Procuring Power Through Competitive Bidding: Contemplating the Regulatory Aspects of Such Power Purchase Agreements (PPAS)

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Abstract The Electricity Act, 2003 envisaged to usher a new era of transparency and competition in the power sector. Procurement of power through the process of competitive bidding was understood as the most transparent and efficient way of procuring cost effective power. Central Government in order to boost and regulate long term procurement of electricity through the mechanism of competitive bidding notified detailed guidelines. The role of Regulatory Commission was minimised in such cases so as to allow the market forces to determine the power tariff. As a consequence, many Power Purchase Agreements were entered into via competitive bidding between the generators and the distribution licensees at very competitive prices. However, recently these PPAs have faced multiple legal and regulatory hurdles. Generators have approached the adjudicatory bodies to make modification and changes to the power tariff on grounds of Force majeure and change in law clauses of PPA. Tariff of such PPAs hold utmost importance as the bidders are selected on the basis on lowest tariff. Any demand for modification in the tariff raises concerns not only on the sanctity of such PPAs but also on the regulatory powers of Regulatory Commissions. Adjudicatory bodies have made attempts to safeguard the financial viability of the generators while trying to restore and preserve the sanctity of the contract; however such decisions are not free from doubts and ambiguity. The paper makes an attempt to study the aforementioned issues and also scrutinises the alternative method of power procurement other than competitive bidding process.

KEYWORDS: Competitive Bidding, Power Purchase Agreements, Force majeure, Electricity tariff, Electricity Regulatory Commissions.

I. Introduction

The year 2003 marked a new beginning of reforms in the Electricity Sector in India with enactment of the Electricity Act which replaced the old legal framework. The Electricity business can be conveniently divided into three segments i.e. Generation, which basically is the production of the electricity from various sources like thermal, hydro, renewable etc. The second segment is the Transmission i.e., the carrying of electricity at high voltage level to the load centers through High Tension Transmission network. Finally the last and the most important segment is the Distribution i.e. distribution of the electricity to the end consumers at various voltage levels.

1. The Electricity business in India before 2003 was regulated by chiefly three statutes, Electricity Act, 1910, Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998

Electricity Act, 2003 envisaged to completely distance the government from regulatory as well as commercial activities of the electricity sector. It endeavoured to remove the bottlenecks in all segments i.e. generation, transmission and distribution and to create an environment which promoted competition, private sector participation and consumer interest.


To meet the drastically growing demand of electricity, the Electricity Act, 2003 provided that any person can operate, establish and maintain a generating station, without any requirement of obtaining a license under the Act. Delicensed generation and private participation boosted the electricity generation by Independent Power Producers (IPP). Power Purchase Agreements (hereinafter referred to as PPAs) forms an integral part of the Electricity business in India. They form the link between the demand and supply of electricity. A power purchase agreement is a contract between two parties, one who generates electricity for the purpose of sale i.e., the seller and one who is looking to purchase electricity i.e., the buyer. The buyer may be a distribution licensee or an electricity trader. PPAs are like any other bilateral contract, governed by the law of Contracts, however the technicalities and regulatory framework existing in the electricity business makes them a subject of legal discussion.

The paper attempts to bring out the challenges faced by the stakeholders in the execution of Power Purchase Agreements with special reference to the PPAs entered into through Competitive Bidding. The paper highlights the lacunas in the competitive bidding process taking into consideration the latest judgments and issues decided by the Regulatory Commissions and Appellate Tribunal of electricity (hereinafter referred to as APTEL or Appellate Tribunal) and subsequently suggest certain changes into the regulatory mechanism to ensure development of the electricity sector as a whole.

II. Legal and Regulatory Regime of PPA

Electricity in India is generated by Central, State and Private entities who sell power to distribution Utilities, Trading licensee and Consumers. There is an enormous growth in the power generation to congregate the rapid demand of Electricity. The said supply and procurement of electricity requires a Power Purchase Agreement. Before we go towards the main aspects of the PPA, it is necessary to analyse the legislative and the regulatory framework governing the purchase and procurement of power.

