

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 79/MP/2016  
Along with IA No. 27/2016**

**Coram:  
Shri Gireesh B.Pradhan, Chairperson  
Shri A.K.Singhal, Member  
Shri A.S.Bakshi, Member  
Dr. M.K.Iyer, Member**

**Date of Hearing: 28.7.2016  
Date of Order : 09.8.2016**

**In the matter of**

Petition under Section 79(1) (c) and 79(1)(k) read along with section 79 (1) (f) of the Electricity Act, 2003 read with Regulation 12(6) of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 along with Regulation 111 and Regulation 115 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 and Clause 3.5.6 of the Billing, Collection and Disbursement (BCD) Procedure under the Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 read with Regulation 2 (1) (i) of the Central Electricity Regulatory Commission (Payment of Fees) Regulations, 2012.

**And  
In the matter of**

Maruti Clean Coal and Power Ltd.  
Ward No. 42, Building No. 14, Civil Lines,  
Near Income tax colony, Raipur,  
Chhattisgarh-492 001.

**.....Petitioner**

**Vs**

Power Grid Corporation of India Limited  
B-9, Qutab Institutional Area,  
Katwaria Sarai, New Delhi-110 016

**.....Respondent**

**Parties Present:**

Shri Abinav Vashisht, Senior Advocate, MCCPL  
Shri E.R.Kumar, Advocate, MCCPL  
Ms. Sanjana Ramachandran, Advocate, MCCPL  
Shri Praveen, MCCPL  
Shri Gautam Chawla, Advocate, PGCIL  
Ms. Akansha Tyagi, Advocate, PGCIL  
Shri Deep Rao, Advocate, PGCIL  
Shri Aryaman Saxena, PGCIL

**ORDER**

The petitioner, Maruti Clean Coal and Power Ltd., has filed the present petition for a declaration that the accident which occurred on 28.10.2015 in the petitioner's generating station was a force majeure event under clause 9 of the BPTA dated 24.2.2010 and under clause 14 of the Transmission Service Agreement dated 6.8.2012 and for a direction that the petitioner is not liable to pay the PoC bills for the period the petitioner is affected by force majeure.

2. Gist of the submissions of the petitioner is as under:

(a) The petitioner has set up a 300 MW power plant at village Bandhakhar, district Korba, Chhattisgarh. The petitioner applied for grant of Long Term Open Access to CTU on 29.7.2009 for transfer of 300 MW power with the commissioning schedule progressively from June 2012. CTU granted LTOA to the petitioner on 29.7.2009 for a period of 25 years with requirement of additional system strengthening.

(b) On 24.2.2010, Bulk Power Transmission Agreement was executed between the petitioner and other power generators and CTU. As per the BPTA, LTA was granted to the petitioner for 171 MW (126 MW for WR and 45 MW for NR). Chhattisgarh State Power Trading Co. Ltd. who had an agreement with the petitioner to purchase 96 MW was also granted open access.

(c) PGCIL vide its letter dated 17.7.2015 requested the petitioner to open the Letter of Credit of Rs. 7.7 crore as per the Commission's Regulations. PGCIL further informed that transmission system required for LTA is scheduled for commissioning in August/September, 2015.

(d) As per the status given by PGCIL, the identified transmission system was commissioned in August 2015 with respect to LTA granted to the petitioner. However, the date of commercial operation of the said transmission system had not been made known to the petitioner.

(e) On 12.10.2015 and 20.10.2015, the petitioner opened the LC for Rs. 4.5 crore and 3.2 crore valid up to 11.10.2016 and 10.10.2016 respectively.

(f) On 28.10.2015, the bottom ash hopper of the boiler of the generating station collapsed. Accordingly, the petitioner vide its letter dated 28.12.2015 informed PGCIL regarding occurrence of Force Majeure events, wherein it was brought to the notice of PGCIL that due to major accident, the petitioner was not in position to evacuate the power till the plant became fully operational. In response, PGCIL vide its letter dated 18.1.2016 informed the petitioner that the force majeure notice dated 28.12.2015 cannot be treated as a valid force majeure notice, since the notice was not given under the TSA.

(g) The petitioner vide its letter dated 3.2.2016 informed PGCIL that the LTA was obtained on tentative target region basis and the plant was not likely to be operational as per latest estimates before June 2016 and the LTA may be used for meeting the other medium and short term requirements of DICs instead of blocking the same for the petitioner as the same could not be used due to force majeure event and in the absence of the beneficiaries.

