

**CENTRAL ELECTRICITY REGULATORY COMMISSION**

**NEW DELHI**

**Petition No. 155/MP/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.

Petitioner : Indian Railways (IR)

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

**Petition No.194/MP/2022 along with Diary No.102/2023**

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.

Petitioner : Jindal India Thermal Power Limited (JITPL)

Respondent : Northern Railway (NR)

Date of Hearing : 17.1.2023

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

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  
Ms. Shefali Tripathi, Advocate, JITPL  
Shri Shikhar Verma, Advocate, JITPL  
Shri Sanjay Singh, IR  
Shri Manish Tiwari, IR  
Shri Deepak Chopra, IR  
Shri Raj Protim Kundu, ERLDC  
Shri Ranajit Pal, ERLDC  
Shri Alok Kumar Mishra, ERLDC

## Record of Proceedings

At the outset, learned senior counsel for Indian Railways/Northern Railways submitted that the pleadings in these cases are yet to be completed. The learned senior counsel submitted that after filing of these Petitions, Railways as well as JITPL have proceeded to terminate the Agreement of Power Purchase (APP) dated 13.4.2016 and both the sides would require to bring on record these subsequent developments by way of an amendment to the existing pleadings. The learned senior counsel also pointed out that JITPL is also yet to file the additional details as called for by the Commission vide Record of Proceedings for the hearing dated 5.7.2022 in Petition No.155/MP/2022 and accordingly, the parties may be permitted reasonable time to complete the pleadings in these matters. The learned senior counsel submitted that during the course of hearing of Diary No. 102/2023 on 10.1.2023, the Railways had specifically brought to the notice the settled position of law with regard to stay on the invocation of Bank Guarantee. However, vide Record of Proceeding for the said date, the Commission, while extending the protection granted by Hon'ble High Court of Delhi till today, did not return any decision in this regard and the Railways may be permitted to proceed with the encashment of BG and that no further stay/protection be granted thereon.

2. Learned senior counsel for JITPL submitted that the both the parties have proceeded to terminate the APP and the Petition filed by Railways seeking specific performance of APP is no longer relevant. Similarly, the interim directions of the Commission to resume supply to the Railways under the APP have also lost their validity. The learned senior counsel further recapitulated as to how the decision of CCEA dated 26.2.2022 and Coal India Limited Circular dated 1.3.2022, resulting into the changes in modalities to then existing coal e-auction system, constituted Force Majeure & Change in Law events and the subsequent termination of APP by JITPL on account of the subsistence of the said Force Majeure event. The learned senior counsel accordingly submitted that since both the parties are required to bring on record these subsequent developments, the parties may be allowed to do so and in the meantime, it would be appropriate that the parties be directed to maintain the *status quo* with regard to the invocation & encashment of BG.

3. In response to the specific query of the Commission with regard to ERLDC having taken any action upon being informed by Railways about JITPL having stopped the scheduling the power to Railways under APP and selling power to exchange, the representative of ERDLC submitted that ERLDC had sought clarification for non-scheduling of power to Railways under the APP to which JITPL informed that it stopped the supply on account of Force Majeure & Change in Law events and consequently APP having stood frustrated. However, ERLDC had specifically asked JITPL to approach this Commission for necessary adjudication and for honouring of the contract till such time. The representative also added that upon ERLDC having pointed that as per the affidavit submitted by JITPL while applying for NOC to sell the power on exchange it had indicated its contract with Railways, JITPL proceeded to furnish revised affidavit, removing from it, its contract with Railways.

4. Learned senior counsel for the Railways submitted that the merits of the underlying dispute between the parties are immaterial in regard to the invocation of BG which is a separate and independent contract. The learned senior counsel again relied upon the paragraphs 9, 10, 13 and 35 of the judgment of APTEL dated

22.12.2022 in IA No. 1467 of 2022 (Arian Solar Pvt. Ltd. v. CERC and Ors.). The learned senior counsel also submitted that the Petition No.155/MP/2022 is not limited to seeking specific performance but also seeks damages from JITPL. The learned senior counsel accordingly urged that the Railways be permitted to proceed with the encashment of BG and no stay on its invocation should be allowed by the Commission against the settled principles governing the subject matter. The learned senior counsel pointed out that the Commission's directions to JITPL to resume supply to Railways under APP were also communicated to ERLDC. However, ERLDC did not restrict JITPL from selling the power to the power exchange.