The new regulatory mechanism possesses certain main objectives including assured electricity to consumers at reasonable and competitive rates, financial viability of the sector, promoting transparency, consistency and predictability in regulatory approaches across jurisdictions and encouraging competition. These objectives act as the guiding principles for the Central and State Commission while performing their duties.

4. The Electricity Act, 2003, S. 7. Under the erstwhile the Electricity (Supply) Act, 1948, there was a requirement of obtaining techno-economic clearance from the Central Electricity Authority for thermal power plants. This provision has been done away with in the new Act in order to encourage power generation and private participation. The provision primarily deals with the thermal power plants.

5. The Electricity Act, S. 2 (29) defines “generate” to produce electricity from a generating station for the purpose of giving supply to any premises or enabling a supply to be so given;

6. Electricity Act, S. 2 (17) defines Distribution licensee as “a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply”;

7. Electricity Act, S. 2 (71) defines Trading as “purchase of electricity for resale thereof and the expression “trade” shall be construed accordingly”;

Electricity Act, S. 2 (26) defines Electricity Trader “as a person who has been granted a licence to undertake trading in electricity under section 12”.

8. Private, State and Central generating Stations produces 41.77%, 33.32% and 24.91% respectively of the Total Installed capacity. Power Sector at a glance, Ministry of Power, (10th November, 2016), http://powermin.nic.in/en/content/power-sector-glance-all-india

9. Electricity Act, S. 3 provides for the formulation of the National Electricity Policy (NEP) and National Tariff Policy (NTP) by the Central Government. Central Government in compliance of the above obligation notified the National Electricity Policy, 2005 and the National Tariff Policy, 2006 which lays down various objectives of the power sector.

Procuring Power Through Competitive Bidding: Contemplating the Regulatory Aspects of Such Power Purchase Agreements

As already stated above, the Electricity Act, 2003 brought in the regime of license free generation of Electricity including captive generation as well. The Act lays down the duties of generating companies. It states that the generating company may supply electricity to any licensee, i.e., a distribution licensee or a trading licensee in accordance with the rules and regulations. Hence the Act allows the generating company to supply power to distribution licensee, trading licensee and also directly to a consumer.

Open access in transmission has allowed the licensees (distribution or trading) to procure power from generating station at any corner of the country. Even a consumer can directly purchase power from the generating Station. This is instrumental in bringing about competition in the Electricity Sector. Further, Section 49 of the Act also gives the freedom to the consumer to enter into a Power Purchase agreement with the generating companies on such terms and conditions including the tariff of the power as agreed by both the parties.

11. RAJ SINGH NIRANJAN, GUIDE OF ELECTRICITY LAWS IN INDIA, UNIVERSAL LAW PUBLISHING, NEW DELHI 2013.
12. Electricity Act, 2003 S. 10
13. Section 2 (47) “open access” means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission. Open access has been envisaged in the Electricity Act, 2003 as a framework for encouraging competition in the electricity sector and for enabling consumers to choose their suppliers. Open access in Transmission means freedom to the licensee to procure power from any generation source using the transmission lines. It is basically non-discriminatory provision for use of transmission lines or distribution lines or their associated facility by any licensee, consumer or a generating plant. See generally, Open Access – Theory and Practice, Forum of Regulators: November, 2008, (November, 13, 2016) http://www.forumofregulators.gov.in/Data/Reports/FOR%20Report%20on%20Open%20Access-Theory%20and%20Practices-08-04-2009.pdf.
14. Second proviso to Section 42 (2), provides that consumers whose demand exceed 1MW can directly procure power through a generating station.

Electricity being a regulated business, the terms and conditions of the Power Purchase Agreements and the electricity tariff are regulated by the State Electricity Regulatory Commissions (hereinafter referred to as SERC) or the Central Electricity Regulatory Commissions (hereinafter referred to as CERC) as the case may be. These Regulatory and Statutory bodies were constituted under the erstwhile Electricity Regulatory Commission Act, 1998 and are retained under the Electricity Act, 2003 and are entrusted with wide powers including framing and notification of the Regulations.

