

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.155/MP/2019

Subject : Petition under Section 79(1)(f) of the Electricity Act, 2003 read with Articles 3, 6, 7.2(b) and other provisions of Power Purchase Agreement dated 26.12.2005 seeking adjudication of disputes related to legitimate dues payable to Udupi Power Corporation Limited by Karnataka ESCOMs for the period 2010-11 to 2018-19.

Date of Hearing : **20.5.2022**

Coram : Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Petitioner : Udupi Power Corporation Limited

Respondents : Power Company of Karnataka Limited & Ors.

Parties present : Shri Amit Kapur, Advocate, UPCL
Ms. Poonam Verma, Advocate, UPCL
Shri Saunak Rajguru, Advocate, UPCL
Shri M.R. Krishan Rao, UPCL
Shri Mehul Rupera, UPCL
Shri Sameer Ganju, UPCL
Shri Malav Deliwala, UCPL
Shri Kumar Gaurav, UCPL
Shri Tanmay Vyas, UPCL
Shri M.G. Ramachandran Sr. Advocate, PCKL, MESCOM & HESCOM
Shri Arunav Patnaik, Advocate, PCKL, MESCOM & HESCOM
Ms. Bhabna Das, Advocate, KPTCL
Shri Prasanna, PCKL
Ms. Padamalatha, PCKL
Shri Darpan KM, Advocate, HESCOM & MESCOM
Ms. Amrita Sharma, Advocate, HESCOM & MESCOM
Shri Rajat Jonathan Shaw, Advocate, HESCOM & MESCOM,

Record of Proceedings

Case was called out for virtual hearing.

During the hearing, the learned counsel for the Petitioner circulated note of arguments and made detailed oral submissions mainly as under:



(a) The claims of the Petitioner relating to non-payment of dues of Rs 884.50 crore towards differential tariff for the period from November, 2010 to January, 2013 and the non-payment of reimbursement charges by the Respondents, have been mutually settled between the parties.

(b) The present petition is confined to (i) disputes pertaining to difference in computation of declared capacity and disallowance of capacity charges of Rs 131.98 crore for the period from 10.3.2011 to 31.3.2013 and (ii) dispute regarding the computation of energy charges due to disallowance of actual landed coal cost incurred by the Petitioner towards spot procurement of coal for Rs 336 crore for the period from November, 2010 to March 2019.

(c) The difference in computation of declared capacity had arisen due to (i) non-availability of 400 kV transmission line for evacuation of power from the Petitioners project, which was the responsibility of the Respondents (ii) shortfall in generation faced by Petitioner due to non-availability of coal consequent to payment default by Respondent Escoms (iii) Failure of Respondents (SLDC/KPTCL) to provide pragmatic day-ahead schedule as per Regulation 21(4) of the 2009 Tariff Regulations (iv) Tripping of transmission lines and (v) Difference in formula of capacity charges on account of above.

(d) The Petitioner was constrained to terminate the long-term contracts with Adaro and Banpu for supply of coal and was compelled to resort to spot procurement of coal in order to meet its obligations under the PPA. However, due to the delay in approval process of Respondent PCKL, the 9th bidding process started by the Petitioner in 2015, was extend beyond 3 years without any conclusion.

(e) The Respondent PCKL in its 46th Board of Directors' meeting on 15.12.2017 resolved that spot procurement of coal by the Petitioner till March, 2016 would be allowed based on self-certification by the Petitioner, Subsequently, vide letter dated 18.1.2019, the Respondent informed the Petitioner that the decision taken on 15.12.2017 allowing spot procurement of coal, will continue to be applicable from 2016-17 onwards along with modifications. The decision to vary the conditions allowing sot procurement of coal by the Petitioner creates a situation where the gains of spot procurement are retained by the Respondent Escoms, whereas the losses are passed on solely to Petitioner. (*judgment of APTEL in GUVNL v GERC (2014 SCC OnLine APTEL 168 and M/s Hinduja National Power Corporation Ltd v APERC & ors 2020 SCC OnLine APTEL 3 was referred to)*)

(f) The Petitioner is entitled to recover actual landed cost of coal procured without any exceptions in terms of Regulation 21 of the 2009 Tariff Regulations and Regulation 30 of the 2014 Tariff Regulations. Any disallowance of the same would result in reduction of ROE, which is contrary to the letter and spirit of the Tariff Regulations. In *Nabha Power Ltd v PSPCL 92018) 11 SCC 508*, the Hon'ble Supreme Court while interpreting the energy charge formula in its PPA held that the actual cost of coal will be weighted average cost of purchasing cola, transporting it to plant and unloading of coal at site.



