



25. Regulation 8.5 in clear terms enables the party to amend the provisions of the connection agreement. If both parties agreed that due to law and order situation, Petitioner's ability to commission the project is impacted then it is reasonable for the transmission licensee being a state instrumentality to allow change in the connectivity location. Relevant provision of the Regulations is extracted below:

"8.5 In case of modification to existing or proposed point of connectivity due to any non-material change such as re-allocation of bays etc. by either of the parties of the connection agreement, if mutually agreed, an amendment to the connection agreement shall be executed between such parties subject to prior approval of the Nodal Agency."

26. The Hon'ble Supreme Court of India in *Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489, provides that when an instrumentality of state enters into a contract, it is required to act in fair manner.

27. Further, the ability of the Petitioner to perform its obligations towards construction of the Project has been severely impacted due to difficulty faced by it in acquiring the land. The Petitioner availed connectivity for supplying power to its consumers for which construction of generating station is a pre-requisite. However, construction of the generating station has become difficult due to occurrence of Force Majeure events which has led to impossibility of performance of its obligations.

28. The events which have led to the impossibility of performance of the Petitioner's obligations are again summarized below:

(a) Landholding in the region is diversified and requires dealing with more than 2000 individuals. Under the influence of external forces, these individuals are refusing to execute any lease deed.

(b) Those who have executed the Consent to Lease agreements are threatening that the same will be withdrawn.

(c) Few landowners even cancelled the lease deeds already executed.

(d) The land of the Petitioner wherein the Project is to be developed is dominated by bunch of criminals/gangsters and therefore, it was difficult to develop the project in the said area since grievance with these people would lead to threat to the lives of the Petitioner and its workers.





29. Further, Section 56 of Indian Contract Act 1956 provides when a contract is executed between the parties to perform an act, however, after execution of the contract if the performance of contract becomes impossible or, by reason of some event which the promisor could not prevent, then contract is rendered void when the act becomes impossible. The essential ingredient of the Doctrine of Impossibility is that performance of contract becomes impossible due to some circumstances which are beyond the control of the parties and the purpose of the contract ceases to subsist.
30. Petitioner has made all prudent efforts to ensure completion of the generating project despite being hit by Force Majeure however, owing to the supervening events, the performance of obligations has become impossible.

UPNEDA Reply dated 06.11.2023

31. Force Majeure is neither statutory relief nor a relief in equity. Force Majeure is a contractual remedy which is defined in clause 10 of the Connection Agreement.
32. Connection Agreement was executed by and between Petitioner and UPPTCL only, on the basis of which Force Majeure has been claimed and the jurisdiction of the Commission has been invoked. UPNEDA is not a party to the Connection Agreement, hence no relief lies against UPNEDA.
33. A bare perusal of the Petition itself and the relevant provisions of law would further show that UPNEDA had no role to play in the transaction between the Petitioner and UPPTCL. Further, none of the reliefs claimed have been claimed as against UPNEDA.

UPPTCL's Supplementary Affidavit dated 15.12.2023

34. As per the intention of State Government policy to promote investment in the State of U.P., UPPTCL wrote a letter to UPNEDA to facilitate the land acquirement. As UPSTU, it has to do nothing with the land acquirement/procurement by Petitioner. If Petitioner wishes to take letter of facilitation by UPPTCL to UPNEDA as an acceptance of force majeure then Petitioner is trying to mislead.
35. The material change has been defined by the Commission in Regulation 6.3 of the Connectivity Regulations where change in location is construed to be a material change and same is not applicable to amend the agreement. Therefore, change in location is a material change, and for that a fresh application needs to be made by the applicant.

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36. The judgement as stated by the Petitioner does not apply in the present case, as the facts and circumstances are different.

Petitioner's Additional Affidavit dated 20.03.2024

37. Letter dated 05.09.2022 from farmers demanding immediate cancellation of lease deed is filed which establishes the submission that Petitioner has been compelled by external factors to surrender the land acquired by it.

38. Additionally, even UPERC (Grant of Connectivity to intra-State Transmission System) (First amendment) Regulations, 2024 ("Amended Connectivity Regulations") takes into consideration that there can be implementation issues in development of projects and accordingly, allows change of connectivity to the extent of 50%. Regulation 8A-4 clearly states that where the developer is unable to implement the project then it will get an opportunity to get new connectivity to at least 50% of the previous connectivity and will revoke previous connectivity. It is only if it fails to achieve COD of the entire capacity under fresh application of connectivity then the BG will be encashed. Therefore, it is imperative that Petitioner allows connectivity at a new location under the same fee schedule without forfeiting its existing bank guarantee.