(h) On 18.3.2016 and 5.4.2016, PGCIL raised the POC bills for the months of February and March 2016 amounting to Rs. 4,00,57,859/- and Rs. 4,28,57,735/- respectively. The petitioner vide its letter dated 20.4.2016 requested PGCIL to withdraw the POC bills and not to raise any further POC bills till the event of force majeure continues and the plant is not operationalized. However, no response was received from PGCIL.

(i) As per clause 14.2 of the Transmission Service Agreement, any event which prevents or unavoidably delays an affected party in the performance of its obligations is a force majeure event. Therefore, the petitioner being the affected party is entitled to claim relief for force majeure event as provided under clause 14.6 of the TSA and is not liable to pay the POC bills for the months of February, March and April, 2016 raised by PGCIL.

3. Against the above background, the petitioner has made the following prayers:

- (a) Declare that the accident/mishap which took place on 28.10.2015 at the generating station of the petitioner situated at village Bandhakhar, Korba district, Chhattisgarh i.e collapse of bottom ash hopper of the boiler was a force majeure event under clause 9 of the BPTA dated 24.2.2010 and clause 14 of the TSA dated 6.8.2012;
- (b) Hold that the petitioner is not liable to pay POC bill No. 91101794 dated 18.3.2016 and Bill No. 91101895 dated 5.4.2016 and Bill No. 91102003 dated 10.5.2016 raised by the respondent;
- (c) Direct the respondent to withdraw the POC Bill dated No. 91101794 dated 18.3.2016 and Bill No. 91101895 dated 5.4.2016 and Bill No. 91102003 dated 10.5.2016.
- (d) Direct the respondent not to raise any bills towards and in respect of Long Term Access granted to the generating station of the petitioner till the event of force majeure continues and plant is made operational.

4. The matter was heard on 26.5.2016 and notice was issued to the respondent. The respondent vide Record of Proceedings for the hearing dated 26.5.2016 was directed not to take any further action for recovery of the bills raised by it for POC charges till the next date of hearing.

**Analysis and decision:**

5. We have heard the learned counsels of the petitioner and the respondent and perused documents on record. The issue for our consideration is whether the petitioner is entitled to the benefit of force majeure in terms of the BPTA/TSA for its generating station. On 24.12.2007, the petitioner made an application to CTU for grant of LTA for 300 MW. On 29.7.2009, CTU granted LTA to the petitioner. On 24.2.2010, the petitioner entered into Bulk Power Transmission Agreement (BPTA) with PGCIL. Under the BPTA, the petitioner

was granted LTA for 171 MW [126 WR and 45 MW NR] and remaining 96 MW was purchased by Chhattisgarh State Power Trading Company Ltd who was granted open access for the same under the BPTA. Pursuant to Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 (Sharing Regulations), the petitioner entered into the TSA with PGCIL on 6.8.2012. Clause 2.1.2 of the TSA provides that in the event of any conflict between the existing Bulk Power Transmission Agreement (BPTA) and Transmission Service Agreement (TSA), the terms of TSA Agreement shall supersede, as far as the sharing of transmission charges are concerned. Accordingly, the petitioner's case is being dealt with under the provisions of the TSA. Clause 14.4 of the TSA provides as under:

“14.4.1. The Affected Party shall give notice to the other Party and the CTU of any event of Force Majeure as soon as practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as practicable after reinstatement of communications, but not later than one (1) working day after such reinstatement.”

As per the above provisions, the petitioner was required to give notice of force majeure within seven days of occurrence of force majeure event. According to the petitioner, the bottom ash hopper of the boiler collapsed on 28.10.2015 at 16.45 hrs and is a force majeure event. The petitioner vide its force majeure notice dated 28.12.2015 informed PGCIL that due to major accident, the petitioner was not in position to evacuate the power till the plant becomes fully operational. Relevant portion of the said letter is extracted as under:

“It is to submit that our company i.e. M/s Maruti Clean Coal and Power Limited (Company) entered into a Bulk Power Transmission Agreement with PGCIL on 24<sup>th</sup> February, 2010. Pursuant to Clause 9 of the said Agreement, it is hereby informed that there was a major accident/mishap i.e collapse of Bottam Ash hopper of the Boiler which was beyond our control. The restoration work is undergoing to set the plant operational which may take time and as per the technical evaluation as on date, it shall not be operational before March, 2016. So, we won't be able to evacuate the power till such time the plant became fully operational and this intimation may be treated as notice under Section 9 of the above said Agreement declaring this accident as Force Majeure event and supply of power shall be resumed immediately after the correction of such event.”

