entered into a BPTA with PGCIL for 546 MW LTA. Simhapuri Energy Private Limited (Simhapuri) is also a party to the first BPTA. Subsequently, petitioner and PGCIL entered into another BPTA (second BPTA) dated 24.12.2010 as amended on 2.1.2012 to update the specifications of the relevant transmission elements and to incorporate a modified transmission system for 910 MW. The inter se rights and obligations of the petitioner and PGCIL arise from the first BPTA and the second BPTA. The petitioner has successfully commissioned Phase I of the generating station and is selling power through short term open access or medium term

open access to the Southern Grid. However, due to force majeure events, the commissioning of Phase II of the generating station has been delayed.

b). As per clause 9 of the BPTA, the petitioner is not liable to pay transmission charges to PGCIL or create any security for transmission charges for the period by which construction and commissioning of Phase-II has been delayed beyond SCOD.

c). The first Force Majeure (FM) event comprises the decision by POSOCO and SRLDC to treat the petitioner and Simhapuri as a single entity and the Commission's direction to the petitioner to open the interconnection line amounts to "change in law" which is a force majeure event under clause 9 of the BPTA.

d). The second FM event was the restriction on the mining of river sand imposed by the Supreme Court, High Court of Andhra Pradesh and the Government of Andhra Pradesh. Such restrictions resulted in severe scarcity of sand in Andhra Pradesh and consequently the civil works for Phase II were considerably delayed.

e). The third force majeure event which continues to affect the construction of Phase II are delays in obtaining rights of way over land to construct marine outfall pipelines to the Bay of Bengal in order to comply with the conditions of the Coastal Regulation Zone clearance dated 21.6.2012 granted by the Ministry of Environment and Forests.

f). The fourth Force Majeure event was torrential monsoons in 2013 and 2015, which lead to a complete shut-down of construction activity. The construction activities at Phase-II were delayed for the months of September to November 2013 due to the devastating effect of cyclones Phailin, Helen and Lehar respectively. Important components of the civil works were completely submerged and damaged. In November, 2015, the Nellore region experienced tremendous rainfall which led to flooding of the project site. As a result, the construction activity at the project site had to be suspended .

g). The petitioner vide its letters dated 25.6.2013, 9.8.2013 and 24.7.2017 requested PGCIL to revise the commissioning schedule set out in the BPTA. However, PGCIL vide its letters dated 25.9.2013, 20.8.2014 and 1.10.2014 did not accept the petitioner's request and advised the petitioner to establish payment security mechanism.

h). Since the delay in commissioning of Phase II has been occasioned by circumstances beyond the control of MEPL, BPTA discharges the petitioner from any obligation to pay transmission charges or create a security mechanism. In any event, PGCIL will itself suffer nil or insignificant losses by the revision of the scheduled commissioning dates under the BPTAs.

i). Clause 2.0 of the BPTAs is enforceable only to the extent that it guarantees PGCIL, the bare maintenance expenses for the contracted transmission elements that have been built and commissioned exclusively for the petitioner. Since PGCIL ought to licence the use of the transmission capacity meant for the petitioner for MTOA and

STOA, the petitioner should be held liable only for the difference between such bare maintenance expenses and the sums payable as transmission charges by PGCIL's MTOA and STOA customers who actually use the transmission capacity meant for the petitioner.

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

a). PGCIL agreed to provide open access to the petitioner and Simhapuri Energy Pvt. Ltd. from the date of availability of evacuation transmission system for transfer of power in the manner set out in the BPTA for a period of 25 years from the scheduled date of open access of individual LTA customers.

b). Under Clause 2 of the BPTA, the petitioner agreed and undertook to pay transmission charges to PGCIL as per the applicable Regulations of the Commission. Irrespective of when the generating units actually got commissioned, the BPTA envisaged that the liability to pay transmission charges to PGCIL arose from the scheduled date of commissioning of the generating units, provided PGCIL's transmission system was also ready and commissioned.

c). Clause 6 of the BPTA provides for PGCIL's right and entitlement to receive transmission charges from the petitioner for the transmission system to be put in place by it for evacuating power from the generation projects, notwithstanding that the generator failed to construct the generating station/dedicated transmission system or abandon the same.

d). Clause 9 of the BPTA nowhere cast an embargo on the operation of other provisions of BPTA during the period force majeure event was occurring. That being so, the provisions contained in clause 2 as regards payment/sharing of transmission charges by the petitioner continued to be applicable with full force so that irrespective of the occurrence of any force majeure event, the liability to pay transmission charges commenced as soon as the transmission system of PGCIL was commissioned and the scheduled date of commissioning of the project as set out in BPTA was reached even if the generating unit had not yet actually commissioned.

e). The scheme of payment/sharing of transmission charges under the Sharing Regulations shows that once a transmission line of PGCIL comes into existence and becomes part of the inter-State transmission system, then it becomes liable to be included under the Sharing Regulations for computation of transmission charges. The petitioner, without appreciating the said scheme of payment of transmission charges, has approached the Commission by wrongly taking the shelter of force majeure events for evading its regulatory as well as contractual liability to pay transmission charges to PGCIL.

f). The transmission system identified for grant of LTA to the petitioner's project required development of High-Capacity Transmission Corridor (HCPTC). The regulatory approval for development of the said corridor was accorded by the Commission vide order dated 31.5.2010 in Petition No. 233/2009 in which the petitioner's project was also

considered. Accordingly, PGCIL proceeded to implement the transmission corridors for evacuation of power from various projects including that of the petitioner.

g). Unit I and II of the project have been commissioned in October 2012 and April 2013 respectively which are utilizing the grid for transfer of power under short term and medium term open access. The alleged problems in development of Unit II and IV were informed to PGCIL on 25.6.2013. PGCIL vide its letter dated 25.9.2013 and during Joint Co-ordination Committee (JCC) meeting held on 12.2.2014 intimated to the petitioner that it was liable for the payment of transmission charges in terms of BPTA and the Regulations.

h). PGCIL vide its letter dated 7.12.2015 informed the petitioner that since the LTA granted to it is to commence shortly, it is required to furnish the necessary Letter of Credit (LC) for Rs. 33.76 crore as per the Commission's Regulations. Subsequently, in the 14th JCC meeting held on 16.2.2016, the petitioner had expressed its willingness to establish LC for the entire 910 MW of LTA granted. Accordingly, PGCIL vide its letter dated 18.2.2016 requested the petitioner to furnish the LC for Rs. 42.26 crore as payment security mechanism. However, the petitioner has failed and refused to do so.

i). In support of her arguments, learned counsel for PGCIL placed reliance on the Commission's order dated 12.4.2017 in Petition No. 317/MP/2013 (Navbharat Vs. PGCIL) and submitted that the Commission has already held that the LTA Agreement envisages a reciprocal obligation on the part of the LTA customers that in case of its failure to construct the generating station/dedicated transmission system or make an exit or abandoning the project, it would be liable for payment of transmission charges and for damages in accordance with the Commission's Regulations. Therefore, Clause 9 of the BPTA has a limited applicability and PGCIL is entitled to receive the transmission charges.

3. Learned counsel for the petitioner objected to the reference made to the Commission order in Petition No. 317/MP/2013 by learned counsel for PGCIL and submitted that the fundamental rule of precedence is that a judgment is a precedent for what it decides and not for what can be logically inferred from it.

4. After hearing the learned counsel for the parties at length, the Commission directed the parties to file their written submissions with an advance copy to each other, by 4.8.2017.

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

By order of the Commission

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