(g) The Petitioner's claims are not barred by Order II Rule 2 of the Civil Procedure Code (CPC). Similar contention made by the Respondent PCKL in Appeal Nos 10/2020 & batch concerning the same PPA, was rejected by APTEL vide its judgment dated 2.11.2020. The Civil Appeals filed by the Respondents (CA No. 838/2021) was dismissed by the Hon'ble Supreme Court on 8.2.2022.

(h) Order II Rule 2 does not bar the Petitioner's claim for deemed capacity charges since such claim is based on a different cause of action than those which formed the basis of earlier proceedings (*SC judgments in Gurbux Singh v Bhooralal (AIR 1964 SC 1810, Ratnavati v Kavita Ganashamdas 2015 5 SCC 223 was referred to)*).

(i) The Petitioner has all along regularly raised invoices on time since 3.1.2011 for power supplied to Respondent Escoms as per applicable orders. Section 3 of the Limitation Act 1963 which relates to 'Bar of Limitation' is subject to Section 22 of the Limitation Act, 1963, which specifically provides breach of a continuing nature as an 'exception' to the rule of limitation. Every time a breach is committed, the aggrieved party gets a fresh cause of action to invoke appropriate judicial proceedings (*SC judgment in Udai Shankar Awasthi v State of UP (2013) 2 SCC 435, State of MP & ors v Yogendra Srivastava (2010) 12 SCC 538, etc., was referred to*). The Respondent Escoms' default in paying the deemed capacity charges partakes the character of a continuing breach as contemplated under Section 22 of the Limitation Act, 1963. Even otherwise, the Petitioner's claim for recovery of deemed capacity charges is not barred by limitation, since the last right to sue the Respondents accrued much after 12.8.2016.

2. At the request of the learned counsel for the Petitioner, the Commission permitted to upload the note of arguments.

3. The learned Senior counsel for the Respondents PCKL/Respondent Escoms circulated note of arguments and made detailed submissions, mainly as under:

(a) The claims of the Petitioner are time barred and the principles of limitation are applicable in the facts of the present case. Any claim made by the Petitioner for the period beyond 3 years prior to the filing of this petition is not sustainable (*SC judgment in AP Power Co-ordination Committee v Lanco Kondapalli Power Ltd (2016) 3 SCC 468 and Commission's order dated 25.1.2021 in Petition No. 186/MP/2018 (KSKMPCL v SPDCL) were referred to*).

(b) The claims in the present case relate to the period prior to 31.3.2014. The claims relating to the period post 31.3.2014 are independent and has no nexus to the claims pertaining to the previous period. The claims of the Petitioner are distinct and complete in itself and give rise to a separate cause of action for which the Petitioner ought to have raised the claim within the prescribed period. It is not open for the Petitioner to claim that the same constitute a continuing cause of action (*judgment of SC in State of Gujarat v Kothari & associates (2016) 14 SCC 761 was referred to*). Mere writing letters, correspondence/ reports do not automatically extend the limitation as laid down by the Hon'ble SC in *CLP (India) Ltd v GUVNL (2020) 5 SCC 185*;



(c) The Respondent PCKL/Escoms have considered the declared capacity of the generating station of the Petitioner, in terms of the PPA and the 2009 Tariff Regulations and as per the energy accounts duly certified by SLDC; As the dispute relating to capacity charges pertains to the period from April, 2011 to March, 2013, the same is time barred. As there is no dispute from April, 2013 onwards, there is no continuing cause of action.

(d) The claim of the Petitioner that there has been admission of liability by the Respondent PCKL/Escoms based on reconciliation in 2018 is wrong, as the same related only to the payments made by PCKL/Escoms and there has been no admission of the amounts payable by the Respondents during such reconciliation.

(e) Disputes relating to capacity charges was never raised by the Petitioner in Petition No.160/GT/2012 or in truing up Petition No. 7/GT/2016, despite the fact that the issue of delay in setting up the 400kV line was specifically raised and reliefs were claimed.

(f) The Petitioner has failed to establish that it was capable of generating its declared capacity. At no point during the period, has the Petitioner declared a capacity of 556.8 MW, the maximum declared capacity was 555 MW. The Petitioner has not provided any details regarding the days on which and the period for which Unit-I had to reduce generation to accommodate synchronisation of Unit-II, nor has it provided any documents to show that any backing down instructions were received from SLDC for Unit-I. The onus to prove that the Petitioner had to backdown generation from Unit-I to synchronise Unit-II and that it was capable to deliver entire declared capacity from Unit-I lies squarely on the Petitioner, which it failed to discharge.

