

**IN THE JHARKHAND STATE ELECTRICITY REGULATORY
COMMISSION AT RANCHI**

Case No. 06 of 2023

M/s Usha Martin Limited..... Petitioner
Versus
Jharkhand Urja Vikas Nigam Limited & Ors..... Respondents

**CORAM: HON'BLE JUSTICE MR. AMITAV KUMAR GUPTA, CHAIRPERSON
HON'BLE MR. MAHENDRA PRASAD, MEMBER (LAW)
HON'BLE MR. ATUL KUMAR, MEMBER (TECH)**

For the Petitioner :Mr. M. S Mittal, Sr. Advocate and Mr. Saloni Mittal,
Advocate

For the Respondent : Mr. Mrinal Kanti Roy, Advocate

Date – 16th April, 2024

1. The petitioner M/S. Usha Martin Limited, has filed the instant petition under regulation A11 (power to remove difficulties) of the JSERC (Utilization of surplus capacity of Captive Power Plants based on Conventional fuel) Regulation 2010 (“**2010 Regulation**”) in light of certain dispute between the petitioner and the respondent as regards utilization of surplus banked energy which remained unutilized in view of lockdown enforced due to COVID-19.
2. On the basis of the agreement, the petitioner-M/S. Usha Martin Limited has prayed for and sought following reliefs: -
 - (a) Direct the Respondents to allow the Petitioner to adjust the unutilized banked energy as on 31.3.2020 for the first three months of the next financial year i.e., upto 30.6.2020 since the same could not be utilized owing to the lockdown measures imposed due to COVID-19.
 - (b) For grant of any other reliefs that this Hon'ble Commission may deem fit and proper as per the facts and circumstances of this case.

Submissions of the Petitioner

3. The Learned Counsel for the petitioner has submitted that the petitioner is a public limited company registered under the Indian Companies Act, 1956 primarily engaged in the manufacturing of wire, wire ropes, wire rods, wire drawings and allied machines, steel bars and billets, pig iron, bright bars, house wire etc. Further, it was submitted that it (Consumer number - R-2095) has commissioned 2 (Two) captive power plants in Tatisilwai, Ranchi of 10 MW capacity each in the year 2014.
4. It was pointed out that Clause A9 of the 2010 regulation provides for the facility of banking of surplus power generated by the C.P.P with the

Licensee/Discom with the intent of exercising its right to draw back this power from the grid in the future. Thus banking of energy is a process by which the petitioner exports power to the grid, not with the intention of selling it, but with the intention of utilizing it in the future.

5. It was pointed out that the agreement dated 14.03.2024 mirrors the 2010 regulation and thereafter on 19.07.2019 the petitioner and the respondent entered into this agreement.
6. It was argued that clause 9.4 of the 2010 Regulations provides for the surplus banked energy as on 31st March of a year (i.e. financial year) which was allowed to be carried forward to the subsequent financial year. This understanding was also reflected in the bills issued by themselves for the period 2014-15 to 2019-20. The petitioner craves leave to produce these bills as and when required.
7. It was pointed out that in the meanwhile the world was hit with an unprecedented devastation i.e. Covid-19 Pandemic. Since the outbreak of the virus was uncontrollable, the entire nation resorted to complete lockdown measures. In this regard reference may be made to the Order dated 24.03.2020, passed by the Ministry of Human Affairs under the Disaster Management Act 2005 by which a complete lockdown was imposed. These lockdowns were subsequently extended by orders dated 15.04.2020, 01.05.2020 and 17.05.2020.
8. It was further pointed out that due to the above mentioned restrictions placed upon the petitioner, it was unable to utilize surplus banked energy as on 31st March 2020.
9. It was submitted that the petitioner vide letter dated 27.02.2021, wrote to the Electrical Superintending Engineer, Electrical Supply Circle, Ranchi stating that in view of the lockdown due to Covid-19 Pandemic, its generating unit had come to a complete shutdown, it could not avail the surplus banked power of 496450 Units as on 31st March 2020 because of the sudden lockdown. It also referred to Clause 10 of the agreement dated 19.07.2019 which was related to Force Majeure events, and requested that the un-utilized banked energy as on 31st March 2020 be allowed to be utilized till 30th June 2020.

Accordingly, the respondent vide its letter dated 21.07.2022 stated that request of the petitioner could not be considered as the same did not come within the purview of the Order dated 21.09.2020 passed by JSERC in Suo Moto Case No. 15/2020. It was also stated that unutilized banked energy as on 31st March of the Financial Year shall be treated as sold in accordance with Clause A9 of 2010 Regulations.