The SERC inter-alia has to regulate the electricity purchase and procurement process of distribution licensees including the price at which the electricity shall be procured from generating companies or licensees or from any other sources through agreements for purchase of power for distribution and supply within the State. The CERC has to regulate the tariff of generating companies, if such generating companies enter into or otherwise have a composite scheme of generation and sale of electricity in more than one State. The tariff is to be determined by the Appropriate Commission in line with the provisions of the Act and it has the authority to require a generating company or other licensees to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

17. Electricity Act, S. 79(1)(b). Supply of power to more than one State from the same generating station of a generating company, ipso facto, qualifies as ‘Composite Scheme’. This was affirmed by the Tribunal in Uttar Haryana Bijli Vitran Nigam Limited v. CERC.
18. Electricity Act, S. 62

Determination of tariff—
(1) The Appropriate Commission shall determine the tariff in accordance with the provision of the Act for—
(a) Supply of electricity by a generating Company to a distribution licensee

\[\text{[73]}\]
However, Section 63 of the Act provides an exception to the above provision. It states that if the tariff is determined through transparent process of bidding in accordance with the guidelines issued by the Central Government, then the Appropriate Commission shall simply adopt the tariff and shall not carry out the exercise of determining the tariff. In furtherance to the same, the Central Government issued guidelines under Section 63 called “Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees” (hereinafter referred to as guidelines). The Guidelines provide for two kinds of mechanism for procurement of power i.e., Case 1 and Case 2 bidding. In Case 1 bidding the location, technology, or fuel is not specified by the procurer. On the other hand in Case 2 bidding hydro-power projects, load center projects or other location specific projects with specific fuel allocation such as captive mines available, are specified which the procurer intends to set up under tariff based bidding process. The provisions of the guidelines are binding on the procurer. Standard Bidding Documents were also issued by the Central Government for both Case-1 and Case 2 Bidding. However, the Standard Documents are applicable only to the PPA entered or purported to be entered through Competitive Bidding and not otherwise. Deviation from the Standard bid Documents is allowed only with the prior permission of the Appropriate Regulatory Commission.

The procurement of electricity by distribution licensees can be either long-term procurement for a period of 7 years and above or medium term procurement for a period of up to 7 years but exceeding 1 year. Separate Standard Bid Documents are issued for long-term and medium term PPA.

In addition to the above, Central Government in order to boost electricity generation and to meet the power needs of a number of States/distribution companies located in these States, issued notification in 2005-06 for the development of Ultra Mega Power Projects (UMPPs). These are very large sized projects, approximately 4000 MW each involving an estimated investment of about Rs. 16,000 crore. Identification of the project developer was done on the basis of tariff based competitive bidding. In pursuance to the Competitive bidding conducted UMPPs were awarded to Sasan Power Limited, Sasan UMPP (Madhya Pradesh), Coastal Gujarat Power Limited, Mundra UMPP (Gujarat), Coastal Andhra Power Ltd., Krishnapatnam UMPP (Andhra Pradesh), Jharkhand Integrated Power Ltd., Tilaiya UMPP (Jharkhand).

Hence, Electricity Act, 2003 and the regulatory mechanism introduced under it regulates the PPAs and its execution. The above legislative and regulatory framework shall form the basis for the discussion in the further chapters.

19. Electricity Act, S. 63

Determination of tariff by bidding process: Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Commission.

20. BSES Rajdhani Power Ltd. v. DERC, 2010 ELR (APTEL) 404.


22. Id. clause 2.2(i) & (ii)

23. Id. clause 5.16

24. Id. clause 2.1(a) & (b).


26. Ibid.

III. Modes to enter into a Power Purchase Agreements

Electricity Act empowers the licensee to procure power from any power source; however, the mode of Procurement of Power has not been clearly specified in the Electricity Act, 2003. The first mode of procuring power can be a MoU route (negotiated route) i.e., through bilateral contract between the generator and the licensee and the second can be through Competitive bidding. In case of a PPA entered through the MoU route, the PPA as well as the tariff of the power to be procured is required to be approved and determined by the respective Commission in view of Section 62 of the Electricity Act, 2003.