(g) The Petitioner has already been compensated for the claimed loss suffered on account of delay in setting up of the transmission line in terms of IDC, IEDC and Financing Charges in terms of order dated 24.2.2014. It cannot claim any additional benefit as it amount to being compensated twice for the alleged delay. Moreover, the amounts towards power generated from Unit-II after synchronisation, but prior to COD, are payable as per Regulation 11 and no capacity charges are payable for the same.

(h) After claiming IDC upto the actual date of commissioning, the Petitioner cannot claim deemed generation payment, as it cannot have the benefit of both deemed generation and IDC upto actual COD.

(i) The request of the Petitioner for release of adjustable advance payment shows that there was no subsisting payment obligation on the part of Respondent PCKL/Escoms at that time. The dispute on this issue pertains to the period from February, 2013 to March, 2013, for which, the Petitioner should have made provisions for coal stock in December, 2012 itself. The obligation on the Petitioner to procure fuel and generate power to its full capacity was not affected in any manner by alleged default of the Respondent PCKL/Escoms.



(j) The capacity declaration made by the Petitioner was flawed and SLDC was under no obligation to consider the declared capacity as claimed by the Petitioner. After SLDC exercises its option not to schedule power in such a manner, it is not open to the Petitioner to compel SLDC to consider declared capacity as per its proposed maximum peak hour schedule.

(k) The Petitioner has failed to bring to light any regulatory or contractual provisions which entitles it to additional ten-time blocks and hence, its claim deserves outright rejection. If the Petitioner is facing any loss on account of insufficiency/inaccuracy of OEM specified parameters, it should raise the issue with its EPC contractor.

(l) The claim of the Petitioner to allow the cost of spot procurement as low as the cost of all shipments of coal procured on spot basis is lower than the cost arrived at for all such shipments as per long-term coal supply agreements, compared cumulatively, is unsustainable as it is contrary to the agreement/ understanding between the parties (i.e approval of price for coal shipment procured on spot basis, has to be done on shipment to shipment basis). All along such approval of price of spot shipments were done on a shipment to shipment basis.

(m) The Board of Respondent PCKL in its 46th meeting dated 15.2.2017, decided that the cost incurred for spot procurement of a shipment of coal would be allowed so far as it does not exceed the price of such coal as per the terms of the long-term coal supply agreements which were in force. The aforementioned resolution clearly contemplated comparison of 'CIF prices' of individual shipments procured on spot basis (as opposed to average price of all shipments procured on spot basis) with the price of such coal shipment as per the terms of the long-term coal supply agreements.

(n) Based on the Petitioner's repeated requests, the Respondent PCKL/ Escoms agreed for a comparison of cost of coal procured under spot shipments to the CIF price as per terms of the long-term fuel supply agreements on a shipment-to shipment basis. The comparison has to be made individually for each shipment of coal received on spot basis since each shipment has different characteristics in terms of GCV, moisture content, ash content, Sulphur content etc. Further, comparison on individual shipment basis is required to determine the landed cost of fuel at the time the shipment arrives, which is in turn used to determine the energy charge.

(o) The Petitioner was procuring coal based on the understanding as recorded in the 46th board resolution, which was as per the agreement between the parties. In its 53rd meeting held on 25.5.2018, the Board of PCKL merely decided to continue the methodology adopted in the 46th board meeting for allowance of cost for spot procurement of coal even beyond March 2016.

(p) The cost of spot shipments per MT claimed by the Petitioner is grossly exaggerated as compared to the cost of the same shipments arrived at as per the Glencore FSA i.e. the FSA in force at the particular time. The per MT cost is in many cases is higher by almost \$ 30-35 per MT. The difference for the cost of



the entire shipment can be as high as Rs. 18.11 crores and up to five shipments can come in a month. It is submitted that such a trend is seen especially for the period 2016-19 for which the bulk of Petitioner's claim on this account has been made. The Respondent PCKL has allowed coal prices only as per the benchmark agreed between the parties, and there is no separate need to dispute the rates claimed by the Petitioner. The Petitioner has not shown the basis on which it has computed the cost of coal as per the terms of the long-term FSAs with respect to each spot shipment.