10. It was submitted that the Order passed by this Hon'ble Commission in Suo Moto Case No. 15/2020 has no relevance to the adjudication of the present case since the claim of the petitioner is based on the Agreement entered upon with JBVNL. Further the non-adjustment of the surplus banked energy to the next Financial Year is already a matter of dispute in Case No. 10/22 which is pending for adjudication before this Hon'ble Commission. It was also pointed out that the said case does not have any bearing on the present dispute.
11. Learned Counsel has submitted that the petitioner vide letter dated 29.08.2022, replied to the aforesaid letter dated 21.07.2022 and stated that the

request of the petitioner is independent of Suo Moto Case No. 15/2020 and further Appeal No. 170/2020 filed before the Hon'ble APTEL. It was further stated that Covid-19 Pandemic and the resultant lockdown prevented the petitioner from performing the contract and utilizing the surplus energy. As such, the Force majeure Clause was attracted and the petitioner ought to be allowed to utilize the surplus banked energy as on 31st March-2020 till 30th June 2020.

12. The Learned Counsel for the petitioner has submitted that the respondent vide letter dated 27.12.2022 denied the request of the Petitioner by stating that the petitioner's request could not be accepted in terms of the Force Majeure Clause of the Agreement. Further, the respondents reiterated their stand regarding lapse of unutilized banked energy as on 31st March 2020.

13. It was submitted that due to this action of the Respondent, the Petitioner has been constrained to approach this Hon'ble Court under Clause A 10 and 11 of the 2010 Regulations.

14. It was emphasised that first and foremost it is necessary to establish that COVID-19 comes within clause 10 of the agreement between the parties, i.e. the force majeure clause as reproduced below:

"Force majeure means any event or circumstances, if such events beyond the reasonable direct or indirect control and without the fault or negligence of the party claiming "Force Majeure" conditions such as but not restricted to rebellion, mutiny, civil unrest, strike, lockout, non-availability of power due to shut down of generating units, /re explosion, flood, cyclone, lightning. Earth-quake was or other forces, accidents or Act of God or similar other causes beyond control..."

15. It was hardly doubted that the novel coronavirus and the measures of the lockdown emanating as a consequence thereof was beyond the reasonable control of the petitioner. Thus, the petitioner, due to no fault of its own and due to force majeure event resulting from the novel coronavirus, was compelled to suddenly discontinue its activity from 24th March 2020 onwards and was prevented from utilizing the surplus banked energy as on 31st March 2020 for the period of next three months.

16. Pertinently, in accordance with the directives from both the Central and State Governments, any attempt by the petitioner to reopen or sustain their business would have resulted in severe penal consequences under Sections 51 to 60 of the Disaster Management Act, 2005, as well as legal actions under Section 188 of the Indian Penal Code, 1860. It is noteworthy that the recognition of COVID-19 as a force majeure event has been extensively affirmed, supported by both government-issued circulars and judicial orders

17. It was pointed out that the Ministry of Finance, Department of Expenditure vide its office memorandum no. F18/4/2020-PPD dated 19.02.2020 has clarified that spread of coronavirus will be considered as a force majeure event. Accordingly, the Ministry of Power, Government of India, vide its letter no. 23/22/2019-R&R Part-4 dated 28.3.2020 addressed to the Central Electricity Regulatory Commission, has itself recognized COVID-19 as "an event of force majeure".

18. Likewise, the JSERC by its own order dated 24.04.2020 in Suo-moto Case

No. 6 of 2020 has noted that:

“The Commission has considered the above directions of the Government of Jharkhand issued under Section 108 of the Electricity Act, 2003 as the Ministry of Home Affairs (MHA), Government of India owing to the dangers posed by spread of COVID-19 vide directives dated 24th March 2020 has placed restriction on movement of public and opening of establishment and offices. The Ministry of Home Affairs (MHA), Government of India vide its order dated 15.04.2020 has also extended the restrictions period till 3rd May, 2020 to contain the spread of COVID-19 in the country with certain conditions. As such the consumers of various Electricity Distribution Licensees of Jharkhand State are facing difficulty in Electricity bills.”