However, in case of a PPA entered through Competitive bidding, the Commission shall simply adopt the tariff in view of Section 63 of the Electricity Act, 2003 and also approve the PPA entered through Competitive bidding.

28. Electricity Act, S. 88(1)(b), provides that the Power procurement of Distribution licensee is regulated by the Commission.

29. Electricity Act, S. 62. (Determination of tariff)—

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for—

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity.

30. Section 63. (Determination of tariff by bidding process):

Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

31. Draft PPA has been issued by the Central Government in the Standard Bid documents. If the parties to the PPA deviate from the Standard bid documents, they need to get the same approved from the respective commission in view of Clause 5.16 of the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees.

32. Clause 5 of the National Tariff Policy, 2006

5.0 General Approach to Tariff

5.1 ............ All future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a State controlled/owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity.

Even for the Public Sector projects, tariff of all new generation and transmission projects should be decided on the basis of competitive bidding after a period of five years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition.

33. BSES Rajdhani Power Ltd. v. DERC, 2010 ELR (APTEL) 404.
licensee could only procure power through competitive bidding process alone.

The Appellate Tribunal of electricity while clarifying the above issue, observed that the Electricity Act, 2003 via section 62 and 63 provides for two alternatives to the concerned parties to procure power with the approval of Appropriate Commission. Under Section 62(1)(a), the Appropriate Commission shall determine the tariff for the supply of electricity by a generating company to a distribution licensee. Whereas, under Section 63, the Appropriate Commission shall adopt the tariff arrived as a result of the Competitive Bidding Process.

Tribunal observed that the wording contained in Sections 62 and 63 of the Act clarify that Section 63 is not implied as a non obstante clause and is an exception carved out from Section 62. Therefore, Section 62 is a substantive provision and Section 63 is an exception. Hence, the exception contained in Section 63 cannot override the scope of the substantive namely Section 62. Tribunal held that Section 62 provides substantive power to the Appropriate Commission for determination of tariff with the sole exception of price discovery through the Competitive Bidding Process under Section 63.

Although a Special Leave Petition challenging the above judgment is pending before the Supreme Court of India, but till the time the above question of law is resolved by the SC, the judgment of the APTEL continues to be effective.

Under such circumstances many State Commissions refuse to allow distribution companies to procure power through MoU route without prior permission. Almost similar issue was raised once again before the APTEL in the matter of, *UPERC v. Noida Power Company Limited*35. The matter revolved around the denial of the State Commission to approve the PPA executed between Noida Power Company Limited and Dhariwal Infrastructure Limited through the negotiated route. The State Commission observed that post 2011, Competitive bidding was the only mechanism to procure power and the Judgment of Tribunal in *BSES Rajdhani* case does not apply post 2011 amendment in the guidelines. Tribunal did not accept the interpretation of the State Commission and expressed that the State Commission has the discretion to grant approval either under section 62(1)(a) i.e., negotiated route or under Section 63 i.e., through the competitive bidding. However, keeping the specific facts of the case into consideration the Tribunal very clearly observed that the discretion should not be exercised by the Commission in an arbitrary manner. Irrelevant and relevant consideration ought to be considered by the Commission before discarding the PPA entered through the MoU route. The matter was remitted to the State Commission and was directed to examine the PPA on merit and approve or reject it based on relevant material.

Clearly, the Commissions are more inclined to opt for competitive bidding method when it comes to approval of PPA, for the obvious reasons of transparency and non-interference. MoU route or the Negotiated route of power procurement has mostly been rejected or discouraged by the Commissions over competitive bidding method. The subsequent chapter

34. Punjab State Electricity Regulatory Commission notified the Punjab State Electricity Regulatory Commission (Power Purchase and Procurement Process of Licensee) Regulations, 2012, Clause 12(i)&(ii) of which says that long-term power purchase shall be through competitive bidding, unless approved by the Commission. UPERC also declined to approve the PPA between NPCL and Dhariwal Infrastructure through the MoU route without even going into the merits of the PPA.


