

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 237/MP/2021

- Subject : Petition under Section 63 and Section 79 of the Electricity Act, 2003 read with the statutory framework governing Inter-state Transmission Systems, and Articles 11 and 12 of the Transmission Service Agreement dated 14.3.2016 executed between Khargone Transmission Limited and its Long-Term Transmission Customers for inter alia claiming compensation due to Change in Law and seeking extension in the scheduled commercial operation date of the relevant elements of the Project on account of Force Majeure.
- Date of Hearing : 17.5.2022
- Coram : Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member
- Petitioner : Khargone Transmission Limited (KTL)
- Respondents : Madhya Pradesh Power Management Co. Limited (MPPMCL) and 7 Ors.
- Parties Present : Shri Deep Rao, Advocate, KTL
Shri Syed Jafar Alam, Advocate, KTL
Shri Saahil Kaul, Advocate, KTL
Shri Ashwin Ramanathan, Advocate, KTL
Shri Ravi Sharma, Advocate, MPPMCL
Shri Akshay Goel, Advocate, MSEDCL
Shri Anup Jain, Advocate, MSEDCL
Ms. Swapna Seshadri, Advocate, PGCIL
Shri Anindya Khare, MPPMCL
Shri Dinesh H Agarwal, MSEDCL
Shri TAN Reddy, KTL
Shri Balaji, KTL

Record of Proceedings

Case was called out for virtual hearing.

2. Learned counsel for the Petitioner submitted that in view of the letter of the lead Long-Term Transmission Customer ('LTTC'), MPPMCL dated 4.5.2022, *inter alia*, demanding the payment of liquidated damages amounting to approximately Rs. 128.59 crore within a period of 10 days, failing which initiation of action as per the Transmission Service Agreement ('TSA'), the Petitioner had filed IA (Diary) No. 178/2022 for restraining MPPMCL and other LTTCs from taking any coercive steps against the Petitioner including the invocation/ encashment of the Contract Performance Guarantee submitted under the TSA. The Commission vide Record of Proceedings for the hearing dated 9.5.2022 directed the parties to maintain the

status-quo and further directed MPPMCL not to take any coercive action till the next date of hearing. However, in this regard, the Respondent, MPPMCL vide its letter dated 11.5.2022 has filed its objections towards grant of said interim relief and disposal of the IA and the Petitioner has also responded to such objections vide its letter dated 13.5.2022. Learned counsel for the Petitioner mainly submitted the following:

(a) MPPMCL has contended that the Petitioner misguided the Commission and presented incorrect facts before the Commission while mentioning IA on 9.5.2022 with regard to intimation about the listing and mentioning of the IA. However, the Petitioner vide its email dated 7.5.2022 had served the copy of the IA to all four officials of MPPMCL which were mentioned in its e-mail dated 4.5.2022, whereby a demand of payment of liquidated damages was made. Further, all four officials were also informed that the Petitioner will be mentioning the Petition and IA on 9.5.2022.

(b) While it escaped the attention of the Petitioner to also mark its email to the MPPMCL's official and the Advocate registered on e-filing portal, it was not the intention of the Petitioner to deliberately avoid informing any person in or acting on behalf of MPPMCL.

(c) MPPMCL being the lead LTTC under the TSA had been kept apprised by the Petitioner of the various Force Majeure events that impacted its Project. The Petitioner had regularly issued the notices of Force Majeure events to the LTTC including MPPMCL by letters dated 15.5.2018, dated 9.1.2019, dated 5.2.2019, dated 19.7.2017, dated 29.7.2019 and dated 27.4.2021. Thus, despite having notice of the delay as early as 2018, MPPMCL never raised any claim qua liquidated damages for the Petitioner for almost 4 years.

(d) The Petitioner had also approached the Commission claiming the Force Majeure reliefs during the construction period of the Project vide Petition No. 308/MP/2019. In the said case also, MPPMCL did not make any demand for liquidated damages. However, the Commission vide its order dated 20.7.2020 had directed the Petitioner to approach the Commission for appropriate reliefs under the TSA once the Project is completed.

