

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 155/MP/2022 along with IA No. 38/IA/2022

Subject : Petition under Section 79(1)(b) and (f) of the Electricity Act, 2003 for adjudication of disputes arising out of Agreement for Procurement of Power dated 13.4.2016 between Northern Railways for Uttar Pradesh and Jindal India Thermal Power Limited read with the Supplementary Agreement dated 8.11.2017.

Date of Hearing : 5.7.2022

Coram : Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member

Petitioner : Indian Railways (IR)

Respondents : Jindal India Thermal Power Limited (JITPL) and Anr.

Parties Present : Shri M. G. Ramachandran, Sr. Advocate, IR
Shri Pulkit Agarwal, Advocate, IR
Shri Sajan Poovayya, Sr. Advocate, JITPL
Shri Akshat Jain, Advocate, JITPL
Shri Pratyush Singh, Advocate, JITPL
Shri Aditya Dubey, Advocate, JITPL
Shri Sanjay Singh, IR
Shri Manish Tiwari, IR
Shri Narendra Kumar, IR
Shr Ashish Awasthi, IR
Shri Pulak Srivastava, JITPL

Record of Proceedings

Case was called out for virtual hearing.

2. Learned senior counsel for the Petitioner submitted that the present Petition has been filed seeking declaration against the Respondent No.1, JITPL to the effect that its act of suspending supply of power w.e.f. 1.4.2022 under the Agreement of Power Purchase (APP) dated 13.4.2016 and the Supplementary Agreement dated 8.11.2017 executed between the Petitioner and JITPL for supply of aggregate capacity of 100 MW is null and void being illegal and unlawful. Learned senior counsel mainly submitted the following:

(a) JITPL vide its letter dated 30.3.2022 informed the Petitioner that it shall be suspending its supply of contracted capacity of 100 MW w.e.f. 1.4.2022 by claiming that due to decision of Cabinet Committee of Economic Affairs (CCEA) dated 26.2.2022 followed by Coal India Ltd.'s Circular dated 1.3.2022, there has been change in mechanism for coal allocation of non-linkage coal to power sector including JITPL resulting into significant increase in the cost of procurement of coal and supply of power under the APP. JITPL claimed the above events as Change in Law and Force Majeure events and stated that power supply shall be



suspended until the new mechanism is in vogue or until the Petitioner provides confirmation/acceptance of its Change in Law and Force Majeure claim.

(b) However, JITPL has wrongly claimed the event changing the mechanism / modalities for allocation of non-linkage coal through e-auction by way of CCEA decision dated 26.2.2022 read with CIL circular dated 1.3.2022 as Change in Law as they do not meet any of the instances prescribed for in Article 26.1 (Change in Law definition) of the APP.

(c) The action of JITPL of suspending power supply under the APP is not valid and contrary to the provisions of the APP.

(d) Even assuming the above events qualify as Change in Law events, Article 21.1 of the PPA clearly provides that only remedy available to JITPL in case of increase in costs due to Change in Law is to place the supplier on the same financial position as it would have enjoyed had there been no such Change in Law. In the event, its claim is not accepted by the utility, JITPL was entitled to approach this Commission. In any case, the said article or any other provisions of APP does not empower JITPL to suspend power supply.

(e) Even the Respondent No.2, ERLDC, after taking into consideration the response of JITPL, vide letter dated 25.4.2022 observed that in the event of any disagreement between the parties, the contending party should approach the Commission/judicial authority for adjudication and till such time the contract/APP needs to be honoured. ERLDC also noted that since there exists a contract for power (APP), sale of power through power exchange would be treated as a violation of declaration under affidavit and Grid Code.

(f) Despite the above, JITPL neither approached the Commission nor restored the power supply to the Petitioner. As per Section 29 of the Electricity Act, 2003, generating company/JITPL is required to comply with the direction of ERLDC and non-compliance of such direction is liable to actions specified therein.

(g) On one hand JITPL suspended supply under the APP alleging the force majeure event on account that the coal availability may be affected while on the other, JITPL has been operating its plant to the same extent and diverting the power to the power exchanges. In this regard, reliance was placed on the Annexure X to the Petition.

(h) In the above circumstances, the Petitioner has also filed IA No. 38/IA/2022 seeking interim direction to the Respondent No.1 to restore the supply of electricity to the Petitioner in terms of APP immediately and continue to do so till the present Petition is decided by the Commission.

3. Learned senior counsel for the Respondent No.1, JITPL mainly submitted as under:

(a) JITPL has already filed Petition before the Commission bearing Diary No.284/2022 seeking appropriate reliefs for Force Majeure and Change in Law on account of major changes in modalities in the existing coal e-auction system by CIL circular dated 1.3.2022 issued pursuant to CCEA decision dated 26.2.2022.