36. Refer to Supra note 32. The National Tariff Policy, 2006 states that all future requirement of power should be procured competitively by distribution licensees. For government owned generating companies 5 year relaxation was given in the Policy which ended on 5.01.2011 (the National Tariff Policy was issues on 6.01.2006).

37. Supra note 33.
will discuss the legal and regulatory issues encircling the PPAs arrived through Competitive Bidding.

IV. Viability of PPA through Competitive bidding

The Electricity Act and National Tariff Policy encourages power procurement through the mechanism of Competitive bidding. The objective behind introducing competitive bidding was to encourage competition amongst developers and to procure reliable power at minimum price thereby facilitating transparency and fairness in procurement processes.

The underlying factor behind Competitive bidding seems to be common good for the people. The power purchase cost accounts for about 80% of Annual Revenue Requirement of the distribution licensees. Competitive bidding results in competitive price of power, thereby directly benefiting the consumers.

Recent issues with respect to the PPAs entered through Competitive bidding have raised many questions on the success of the bidding process and also the sanctity of such PPAs. State Commissions have time and again, diluted the sanctity of the PPA agreements entered through the process of competitive bidding. A strange situation arose, when the Uttar Pradesh Regulatory Commission permitted Noida Power Company Limited (a distribution licensee) after conclusion of bidding process and selection of Essar Power as the successful bidder, to procure power from another generating company (not a participant in the bidding process) as the said company had quoted 10% lower tariff. Essar Power approached the Tribunal challenging the order of the State Commission. Reasserting and affirming the sanctity of the contractual obligation, Appellate Tribunal set aside the order of the Commission.

Tribunal criticised the action of State Commission stating that they cannot bring peculiar procedure through backdoor explicitly when the procedure is excluded as per Section 63 of the Act. It was very firmly held that the power of State Commission under Section 63 were very limited. Tribunal clearly differentiated the process of power procurement under Section 63 and 62 of the Act. The Commission under Section 63 can either reject the PPA if the same is not in consonance with the statutory framework or adopt the tariff and PPA. Further held that the process of competitive bidding is to discover tariff in accordance with the market conditions and the same only needs to be adopted by the Commission. Tribunal further observed that although the formal PPA was not executed between Noida Power Company and Essar Power, however with the acceptance of the bid made by Essar Power, there was a valid agreement and hence, Noida Power was not entitled to reject the bid whenever they want. The judgment stressed on preserving the sanctity if the PPA over any commercial gain or benefit and defeated the attempt of the State Commission to bypass the contractual obligation through regulatory measure.

The regulatory role of the Commission was once again annulled by the Tribunal in the case of Indiabulls CSEB Bhaiyathan Power Limited v. Chhattisgarh State Electricity Regulatory Commission The Tribunal outlawed the attempt of the Chhattisgarh State Commission to direct parties to renegotiate the terms of PPA entered through Competitive bidding. In the words of the Tribunal “The


41. Appeal No. 64 of 2004, decided on 18th February, 2013.
State Commission under Section 63 of the Act has to only ensure that the process followed in the competitive bidding is as per law. The State Commission has to adopt the tariff discovered in the competitive bidding process. The State Commission could not give directions to the parties renegotiate the terms of the PPA.43

This issue caught wider attention in set of disputes, where petitions were filed by the Ultra Mega Power Plants i.e., Coastal Gujarat Power Ltd. (Tata Power Ltd.), Sasan Power Ltd. (Reliance Power Ltd), and other generating stations42 before the Central Electricity Regulatory Commission seeking higher tariff for the electricity generated from their projects from the distribution companies with which they had entered into a PPA (through the process of Competitive bidding) on the basis of “Change in Law” and “force majeure” clause of the PPA.45

The Generating Companies sought higher tariff for their plants as changes in Indonesian fuel pricing regulations made the project unviable at existing tariffs as mentioned in the PPA44. They invoked the Change in Law and force majeure clauses of the PPA and sought financial relief from the distribution companies.

