

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.194/MP/2022

Subject : Petition under Section 79 of the Electricity Act, 2003 read with Article 17 and 23 of the Agreement for Procurement of Power dated 13.4.2016 (and its amendments) executed between Northern Railway for Uttar Pradesh and Jindal India Thermal Power Limited 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 way of Coal India Limited Circular dated 1.3.2022 issued pursuant to Cabinet Committee of Economic Affairs decision dated 26.2.2022.

Date of Hearing : 12.12.2022

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

Petitioner : Jindal India Thermal Power Limited (JITPL)

Respondent : Northern Railway (NR)

Parties Present : Shri Akshat Jain, Advocate, JITPL
Ms. Shefali Tripathi, Advocate, JITPL
Shri Pulkit Agarwal, Advocate, NR

Record of Proceedings

Learned counsel for the Petitioner submitted that present Petition has been filed seeking appropriate reliefs for Force Majeure and Change in Law events on account of major changes in modalities in the existing coal e-auction system by way of Coal India Limited (CIL) circular dated 1.3.2022 issued pursuant to Cabinet Committee of Economic Affairs decision dated 26.2.2022. Learned counsel mainly submitted the following:

(a) JITPL has entered into an Agreement for Procurement of Power (APP) dated 13.4.2016 read with amendments dated 8.11.2017, 9.1.2020 and 19.8.2021 for supply of 100 MW power to the Respondent, Northern Railway (NR) for Uttar Pradesh from its 1200 MW Thermal Power Plant in Odisha for a period of 3 years.

(b) Prior to 1.3.2022, separate e-auctions were conducted by CIL for allocation of coal to power sector and other industrial sectors. The prevalent practice as per the then applicable guidelines of CIL was to conduct specific auction for allocation of non-linkage coal as (i) Special Forward e-auction for Power Producers, (ii) Exclusive e-auction for non-power consumers, (iii) Spot e-auction for all including traders etc. with no end-user restriction, (iv) Special spot-auction coal, and (v) Special spot-auction coal for importers.

(c) However, on 26.2.2022, CCEA approved some major changes in the modalities in then existing coal e-auction system of CIL. In terms of the decision



taken by CCEA, coal companies are not 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. Thus, non-linkage coal is being offered through this auction in place of prior system of sector specific auctions.

(d) Accordingly, on 1.3.2022, CIL issued a circular stating that in terms of CCEA decision dated 26.2.2022 only spot e-auction of coal is required to be conducted henceforth as all coal auctions are now combined into one single window.

(e) Due to this 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 special category of Special Forward e-auction.

(f) Also, there is a substantial decrease in availability of non-linkage coal under e-auction conducted by MCL/CIL in single window 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 & traders. There is also substantial increase in landed price of such non-linkage coal to be procured through single e-auction window.

(g) As per Article 5.8 read with Article 12.5 of the APP, JITPL is not permitted to use concessional fuel for generating and supplying power to NR. As per the 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-auctions conducted by CIL and its subsidiaries.

(h) Accordingly, CIL circular dated 1.3.2022 changing the mechanism/modalities for allocation of non-linkage coal through a single window e-auction to TPPs including JITPL qualifies as (i) Force Majeure event in terms of Article 17.4(a) of APP to the extent that it has resulted in shortfall in availability of sufficient coal required to generate & supply contracted capacity to NR, and (ii) Change in Law event in terms of Article 21.1 of the APP to the extent of increase in the cost of procurement of coal. JITPL has issued the Force Majeure /Change in Law notice to NR on 30.3.2022 under Articles 17.5 and 21.1 of the APP.

(i) In terms of Article 17.9(a) of the APP, JITPL is excused from performing its obligation under the APP i.e. to supply the contracted capacity of 100 MW to NR till the Force Majeure event is in operation.

(j) Also, JITPL had sought NR's consent qua Force Majeure /Change in Law claim in order to be restituted for the increased cost of coal if procured from single window e-auction of CIL. However, NR denied to provide its consent qua the Force Majeure/Change in Law claim of JITPL.

2. Learned counsel for the Respondent, NR submitted as under:

(a) NR has also filed a Petition before this Commission bearing Petition No. 155/MP/2022 along with IA No. 38/IA/2022 seeking declaration against JITPL to the effect that its act of suspending supply of power w.e.f. 1.4.2022 under the APP is null and void being illegal and unlawful. The Commission vide Record of Proceedings for the hearing dated 5.7.2022 directed JITPL to restore the supply of electricity to NR in terms of APP immediately. However, JITPL has not restored the supply and has chosen to file an appeal against the said direction.

(b) While there is no stay against the said direction of the Commission, APTEL has given a liberty to JITPL to approach APTEL in the event any precipitative action initiated by NR.

(c) Eastern Regional Load Despatch Centre (ERLDC) vide its letter dated 25.4.2022 had asked JITPL to honor the contract/APP. It also noted that since there existed contract/APP, the sale of power by JITPL through power exchange would be treated as violation of the declaration given by it under affidavit and Grid Code. The details of this letter have also not been disclosed by JITPL.

(d) The provisions of the APP including the Change in Law provisions do not permit JITPL to suspend the power supply. Such action of JITPL is invalid and contrary to the provisions of APP.

(e) From the letter of JITPL dated 30.3.2022, it is evident that JITPL was ready to supply the entire contracted capacity provided the NR give its consent to the higher cost of coal procurement. However, under the provisions of APP, there cannot be any such pre-condition for supply of power. Even for the Change in Law relief on restitution principles, the generator is required to incur the additional cost prior to seeking the appropriate & available relief therein.

3. After hearing the learned counsel for the parties, the Commission ordered as under:

(a) Admit and issue notice to the Respondent.

(b) The Petitioner to implead ERLDC as party to the Petition and to file a revised memo of parties within two weeks;

(c) The Petitioner to serve copy of the Petition on the Respondents and the Respondents to file their reply to the Petition within three weeks after serving copy of the same to the Petitioner, who may file its rejoinder within three weeks thereafter.

(d) ERLDC to clarify in its reply as to whether the provisions of LPS Rules is attracted in the present case of non-supply of power by JITPL under the APP and whether any action has been initiated against JITPL thereunder.

(e) The petitioner to furnish the month wise e-auction quantity of coal offered by MCL for the year 2021-22 for power and non-power sector and after the implementation of the new methodology.

(f) The Petitioner to furnish the methodology adopted by the coal company for calculation of e-auction quantity.

(g) Parties to comply with the above directions within the above timelines and no extension of time shall be granted.

4. The Petition shall be listed for hearing along with Petition No. 155/MP/2022 on 14.3.2023.

By order of the Commission

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