6. In response to force majeure notice, PGCIL vide its letter dated 18.1.2016 informed the petitioner that the construction and commissioning stage of transmission has already been over and as per the Commission's Sharing Regulations, post commissioning of the transmission system, the terms of the TSA override any other agreements/arrangements pertaining to the development stage. Therefore, the provisions of TSA would be applicable in place of the provisions under the BPTA. The relevant portion of the said letter dated 18.1.2016 is extracted as under:

“This is in reference to your communication dated 28.12.2015 regarding an alleged force majeure event under clause 9 of the Bulk Power Transmission Agreement dated 24.2.2010.

In this regard, it may kindly be noted that the identified transmission system in relation to the long term access granted to you had been commissioned in August, 2015 and the LTA is ready for operationalization except for defaults on your part in establishing an adequate and valid payment security mechanism (by way of a letter of credit). The construction and commissioning stage of transmission has already been over and as per the CERC Regulations on Sharing of Transmission Charges, post commissioning of the transmission system, the terms of the TSA override any other agreements/arrangements pertaining to the development stage. Therefore, now the provisions of the TSA shall be applicable in place of the provisions under the BPTA dated 24.1.2010.

Therefore, the present communication which inter alia relies on Clauses of BPTA cannot be treated as a valid force majeure notice.

Further, it may be noted that POWERGRID has complied with its set of regulatory and contractual obligations and it is incumbent upon you to pay transmission charges and abide by all other regulatory and contractual obligations as may be applicable under the Regulations/Agreements.”

7. It is noted that the event claimed as force majeure occurred on 28.10.2015. However, the petitioner gave force majeure notice to PGCIL on 28.12.2015. As per the TSA, the notice is to be given within 7 days. In the present case, the petitioner gave a notice on 28.12.2015 after a period of two months which is not in compliance with the notice period given in the TSA. Therefore, the requirement of notice of force majeure event within the prescribed period has not been complied with by the petitioner.

8. CTU has further disputed that the event does not fall under force majeure.

Clause 14.2 of the TSA with regard to force majeure event provides as under:

14.2 A ‘Force Majeure’ means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.”

9. Force Majeure clause in the TSA provides that any event or circumstance wholly or partly prevents or unavoidably delays an affected party in the performance of its obligations under the TSA, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the affected party and could not have been avoided if the affected party has taken reasonable care or complied with prudent utility practices.



10. The petitioner has submitted that collapse of bottom Ash hopper of the boiler was beyond its reasonable control, therefore its case is covered under force majeure. Learned counsel for PGCIL during the hearing submitted that as per the internal inquiry report, the accident does not fall in any of the clauses of force majeure events and had occurred due the default of the petitioner. Learned counsel for PGCIL submitted that after the commissioning of the unit on 30.7.2015, the unit had undergone frequent tripping and were taken under shutdown. Learned counsel for PGCIL submitted that under clause 14.3.6 of the TSA, the petitioner's case is excluded from being declared as force majeure event, since the act of the petitioner is negligent in itself which lead to breakdown of machinery in the generating station of the petitioner and the petitioner was aware of the probable causes of the accident which was under its control. Clause 14.3 provides as under:

“14.3 Force Majeure Exclusions

14.3.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Affected Party and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure.  
.....

14.3.6 Non-performance caused by, or connected with, the Affected Party`s:

- (a) negligent or intentional acts, errors or omissions;
- (b) failure to comply with an Indian Law; or
- (c) breach of, or default under this Agreement

11. According to the petitioner, the accident in the boiler hopper was on account of accumulation of ash in the boiler. In our view, this accident could have been avoided by following prudent utility practices and was not beyond the control of the petitioner. Therefore, no case of force majeure is made out.

12. In view of the above, the petitioner's case is not covered under clause 14 of the TSA.

13. Regulation 12 (6) of the Sharing Regulations provides as under:

"(6) Every Designated ISTS Customer shall ensure that the charges payable by them are fully discharged within the time-frame specified in the Transmission Service Agreement or the amended Bulk Power Transmission Agreements. Disputes, if any shall be resolved as per the provisions of the Transmission Service Agreement or the amended Bulk Power Transmission Agreements as specified in Chapter 6 of these regulations."