Central Electricity Regulatory Commission vide its orders dated 15th April, 201346, held that the generating stations were not entitled to relief under “Change in Law” as the term “Law” was restricted only to change in the laws of India and any change in the laws and regulations of Indonesian, from where the coal was being imported was not entitled to any relief under the PPA. Further, Commission held that the Indonesian regulation merely matched the price of sale of coal to the international market and any increase in the international coal price cannot constitute a force majeure situation. Commission further, relied on the clause of the PPA which clearly stated that any increase in the coal price cannot be considered as a force majeure event unless it is a consequence of a force majeure event. The Commission pointed out that the generating companies failed to take reasonable care, while computing the energy charges by quoting non-escalable energy charges for 55% of the contracted coal.

Further, CERC strongly disapproved the renegotiation of tariff as discovered through the competitive bidding and emphasized that the sanctity of the PPAs and the tariff agreed therein should be maintained. However, in total negation of the PPA conditions and the objective of Competitive bidding, the Commission decided to use their regulatory powers and grant relief in the form of compensatory tariff over and above the tariff agreed in the PPAs. The Commission observed as follows:

“Financial viability of the generating stations is an important consideration to enable them to continue to supply power to the consumers. The present case is one of the first of its kind where the tariff was determined through competitive bidding under Section 63 of the Act. The petitioner had quoted the bids on certain assumptions and those assumptions have been negated on account of the unexpected rise in coal price in international market coupled with the promulgation of Indonesian Regulations, required all long term contracts to be adjusted to the international benchmark price. In our view, under the peculiarity of the facts of the present case and also keeping

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42. Other Generating Stations included Adani Power and GMR Energy.
in view the interest of both project developer and consumers, we consider it appropriate to direct the parties to set down to a consultative process to find out an acceptable solution in the form of compensatory tariff over.\textsuperscript{46}

Central Commission on one hand stressed on the sanctity of the contract, and on the other hand granted compensatory tariff using their regulatory powers in complete contrast to the provisions of Electricity Act and the principle of Pacta Sunt Servanda\textsuperscript{47}. They further, appointed an \textit{ad hoc} expert committee to compute the compensatory tariff. The order of CERC faced staunch criticism from the State distribution Utilities and other stakeholders as the compensatory tariff resulted in increase in the tariff of electricity\textsuperscript{48}.

Further, it has been contended that a major lacunae with the CERC is that it merges up the regulatory powers of tariff regulation under section 79(1)(b) with adjudicatory powers of dispute handling under Section 79(1)(e), despite the fact that the legal requirements for the two are procedurally and substantively different\textsuperscript{49}.

The order of the CERC was challenged by the parties to the PPA i.e., generating companies (on rejection of Force Majeure and Change in Law Plea) the State distribution licensees\textsuperscript{50} (for grant of compensatory tariff) and some NGOs before the Appellate Tribunal of Electricity. State distribution Utilities argued that the CERC has no power to decide any compensatory tariff once it is agreed by the electricity producer after the competitive bidding\textsuperscript{51}.

Much awaited judgment was finally pronounced by the Appellate Tribunal in April 2016, clarifying the issues pertaining to compensatory tariff and sanctity of the PPA. Tribunal held that Central Commission has no regulatory powers under Section 79(1)(b) of the Act to fluctuate or modify the tariff or grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bidding i.e., under section 63 of the Act. Tribunal held that Commission can only exercise adjudicatory powers if the case of Force majeure and Change in Law is made out.

Tribunal while interpreting the situation observed that the increase in price of coal on account of the intervention by the Indonesian Regulation as also the non-availability/short supply of domestic coal in case of some power generator constitutes a Force Majeure event in terms of the PPA. However, ruled against the use of the Change in Law clause by holding that Electricity Act should not be construed to include laws other than Indian Laws such as the Indonesian Law/Regulations. Tribunal remanded back the matter to the Commission to exercise its adjudicatory power and provide relief under the force majeure clause under the provisions of the PPA. Even the Supreme Court has denied staying the order of the APTEL, while keeping the matter open for scrutiny on merit in due course of time\textsuperscript{52}.