5. In response, the learned senior counsel for JITPL suggested that in the event, the Commission is not inclined to extend the stay on the invocation of BG, JITPL may be permitted till 20.1.2023 to deposit the amount equivalent to BG to Railways rather than the Railways encashing the BG furnished by JITPL under the APP. The learned senior counsel for Railways did not oppose to the said proposition.

6. After hearing the learned senior counsel and the representative of the parties, the Commission ordered as under:

(a) The parties to file their amended pleadings within in two weeks with copy to the other side, who may file their reply, if any, within four weeks thereafter. JITPL to also furnish additional details as called for vide Record of Proceedings for hearing dated 5.7.20222 along with its amended pleadings.

(b) There shall be no stay on the invocation of BG as furnished by JITPL under the APP. However, in the event JITPL deposits the amount equivalent to BG to Railways by 21.1.2023, Railways shall not proceed with encashment of BG as agreed to by them. In the event, JITPL fails to deposit such amount by 21.1.2023, Railways will be at liberty to take the appropriate actions with regard to BG. Needless to add that such deposit / encashment of BG, as the case may be, will be subject to the outcome of these Petitions.

7. The Petitioner to file the following information on affidavit within three weeks:

(a) JITPL as well as Northern Railways, both, shall furnish the details regarding the Performance Bank Guarantee associated with 17 MW tied up through supplementary APP dated 8.11.2017.

(b) In regards to claim of the JITPL that the contract with Northern Railways has become infructuous after 31.3.2022, furnish the date from which the contract considered as infructuous along with relevant clauses of APP and supporting documents substantiating such claim.

(c) Considering the definition of 'Concessional Fuel' under Article 26.1 of APP i.e. price of fuel used under APP is determined by market forces, furnish the following information:

(i) Price of fuel used to supply power prior to approval of CCEA dated 26.2.022 and CIL circular dated 1.3.2022, is concessional or market based;

(ii) Price of fuel used post approval of CCEA dated 26.2.2022 and CIL circular dated 1.3.2022 is concessional or market based.

(d) In case of price of fuel prior and post approval of CCEA dated 26.2.2022 and CIL circular dated 1.3.2022 is market-based, how the subject approval and circular can be considered as Change In Law and/or Force Majeure.

(e) Quantity of coal requisitioned, quantity of coal received, GCV of coal and cost of coal prior & post to subject circular of CIL i.e. 1.3.2022 to 31.12.2022.

(f) Relevant clauses for termination of APP, particularly, unilateral termination and non-applicability of Article 21.1 of APP in the present case and how the the actions of JITPL are in-compliance of APP?

(g) Information regarding source of coal, which was utilized for supply of power in exchange and the reasons for not using such coal to supply power to Northern Railways.

(h) Detailed reasons for not complying with direction of the Commission to restore the supply immediately and information sought vide ROP dated 8.7.2022.

8. ERLDC is directed to submit the following information on affidavit within three weeks:

(a) Sequence of events with regard to non-supply by JITPL under the APP as brought to its notice by the Railways and the actions taken by ERLDC along with the reasons thereof, if not submitted.

(b) Methodology/guidelines in scheduling of power to MTOA beneficiaries and short-term market, including exchanges, and the relevant clauses under which JITPL was allowed to sell the power in market by compromising supply to Northern Railways, particularly, post RoP dated 8.7.2022 and whether such sale of power is not in violation of IEGC, 2010.

(c) Details regarding communication and consent of Northern Railways taken for termination of subject contract by JITPL and relevant rules and regulations under which MTOA contracts were terminated , and whether the present case squarely falls under such clauses.

9. Parties are directed to comply with the above directions within the specified timeline and no extension of time shall be granted.

10. The Petitions shall be listed for hearing on 11.4.2023.

**By order of the Commission**

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