(q) While the Petitioner procures lower GCV coal which has a lesser demand and lower price, it enjoys the benefit of price adjustment as per the terms of the long-term FSA which provide for high GCV coal, which has a high demand and high price. Therefore, considering the grade of coal actually being procured by the Petitioner on spot basis, the Respondent PCKL/ Karnataka ESCOMs have already provided a beneficial benchmark to the Petitioner, no further benefit can be allowed.

(r) The Petitioner had never raised the issue of considering dead freight for the purposes of calculation either in the meeting held on 12.8.2016 or in its letters communicated to Respondent PCKL. The Petitioner cannot claim a hypothetical dead freight charge to arrive at an inflated CIF price as per the Glencore FSA for the purpose of benchmarking its spot shipments.

(s) The expenses claimed by the Petitioner viz. license fee, dredging fee, annual maintenance charges, land license and maintenance fee, 50% of railway Marshalling yard charges, LC establishment charges, Insurance, port dues, pilotage charges, water charges, sampling analysis do not relate to handling of coal and bringing the coal upto the plant and ought to be disallowed. Also, demurrage charges are disallowed in Form 15 of the Tariff Regulations for computing the weighted average cost of coal. When the Petitioner has a dedicated jetty, there is no question of paying demurrage charges.

4. At the request of the learned Senior counsel for the Respondents, the Commission permitted to upload the note of arguments. The learned Senior counsel also prayed that the Respondents may be permitted to file a short-written submission, in response to the note of arguments circulated by the Petitioner.

5. In response to the above, the learned counsel for the Petitioner referred to the judgment dated 2.11.2020 in Appeal Nos. 10/2020 to 13/2020 (PCKL & anr v UPCL & batch) filed by the Respondents before APTEL (against the Commission's order dated 8.11.2019 in Petition Nos.324/MP/2018 and 325/MP2018 filed by UPCL) and pointed out that the issue of *res judicata*, limitation, Order II Rule 2 of CPC and Section 34(2) of CPC, concerning the same PPA, as raised by the Respondents in the said appeal was rejected by the APTEL. Referring to the various correspondences between the Respondents and the Petitioner from 2015 to 2018, the learned counsel for the Petitioner submitted that the appointment of various committees and the participation of the Respondent Escoms in the process of resolving the issues raised by the Petitioner, indicates that the Respondents contention of limitation, is only an afterthought, to deny the lawful claims of the Petitioner. The learned counsel for the Petitioner also prayed that the Petitioner may



be permitted to file a short-written submission, in response to the note of arguments circulated by the Respondent PCKL/Escoms.

6. The learned counsel for the Respondent KPTCL/SLDC referred to the reply and briefly submitted the following:

(a) Unit I of the generating station was not functioning properly and had to be shut down by the Petitioner due to turbine failure and other technical problems attributable solely to UPCL, as evident from the data provided in Annexure R7/1. Even prior to synchronization of Unit II, Unit-I failed to generate power at the capacity declared by the Petitioner and on several occasions, the combined generation from both units would also not meet the declared capacity.

(b) As per outage details of the generating station, enclosed as Annexure-R7/1, for the period from 11.11.2020 to 31.3.2013, the duration of interruption due to generators outage is 2855.57 hours.

(c) On the advice of CPRI, this Respondent permitted the Petitioner to synchronize Unit II with the grid in view of lack of power generation from Unit I. No instructions were given by this Respondent to back down generation from Unit I, but there was a unilateral reduction in power generation by Petitioner owing to the frequent outages suffered by Unit I on account of equipment failure, such as boiler tube leakage, turbine failure, condenser tube leakage etc.

(d) Regulation 21(4) of the 2009 Tariff Regulations does not place any obligation on the SLDC to specify a pragmatic day-ahead schedule. On the contrary, the same is left to the option of SLDC, depending on the facts and circumstances and prevailing grid situation.

7. In response to the above, the learned counsel for the Petitioner also relied on Annexure-R7/1 of the reply and submitted that the Petitioner's claim for Rs 1.45 crore is only on account of interruption due to KPTCL line outage for 118.72 hours, for the period from 11.11.2010 to 31.3.2013.

8. Considering the request of the learned counsel for the Petitioner and the learned Senior counsel for the Respondent PCKL/Escoms, the Commission permitted these parties to file short written submissions, with copy to the other, on or before 20.6.2022.

9. Subject to the above, order in the petition was reserved.

By order of the Commission

Sd/-
(B. Sreekumar)
Joint Chief (Law)