\textsuperscript{46} Id. at para 86.
\textsuperscript{49} Supra note 47.
\textsuperscript{50} State distribution companies from State of Haryana, Gujarat, Punjab, Rajasthan, Orissa, Uttar Pradesh, Uttarakhand, Madhya Pradesh had entered into PPAs with the UMPPPs and other generating station and tied up power supply.
\textsuperscript{52} Apurva Vishvanath, SC refuses to stay CERC proceedings on compensatory tariff for power firms, Live Mint, 8th April, 2016, (November, 26, 2016), http://www.livemint.com/Industry/h0HKSMVGOv2lmKCeV1VVFK/SC-refuses-to-stay-CERC-proceedings-on-compensatory-tariff.html.
Hence, in very simple words what Tribunal took away from hand gave it back through the other hand. Hence, with the acceptance of plea of Force majeure, the financial impact of Indonesian coal and shortage of domestic coal supply will be passed on to the State Utilities thereby increasing the tariff, which may be even higher than that of the compensatory tariff\(^53\). However, the judgment does limit the regulatory role of the Central Commission in PPAs arrived through the process of Competitive Bidding.

Many have applauded the judgment of the Tribunal as the same will resolve the problem of stranded PPAs in the country that have been impaired due to shortage in supply of domestic coal and the price changes in imported coal\(^54\). However, the impact of force majeure on the PPA has to be assessed by the CERC, which undeniably stands chance of being challenged in appeal before the Tribunal or even the Supreme Court.

Few issues need deliberation while analysing the judgment of the Tribunal. Whether change in Indonesian Regulation leading to increase in the price of imported coal and shortage of domestic coal can be referred to as a force majeure event? Tribunal was of the view that unexpected promulgation of Indonesian Regulation was beyond the control of the affected parties and hence amounted to force majeure. Focusing on the commercial viability of the project the Tribunal further, stated that the intention behind Force Majeure clause is to save the affected party from the consequences of anything over which they had no control. Wider meaning to force majeure would ensure that the assets of the generator are not stranded; it can fulfill debt service obligations and that consumers can get uninterrupted power supply. Tribunal observed that the generator may do so with a hope that the Force Majeure clause in the PPA would take care of such a situation. If such a view is not taken, then the Force Majeure provision in the PPA would be a dead letter. Further, noted that as the PPAs are long term contract, it may not be possible for the generator to envisage all possible risks over such a long period of time.

It appears that the Tribunal is trying to include the aforesaid event or circumstance as a force majeure event in the interest of overall commercial viability of the sector. Clearly, the force majeure as provided under the Standard Bid documents and the PPAs requires circumstances or events which prevents or unavoidably delays the performance of the party. In the existing dispute, the generating stations were not prevented or delayed from procuring coal. The force majeure pleaded here is akin to economic force majeure\(^55\), which is not

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\(^{53}\) Tata Power, Adani UMPPs set to get greater tariff relief, The Economic Times, 8th April, 2016, (November, 26, 2016 at 5:15 P.M.)


\(^{55}\) Definition of Force Majeure as per Standard Bid Documents:

**Force Majeure**

9.3.1 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:

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protected under the PPA and the same has been rejected by Supreme Court in some of its judgments. The generating Stations have taken the plea that increase in coal price hinders the performance of the Contract, despite the fact that the PPA provides for a clear exclusion of cost rise and insufficiency of funds as a ground for force majeure. The judgment fails to reflect how the event can be termed as force majeure in light of the clauses of the PPA. By giving a wider purport to the Force majeure clause and considering the said event a Force majeure event appears as a feeble attempt to provide relief to the generating stations within the framework of the PPA to justify or preserve contractual sanctity, when clearly the event does not satisfies the condition of force majeure.

