

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 21/MP/2013**

**Sub:** Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Articles 13.2.(b) of the Power Purchase Agreement dated 07.08.2007 executed between Sasan Power Limited and the procurers for compensation due to change in law during the construction period.

Date of Hearing : 10.10.2013

Coram : Shri V. S. Verma, Member  
Shri M. Deena Dayalan, Member  
Shri A. K. Singhal, Member

Petitioner : Sasan Power Limited, Mumbai

Respondents: : MP Power Management Company Ltd. & Others

Parties present : Shri J.J.Bhatt, Senior Advocate, SPL  
Shri Vishrov Mukherjee, Advocate, SPL  
Ms. Ritika Arora, Advocate, SPL  
Shri P.Venkatarao, SPL  
Shri Arun, Dhillon, SPL  
Shri N. K. Deo, SPL  
Shri Raj Verma, SPL  
Shri Sandeep S. Mysetty, SPL  
Shri Mayank Gupta, SPL  
Shri Srikant, SPL  
Shri Vivek Kejirwal, SPL  
Shri R.S.Johri, SPL  
Shri G.Umapathy, Advocate, MPPMC  
Shri M.G.Ramchandran, Advocate, HPPC  
Shri Poorva Saigal, Advocate, HPPC  
Shri Apoorve Karol, Advocate, HPPC  
Shri Padamjit Singh, PSPCL  
Shri T.P.S.Bawa, PSPCL  
Ms. Shobana Masters, Advocate, BRPL and BYPL  
Shri Himansu Chauhan, BRPL  
Shri Alok Shankar, Advocate, TPDDL  
Shri S.S.Barpanda, NLDC  
Ms. Jyoti Prasad, NLDC

## Record of Proceedings

Learned Senior Counsel for the petitioner submitted that the present petition has been filed for compensation for increase in capital cost of the project due to change in law during the construction period.

2. Learned Senior Counsel submitted that as directed by the Commission during the hearing on 14.3.2013, the petitioner and the procurers discussed the issues raised in the petition in the meeting held on 20.4.2013 and the procurers agreed that the items are covered under change in law under Article 13 of the PPA and the petitioner is entitled for relief in accordance with the formula prescribed under Article 13.2(a) of the PPA. However, there was no consensus regarding the quantum to be admitted. The said Minutes have been placed on record by the lead procurer, Madhya Pradesh Power Management Company Ltd. (MPPMCL). Learned Senior Counsel submitted that the procurers have subsequently raised certain objections to the claims of the petitioner.

3. Learned Senior Counsel submitted that Article 13.2 of the PPA provides that while determining the consequences of change in law, the parties shall have due regard to the principle that the party affected by such change in law is restored through monthly tariff payment, to the extent contemplated in Article 13 to the same economic position as if such change in law has not occurred. Learned Senior Counsel submitted that aggregate final impact on the project on account of change in law is about ₹1330 crore.

4. Learned Senior Counsel submitted that this Commission has the jurisdiction to adjudicate the claims and grant relief to the petitioner in terms of Article 13 read with Article 17 of the PPA and para 15.7 of the Competitive Bidding Guidelines issued by the Government of India.

5. Learned Senior Counsel broadly dealt with the item-wise claims under change in law as under:-

- (a) The definition of 'change in law' under Article 13.1 includes any change in the declared price of land for the project, the cost implementation of R&R plan and the cost of compensatory afforestation for coal mines. Therefore, the increase in the price of land, the cost of implementation of R&R plan and the compensatory afforestation are covered under change in law for which the petitioner has to be compensated.
- (b) The withdrawal of exemption from payment of excise duty in the Union Budget which was later included in the Finance Act, 2012 amounts to change in law as defined under Article 13.1 of the PPA.
- (c) Notification 21 of 2012-Customs issued by the Ministry of Finance, Government of India, has granted 100% exemption from the custom duty to goods required for setting up of any mega power project. Since the mines are an integral part of

project, it is entitled for exemption from custom duty on import of equipments required for operation of the mines. However, Ministry of Power vide its Office Memorandum dated 17.6.2011 intimated the Government of Madhya Pradesh that the exemption from custom duty for UMPP is given only with respect to the power equipments. The decision of the Ministry of Power which results in denial of custom duty exemption on the mine equipments amounts to change in law under Article 13.1 of the PPA, for which the petitioner needs to be compensated.