(e) Even in the present Petition, which was filed in September, 2021 with notice to MPPMCL, no urgency was demonstrated or coercive steps were taken by MPPMCL till date. Since the Petitioner's claims for Force Majeure reliefs including exemption from the liability to pay any purported liquidated damages to LTTCs is sub-judice before the Commission in the present Petition, there is no reason for MPPMCL to take coercive action at this stage.

(f) All the elements of its Project have already achieved the commercial operation with the last element having achieved the commercial operation on 13.12.2021 (against the SCOD of July, 2019). The delay in achieving the commercial operation have been due to various Force Majeure events including the unexpected requirement to divert its Khandwa Pool - Dhule 765 D/C line to avoid intersection with proposed Jamphal Dam.

(g) The balance of convenience lies with the Petitioner and no prejudice is likely to be caused to MPPMCL in case the interim relief is continued by the Commission. There is no compelling urgency for MPPMCL to encash the CPG. MPPMCL has also not even contended the occurrence of any loss attributable to the Petitioner. In any case, the CPG furnished under the TSA is

valid up to 30.4.2023. In the above circumstances, the interim protection granted in favour of the Petitioner ought to be continued till the pendency of the present Petition.

3. Learned counsel for the Respondent, MPPMCL mainly submitted as under:

(a) The Petitioner has made incorrect and false depositions to get the favourable order dated 9.5.2022 in IA (Diary) No. 178 of 2022. No intimation regarding listing of IA or mentioning was sent to the concerned officer of the MPPMCL as registered on the e-filing portal. Moreover, the e-mail was sent by the Petitioner on non-working day for MPPMCL.

(b) Moreover, despite the vakalatnama having been filed on record, no intimation was given to the legal counsel representing the MPPMCL, which is bad in law.

(c) It is a settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction. Unless fraud or special equity exists, the beneficiary cannot be restrained from encashing the bank guarantee even if the dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank had arisen in the performance of the contract.

(d) Article 6.4 of the TSA provides a formula for computing the pre-estimate of loss to be paid as liquidated damages in the event the transmission licensee fails to achieve commercial operation of any of the elements of the Project within the stipulated period. Accordingly, the demand letter dated 4.5.2022 for payment of liquated damages has been issued as per the provisions of the TSA.

(e) Moreover, on account of delay in achieving commercial operation of the Petitioner's Project, NTPC's Khargone Thermal Power Project ('KTPP') has also been delayed for approximately 230 days as the Petitioner's Project forms part of associated transmission system for the said thermal power project. In the event such delays are condoned, the burden in the form of cost over-runs ultimately passes on to the beneficiaries such as the Respondent herein. The Petitioner has also been impleaded as party Respondent to the said Petition vide Record of Proceedings for the hearing dated 25.2.2022 in Petition No. 402/GT/2019 filed by NTPC in respect of KTPP.

(f) Thus, MPPMCL may be permitted to file its detailed reply in IA and the Commission may re-hear the IA after giving equitable opportunity to the Respondent. MPPMCL will not proceed to take any coercive action against the Petitioner till the time the Commission passes a detailed order in the IA. MPPMCL may also be permitted to file its reply to the Petition.

4. Learned counsel appearing on behalf of Power Grid Corporation of India Limited (PGCIL) submitted that the Petitioner may be directed to implead PGCIL as party to the Petition as it involves certain issues relating to the mismatch in commissioning of the elements being implemented by PGCIL. Learned counsel for PGCIL further requested that the present Petition be taken up together with Petition No. 694/TT/2020 filed by PGCIL and Petition No. 419/GT/2020 filed by NTPC.

5. Learned counsel for the Respondent, MSEDCL sought four weeks' time to file reply to the Petition.

6. After hearing the learned counsel for the Petitioner and the Respondents, the Commission ordered as under:

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

(b) The Respondent, MPPMCL to file its reply on IA by 31.5.2022 after serving copy to the Petitioner, who may file its rejoinder, if any, by 13.6.2022.

(c) The Respondents to also file their reply to the Petition within four weeks after serving copy of the Petitioner, who may file its rejoinder, if any, within three weeks thereafter.

(d) As fairly stated by MPPMCL, no coercive action will be taken against the Petitioner till the time IA is decided by the Commission after considering the detailed reply of MPPMCL therein. The submissions of the learned counsel was taken on record. The IA shall be set down for hearing in due course after the completion of pleadings therein.

7. The Petition and IA 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)**