Hearing dated 04.04.2024

39. Ms. Anukriti Jain appearing on behalf of Petitioner submitted that the Commission vide Order dated 05.03.2024 had directed Petitioner and Respondents to file requisite documents within two weeks. In compliance of the same, the Petitioner has filed its additional affidavit dated 20.03.2024, which has also been served upon the respondents.

40. She further submitted that the Petitioner has demonstrated that there is a difficulty in the land acquisition process which has led to current difficulty in implementation of the project. The Petitioner in its additional affidavit dated 20.03.2024 has also annexed letter dated 05.09.2022 from the farmers demanding immediate cancellation of lease deed, which establishes that it has been compelled by external factors to surrender the acquired land.

She further added that the Amendment Connectivity Regulations itself provide that if there is a difficulty in implementation of the project, then a second chance will be given to the generator if at least 50% of new connectivity is taken. Therefore, the Petitioner

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may be given a second chance as the Petitioner is going to shift the project/ investment at other location within the State.

41. Sh. Puneet Chandra appearing on behalf of UPPTCL submitted that no application of new connectivity on behalf of Petitioner is received by UPPTCL.

Commission's view

42. The Commission has taken note of submissions placed by the parties. The Petitioner has requested to allow the Petitioner to transfer the investment and development of 70 MW Solar PV Power Plant, situated at Lalganj, Azamgarh Uttar Pradesh to some other part of the State and further grant feasibility and connectivity at the new location under the same fee schedule without forfeiting the Bank Guarantee dated 06.02.2021 (as amended on 11.01.2023).
43. In this regard, it is observed that the Commission has recently finalized the first amendment to UPERC (Grant of Connectivity to intra-State Transmission System) Regulations 2010, which deals with the cases where project has failed to take place at a particular location due to implementation issues but the developer is still keen to invest in the State however, the developers desires to implement the power plant considering new connectivity. In such circumstances, the amended Regulations provides for the treatment of BG if full cancellation of connectivity is sought due to implementation issues and at the same time a new connectivity on different location is sought for at least 50% of such previous capacity. The Regulations provide that if new connectivity is sought for at least 50% of the previous capacity then, previous BG shall be returned along with new BG of fresh connectivity, when COD is achieved for full capacity under new connectivity. The relevant provision is reproduced below:

"8A-4 If applicant before encashment of Conn-BG2 under clause 8A-2 seeks full cancellation of connectivity granted to it due to implementation issues, then applicant will submit such request describing the implementation issues hindering his connectivity along with a copy of fresh application for seeking new connectivity for at least 50% of such capacity (which shall not be less than 5 MW) for which full cancellation of connectivity has been sought. In such case the Nodal Agency shall within fifteen (15) days of such request revoke the initial connectivity for which cancellation has been sought and shall return Conn-BG2 for cancelled connectivity once the applicant achieves COD of generating station / of electrical plant or electric line for full capacity under fresh application of connectivity:

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Provided that in case applicant is unable to achieve COD of entire capacity under fresh application of connectivity, notwithstanding anything contained under clause 8A-2 regarding return of Conn-BG2, entire Conn-BG2 for cancelled connectivity along with Conn-BG2 under fresh application of connectivity shall be encashed by the Nodal Agency."

44. In view of above, the Amended Connectivity Regulations provide a mechanism under which the Petitioner can seek cancellation of connectivity at 132 kV Substation Lalganj and seek new connectivity for at least 35 MW capacity (i.e. 50% of 70 MW) at an alternative location. Further, with respect to estimated amount submitted by the Petitioner towards construction of 132 kV feeder bay at 132 kV Substation Lalganj, the Commission is of the view that if construction work of 132 kV bay has not been carried out by UPPTCL then holding the amount towards bay, which is neither constructed and not to be used by the Petitioner, may not be in the interest of justice. Therefore, UPPTCL shall return the amount to extent of the work, which has not taken place (i.e. amount towards that work/ construction, which has not yet been carried out, shall be either refunded, or adjusted for in construction of bay at new connectivity). Further, the application fee as deposited by the Petitioner for old connectivity shall not be refunded/adjusted as the application has already been processed. Accordingly, the application fee shall be borne by the Petitioner.

45. With the above directions, the Petition is disposed of.

(Sanjay Kumar Singh)

Member

(Vinod Kumar Srivastava)

Member (Law)

(Arvind Kumar)

Chairman

Place: Lucknow

Dated: 02 .05.2024