Quoting of non-escalable energy charges by the generating companies is another ancillary issue which needs deliberation. The Standard bid documents allows the generating companies to quote escable, non-escable and partly escable energy charges. The generating companies with the intention to win the bid quoted non-escable or partly escable energy charges, which did not allow them to accommodate the rise of fuel cost. This deliberate action or move of the generating companies has not been taken into consideration by the Tribunal. Tribunal on the other hand takes the view that merely quoting non-escable energy charges does not preclude the generators from seeking relief. The events relating to increase in the price of coal should have been anticipated and was, in fact, anticipated by some generators like CGPL and cannot therefore be considered as unprecedented or unanticipated.

Tribunal by including the event as Force majeure has opened up a Pandora box, most generators will insist on passing the cost to consumers. As already stated the hike in the tariff due to force majeure can be even higher than the compensatory tariff given by the CERC earlier. In order to provide legitimacy to the tariff increase within the framework of the PPA, Tribunal has tries to exonerate the generators from any liability and has held that the entire situation could not have been foreseen by the generators.

There is no doubt that the commercial viability of the generating station is very essential for the overall growth of the electricity sector and the economic interest of the generators needs to be protected as well. Both Tribunal and CERC, although adopted totally different methods, but tried to protect the commercial interest of the generators. However, such a situation raises many questions over the viability of such long term PPA. The ongoing litigation and the past litigations have exposed the down side of the PPAs arrived through competitive bidding.

V. Conclusion

Competitive Bidding which was intended to bring down the electricity tariff and introduce competition and transparency in the market has met a very disappointing fate. The aforementioned case of the UMPPs and other generates like Adani Power and GMR Energy are clear evidence of the lacunas and failure of the Competitive Bidding process. Further, another instance which deserves mention is the already discussed Essar and NPCL matter. Tribunal in the instant case directed the parties to enter into a PPA to protect the sanctity of the contract and the process of Competitive bidding. Unfortunately, Essar Power (who approached the Tribunal and sought relief for

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56. It was open to the generators to quote escable energy charges in bid which would have aligned the bid to market prices, CGPL decided to quote non-escable fuel charges for 55% and Adani Power quoted 100% non-escable fuel charges.

57. Supra note 40.
executing of PPA) was ultimately not able to supply power to NPCL from the scheduled date specified in the PPA and later on terminated the PPA for they were unable to set up the generating plant due to certain technical and financial reasons. This case is another disappointing outcome of a competitive bidding process.

In such circumstances it appears that over emphasis on Competitive bidding may not necessarily be in the best interest of the electricity sector. It seems highly unlikely that a levelised tariff quoted by a generator today, keeping into consideration the current market conditions will continue to hold good for the next twenty five years. Supreme Court in some of its landmark judgment has already stated that bidding process or the auction process is not a constitutional or a legislative mandate58. Hence, power procurement through MoU route or the negotiation route should not be discouraged or rejected by the Commissions. Subject to proper approval and proper scrutiny, such PPAs should be approved especially keeping into consideration the issues which emerge out of competitive bidding method.

In addition to the above, it is also suggested that it may also be in the best interest to grant some regulatory powers to the appropriate Commissions in case of Competitive Bidding as well, to evaluate and assess the bidding process and the lowest bid. Currently Commission exercises very limited powers like adoption of tariff etc. This will ensure that generators do not quote predatory prices to win the bid over others and later seek hike in tariff due to some reason or the other. This practice is also unfair towards the fellow bidders whose bids were rejected for being higher. Hence, necessary changes need to be made in the existing guidelines for procuring power through competitive bidding. The guidelines need to inculcate and take into consideration the aforementioned lacunas and problems arising in the PPAs entered through competitive bidding.


**About the Author**

Sakshi Parashar is a Ph.D. Research Scholar at the Indian Law Institute, New Delhi. Prior to this, she was working as an Assistant Prof. (Law) at Lloyd Law College, Greater Noida wherein, she was teaching Constitutional Law, Law & Media and Law of Torts. She qualified the National Eligibility Test and JRF in December, 2014. She has experience of working as in-house counsel in energy companies like GMR Energy Ltd. and Noida Power Company Ltd for more than two years.

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