19. It is indisputable that COVID-19 was an event beyond control of the petitioner, either directly or indirectly, and consequently falls within the scope of the force majeure clause, i.e., clause 10 of the Agreement. It is important to note that the respondents have not raised any doubt regarding COVID-19 being categorized as a force majeure event.
20. It was pointed out that the respondents did not dispute COVID-19 as a force majeure event, it was expected that they would have granted the petitioner's request to utilize the unutilized banked energy as on March 31, 2020. It is undeniable that the petitioner was unable to use the surplus banked energy during the initial three months of the financial year 2020-2021 due to restricted plant operations caused by COVID-19. Consequently, the right acquired by the petitioner as on March 31, 2020, to carry forward and utilize the surplus banked energy was thwarted by the force majeure event.
21. It is asserted and argued that the referenced cases are irrelevant to the current dispute, as they pertain to reliefs granted to electricity consumers, such as the waiver of demand or fixed charges. In the present case, the Applicant is seeking to invoke the force majeure clause to access the unutilized banked energy as on March 31, 2020, which was not utilized due to the impact of COVID-19
22. It was emphasised in the above mentioned cases before the Commission on a completely different footing and the relief asked by the petitioner in the present case is entirely different and does not come within the ambit of the order of this Commission in Sua Moto Case No. 15 of 2020. Only in order to deny the request of the Petitioner, the respondents have taken shelter of the order passed in Sua Moto Case No. 15 of 2020, though the same has no applicability to the present case.

Furthermore, in subsequent communications, the respondents altered their position by asserting that the Petitioner's request cannot be granted under the force majeure clause itself. They contended that according to the force majeure clause, no compensation or damage can be awarded to any party.

23. It was submitted that the above stand of the respondent is clearly misconceived and is based on an incorrect interpretation of the force majeure clause. The Applicant's request is for 'adjustment' of unutilized banked energy for the first three months of financial year 2020-2021. This is opposed to compensation / damages which come within the ambit of sections 73/74 of the Indian Contract Act, 1872.

24. It was submitted that the term 'compensation'/ 'damages' used in the Force Majeure clause relates to monetary liability of either party for failure to perform the contract. The petitioner request cannot be remotely connected to such compensation/damages. "Adjustment" is only of the unutilized surplus banked units as on 31.03.2020 which the Applicant could not utilize due to reasons beyond its control i.e. Covid-19.
25. In addition to the points mentioned above, it is crucial to highlight that the respondents have altered their stance from their initial response. Initially, they rejected the Petitioner's request solely on the grounds that it was not covered by Suo Moto Case No. 15 of 2020. However, to deny the petitioner's legitimate request, the respondents have subsequently introduced new arguments at later stages. Such a change in position is inconsistent and not in accordance with the expected conduct of an entity falling under the definition of 'State' as per Article 12 of the Constitution of India
26. The Learned Counsel for the petitioner has submitted that the respondent has pointed out clause 9.4 of the 2010 regulations and emphasised that the unutilized banked energy as on 31st March of a year, gets lapsed and cannot be carried forward.

Submission of the Respondents

27. The Learned Counsel for the respondent has submitted that the matter has already been decided by the Hon'ble Commission in the case of M/s Usha Martin Limited versus JUVNL bearing Case No.10 of 2022 vide judgment dated 12-06-2023 as reproduced below:

" With regard to unutilized banked energy, the banked energy at the end of the financial year, i.e. as on 31st March shall be treated as sold to the licensee".

28. It was further submitted that Force Majeure Clause has been taken into note in clause 10 of the CPP agreement signed on 19-07-2019. The same has been reproduced below for immediate reference:

"Force Majeure means any event or circumstances, if such even is beyond the reasonable direct or indirect control and without the fault or negligence of the party claiming Force Majeure conditions such as but not restricted to rebellion,mutiny,civilunrest,strike,lockout,non-availability of power due to shut down of generating units, fire explosions,flood,cyclone,lightning,earth quake, war or other forces, accidents or Act of GOD or similar other causes beyond control, neither party shall be entitled for claiming compensation or damage in the event of Force Majeure and planned shut down for the maintenance of system of both the parties."

29. It was pointed out that as per clause 10 of the executed agreement dated 19-07-2019 between M/s Usha Martin and JBVNL that ***in case of force majeure neither party of this agreement shall be entitled for claiming compensation or damage.*** So being a party of the noted agreement, the desirable compensation with regard to extension/pass on the unutilized banked energy as on 31st march FY 2019-20 for three months upto June-2020 is not justified.