As per the above provision, DIC is required to pay transmission charges within 30 days in terms of clause 12 of the TSA which provides as under:

"12.2 The CTU shall raise bills, collect and disburse in accordance with the detailed "Billing, Collection and Disbursement Procedure."

12.5 If payment by DIC against any invoice raised under Billing, Collection and Disbursement procedure is outstanding beyond thirty days after the due date or in case the required Letter or Credit of any other agreed payment security mechanism is not maintained by the IDC, the CTU is empowered to undertake Regulation of Power Supply on behalf of all the ISTS Licensees so as to recover charges under the provisions of CERC (Regulation of Power Supply) Regulations, 2010 and any amendments thereof."

14. In the present case, the generating station of the petitioner achieved commercial operation on July, 2015. CTU declared commercial operation of the transmission line on 13.8.2015. With effect from that date, the petitioner has been using the said transmission line for supply of power. Since we have held that event of accident in the generating station is not a force majeure event in terms of the TSA, the petitioner cannot be discharged from its liability to pay the transmission charges for the period when its generating station has been shut down for rectification of the defects. The learned counsel for the petitioner submitted during the hearing that the petitioner has started supplying power from the month of June 2016 and is paying the transmission charges. From

18.10.2015 till 31.5.2016, the transmission assets were kept ready for use by the petitioner and therefore, the petitioner is liable to pay the transmission charges as per the PoC.

**I.A.No. 27/2016**

15. In I.A. No. 14 of 2016, the petitioner has submitted that pending disposal of the main petition, the petitioner apprehends that CTU may enact the LC given by the petitioner on the ground that the applicant has defaulted in payment of monthly charges. The petitioner had sought a declaration to restrain the CTU and its officers/employees/agents from taking any coercive steps against the petitioner to recover the amounts demanded by PGCIL. The Commission in the Record of Proceedings for the hearing dated 26.5.2016 had directed CTU as under:

“4. The Commission directed to list the matter for hearing on 2.6.20006 and directed PGCIL not to take any further action for recovery of the bills raised by it for PoC charges till next date of hearing.”

16. Thereafter, the matter was heard at length and order was reserved. On 4.7.2016, CTU sent a e-mail dated 4.7.2016 intimating the petitioner about its intention to realise the payment in respect of PoC bills No. 91101895 dated 5.4.2016 for the month of March 2016 for a sum of Rs. 4, 28,57, 735/-. The petitioner has filed IA No. 27/2016 pleading that the threatened action of PGCIL was illegal, malafide, contrary to the interim order passed by the Commission on 26.5.2016. According to the petitioner, the interim order continues till it is vacated and even when the interim order is till the next date of hearing, the parties have to comply with the same till it has been specifically vacated by an order of the court. Accordingly, the petitioner has sought a

clarification that the interim order dated 26.5.2016 passed by the Commission is in operation and has not been vacated and PGCIL may be restrained from taking any coercive steps against the petitioner to recover the amounts demanded from the petitioner under the PoC bills dated 5.4.2016 for the month of March 2016 and PoC bills for the months of April and May 2016.

17. The matter was heard on 28.7.2016. Learned counsel for the petitioner submitted that PGCIL could not take any coercive measures to encash the LC since it was covered under the interim order of the Commission dated 26.5.2016. The learned counsel for PGCIL submitted that since the stay was till the next date of hearing and no direction was issued on the next date of hearing regarding stay, the interim stay granted on 26.5.2016 become inoperative due to lapse of time. We have considered the submissions of the petitioner and PGCIL. After hearing the parties, order was reserved on 2.6.2016. There was no mention about the continuation or vacation of the stay dated 26.5.2016. Therefore, the petitioner as well as PGCIL should have approached the Commission for clarity with regard to the stay. In our view, PGCIL should not have sent the e-mail dated 4.7.2016 without seeking a clarification regarding the stay.

18. In view of our decision in the main petition holding that the event claimed as force majeure by the petitioner is not covered under force majeure in term of the TSA, the interim stay granted on 26.5.2016 is vacated. PGCIL is at liberty to raise the PoC bills and recover the PoC charges from the petitioner in accordance with the Sharing Regulations and in terms of the TSA.

19. With the above, the petition and IA are disposed of.

Sd/-  
**(Dr. M.K.Iyer)**  
Member

sd-  
**(A.S.Bakshi)**  
Member

sd/-  
**(A.K. Singhal)**  
Member

sd/-  
**(Gireesh B. Pradhan)**  
Chairperson