(b) Prior to CIL circular dated 1.3.2022, separate e-auctions were conducted by CIL for allocation of coal to the power sector and other industrial sectors. However, in terms of CCEA decision dated 26.2.2022, which was implemented by CIL circular dated 1.3.2022, the coal companies are now mandated to offer non-

linkage coal through one e-auction window of CIL/SCCL only which will cater to all sectors i.e. Power Sector and non-Regulated Sector including traders.

(c) Due to above change in the mechanism/modalities for allocation of non-linkage coal, non-linkage coal through e-auction specific for power sector is no longer available under the special category of 'Special Forward e-auction' thereby resulting in non-availability of coal for power sector w.e.f. 1.3.2022.

(d) There is substantial decrease in availability of non-linkage coal under e-auction conducted by MCL/CIL in single wind scheme mainly on account of (i) offer of lesser quantity of coal by MCL/CIL under e-auction; and (ii) increased competition due to substantial increase in the participants which includes various sectors and traders. A chart was exhibited to indicate that e-auction quantity during the period from 1.4.2021 to 28.2.2022 offered by MCL in all e-auction scheme was 817.66 lakh MT out of which 429.70 lakh MT was specific to power sector (i.e.1,28,653 MT/day). However, after the change in modalities of e-auction coal quantity offered by MCL in the month of March, 2022 was 23 lakh MT (i.e. 74,194 MT/day).

(e) The above change in the mechanism/modalities for allocation of non-linkage coal has also led to substantial increase in the landed price of such non-linkage coal to be procured through single e-auction window.

(f) Moreover, as per the provisions of APP, JITPL is not permitted to use concessional fuel for generating and supplying power to the Petitioner under APP. In terms of APP, JITPL can only use coal procured through spot prices for power sector where the price is determined by market forces i.e. through e-auction conducted by CIL and its subsidiaries.

(g) CIL circular dated 1.3.2022 to the extent it has resulted in shortfall in availability of sufficient coal to generate and supply under APP is also a force majeure event and as per the provisions of APP, the affected party/JITPL is excused from performance of its obligation to the extent it is unable to perform on account of force majeure event.

(h) Keeping in view, the pendency of the Petition filed by the Petitioner before the Commission seeking appropriate reliefs on account of Change in Law and force majeure events, the interim relief of specific performance of the APP as sought for by the Petitioner ought not to be granted. In any case, the JITPL is representing even prior to issuance of notice in the matter and grant of interim relief, if any, may be considered only after providing JITPL to file its response on IA.

4. In rebuttal, learned senior counsel for the Petitioner submitted that the actions and justification of JITPL for suspension of supply proceeds on assumption that the CCEA decision and CIL circular as Change in Law and Force Majeure event under the APP is not permissible.. Learned senior counsel submitted that despite communication of ERLDC being 25.4.2022, no actions were taken by JITPL. Learned senior counsel also submitted that under the APP ensuring the availability of fuel is on JITPL and it ought to have participated in auction or to procure the coal from alternative sources. However, having failed to do so, it cannot be permitted to wriggle out of its contractual obligations.

5. After hearing the learned senior counsel for the Petitioner and the Respondent, JITPL, the Commission ordered as under:

- (a) Admit. Issue notice to the Respondents.
- (b) The Petitioner to serve copy of the Petition and IA No.38/2022 on the Respondents and the Respondents to file their reply on Petition two weeks after serving copy of the same to the Petitioner, who may file its rejoinder within two weeks thereafter.
- (c) In view of the facts and circumstances as stated, the Respondent, JITPL to restore the supply of electricity to the Petitioner in terms of APP immediately till the next date of hearing and disposal of the I.A.
- (d) The Respondent, JITPL to furnish the following details on affidavit within two weeks:
- (i) Month-wise details of quantum of coal procured through e-auction and price thereof from 1.9.2021 to 30.06.2022 along with invoices for the same clearly indicating cost of the coal procured.
 - (ii) Relevant clauses of APP and/ or supplementary APP which provides for unilateral suspension of power supply.
 - (iii) Detailed information regarding financial impact due to Change in Law.
 - (iv) Subsidiary-wise e-auction coal offered (Road and Rail mode) by coal companies from 1.9.2021 to 30.6.2022.
 - (v) Details of total power generated from e-auction coal, power scheduled to beneficiaries, if any, and details of power sold in short term market before suspending the power of the Petitioner for three months prior and post suspension.
- (e) Parties to complete their pleadings on main Petition as well as on the I.A within the timelines and no extension of time shall be granted.

6. The Petition shall be listed for hearing in due course for which separate notice will be issued.

By order of the Commission

**Sd/-
(T.D. Pant)
Joint Chief (Law)**