Commission's Observation and findings

30. The Commission has considered the submission made by the parties and perused the materials available on records.

31. It is further observed that clause 9.4 of the JSERC (Utilization of surplus capacity of captive power plants based on conventional fuel) Regulations, 2010 provides as under:

“9.4 The unutilized banked energy during the year as on the 31st March of the subsequent year shall be treated as sold to the licensee at 65% of the applicable purchase rate of CPP generation.”

32. The Commission has taken into account the banking arrangements as mentioned in CPP agreement which as per clause 9.4 of the JSERC (Utilization of surplus capacity of captive power plants based on conventional fuel) Regulations, 2010 as mentioned above.

33. The Commission is of the view that the Force majeure conditions as referred to clause 10 of the mutual agreement between the parties provides as under:

“Force majeure means any event or circumstances, if such is beyond the reasonable direct or indirect control and without the fault or negligence of the party claiming “Force Majeure” conditions such as but not restricted to rebellion, mutiny, civil unrest, strike, lockout, on-availability of power due to shut down of generating units, fire explosions, flood, cyclone, lightning, earth quake, war or other forces. Accidents or Act of GOD or similar other causes beyond control, neither party shall be entitled for claiming compensation or damage in the event of “Force Majeure” and planned shut down for the maintenance of system of both the parties.”

34. The Commission has acknowledged that the instant case wherein the Petitioner couldn't avail fully the surplus power banked upto 31.03.2020 owing to covid-19 lockdown cited as Force majeure conditions and requested the Commission to direct the respondent to allow the petitioner to bank the unavailed banked power in the next three months.

35. In this context the Commission is of the view that the force majeure conditions arising from the COVID-19 pandemic has uniformly impacted various segments of the industry and society.

36. In Case No. 15 of 2020, the Commission cited the Suo-Moto proceedings and acknowledged its initiation based on directives from the Department of Energy, Government of Jharkhand, as conveyed through letter no. 1384/ACS dated 16.07.2020, invoking section 108 of the Electricity Act 2003. The Commission, responding to the lockdown measures implemented by the Government to curb the spread of Covid-19, issued a general notice in the public interest. Subsequently, the Commission received numerous suggestions and comments from the public, leading to the provision of relief to consumers. The specific details of the relief granted to consumers are outlined in the Commission's order:

I. *“Moratorium of three months for payment of electricity bills which were due between 01.04.2020 and 30.06.2020 without levying any delayed*

payment surcharge for all consumers of all the distribution licensee in the State of Jharkhand, till current month i.e. September 2020.

II. *Waiver of Demand/Fixed charges(provisionally) for the month of April, May and June 2020 for all industrial & Commercial consumers of all distribution licensee of Jharkhand.*

III. *The implementation of the above sub clauses should not have any adverse effect on the applicable tariff/rebate and other terms and conditions of supply.”*

37. The Commission vide Order dated 12.06.2023 in Case No. 10 of 2022 has already opined that the carry forward of unutilized banked energy from one financial year to another financial year was an act of negligence on the part of both the petitioner and the respondent. The relevant para is reproduced below:

“50. In the present case, it is observed that the petitioner was allowed by the licensee to carry forward its unutilized banked energy from one financial year to another financial year and it was an act of negligence on the part of both the petitioner and the respondent and the energy accounting settled previously cannot be allowed to continue prospectively against the provisions of the Regulations.”

38. Since the petitioner has prayed for Carry forward of the unutilized energy in an uncontrollable case of Force-majeure due to the Covid-19 Lockdown, the case may be viewed separately.

39. The Commission has considered that the Consumer has already availed the reliefs granted to it under Suo-moto Case No. 15 of 2020. Further, Covid-19 Lockdown had affected both the petitioner & the respondent, and maintaining a balance between the interest of both the petitioner & respondent is the responsibility of the Commission.

40. The Commission is of the view that allowing any extra relief to the petitioner, over and above the reliefs already granted to it under Suo-moto Case No. 15 of 2020, shall have an adverse impact on the financial health of the respondent.

In the result, it is ordered as:

ORDER

41. Considering the above facts & circumstances, it is a fact that the spread of Covid-19 is a Force-majeure condition as recognized by the Govt. of Jharkhand, but as per CPP Agreement between petitioner & respondent neither party will be entitled for any relief or compensation of any kind during Force-majeure condition. Hence the petitioner’s prayer is rejected.

42. The Petition stands disposed off accordingly.

Sd/-
Member (Tech.)

Sd/-
Member (Law)

Sd/-
Chairperson