- (d) As per provisions of the RFP, the procurers were required to provide water intake study report. The procurers made available the study conducted by WAPCOS to all the bidders before the submission of the bid according to which the cost of water intake system was indicated as approx. ₹92 crore. The said estimate was factored in the bid at the time of submission of financial bid. After the petitioner was acquired by Reliance Power Limited, WAPCOS was tasked with confirming the technical feasibility during the detailed engineering exercise. WAPCOS after conducting another detailed study determined that a new location for water intake system would be suitable. The new location was 23 Kms. from the power plant as against the initial distance of 12.5 Kms. indicated at the time of bidding. Due to increase in distance, the cost of water intake system has been increased to ₹152 crore. The procurers are obligated to compensate the petitioner for the difference in cost due to increase in the distance of the water intake system.

6. As regards the claims for custom duty on mining equipment, the Commission observed that the petitioner while quoting the bid was aware that exemption from custom duty was not available on mining equipment as the Notification No. 21/2002 of Ministry of Finance did not include the mining equipment. The petitioner should have factored the same while quoting the bid and it is not reasonable to interpret the PPA at this stage to claim the relief. In response, learned senior counsel submitted that the said notification, only mentions the description of goods required for setting up the Mega Power Project. However, in the PPA, project has been defined as "power station and the captive coal mines undertaken for design, financing, organizing, procurement, construction, operation, maintenance, repair, refurbishment, development and issuance by the seller in accordance with the terms and condition of the agreement". The definition of the 'project' in the PPA read with the notification of Ministry of Finance can be reasonably interpreted to say that power plant includes captive coal mines and any equipment required to explore the coal mines can be taken as part of the power project.

7. As regards the water intake system, the Commission desired to know the justification for second study of the water intake system by WAPCOS. Learned Counsel referred to the report of WAPCOS at page 918 of the petition and submitted that as per the said report, during the detailed survey it was found that sufficient depth is not available for intake well as bed level of the reservoir is around 252.5 meter and was in small patches. After detailed survey, Location 'A' which is connected by deep valley was proposed for water intake.

8. Learned Senior Counsel submitted that aggregate impact on the capital cost of Sasan UMPP due the actual and estimated expenditure is ₹1330 crore. The increase in capital cost has occurred during the construction period of the project and the petitioner is entitled to compensate for the same. Learned Senior Counsel further submitted that as per Article 13.3(a) of the PPA, for every cumulative increase of ₹50 crores in capital cost, the non-escalable charges shall be increased by 0.267%. However, in the present case, the mechanism provided under Article 13.2(a) of the PPA is not sufficient to restore the petitioner to the same position as if the change in law has not occurred. By applying the provisions of Article 13.3 (a) of the PPA, the petitioner could only be able to recover ₹169 crore over the term of the project instead of ₹1330 crore which the petitioner would incur for the reasons beyond its control. Learned Senior Counsel submitted that it could not have been within the contemplation of the parties at the time of entering into PPA that the capital cost would increase by ₹1330 crore on account of change in law. In the model power purchase agreement circulated by Ministry of Power, Government of India, the mechanism for adjustment of increase in cost provided under Article 13.2 (a) of the PPA has been done away with and the seller has been permitted to claim the entire increase in cost. The Commission may exercise its regulatory powers to devise a mechanism by which the impact on the capital cost of the project on account of change in law is addressed. Learned senior counsel took the Commission through the detailed calculation of various items included under change in law.

9. The Commission observed that the petitioner has sought the compensation for being restored to the same economic position as if the change in law has not occurred. The Commission desired to know whether economic position of the consumers is being protected by allowing the claimed expenditure under change in law. Learned Senior Counsel for the petitioner referring to the preamble of the Act submitted that the Act seeks to take measures conducive to the development of electricity industry and promoting competition while protecting the interest of consumers. Therefore, the interest of the generators and the consumers needs to be balanced. Learned Counsel further submitted that after allowing the reliefs claimed by the petitioner, its tariff will be lesser than the tariff quoted by L-2 bidder and therefore, it will not be against the interest of consumers.

10. Learned counsel for the MP Power Management Company Limited referring to the reply dated 29.8.2013 submitted as under:

- (a) It has been decided in the meeting between the petitioner and the procurers that reliefs to the petitioner should be granted strictly as per the PPA. Article 13.2 of the PPA provides for compensation to the party 'to the extent contemplated in the Article 13' to restore the affected party to the same economic position as if such change in law has not occurred. Therefore, the compensation is not envisaged to be 100%, but only as provided in Article 13. While actual compensation being claimed is ₹1330 crore, under the PPA provision of increase in capacity charge being 0.267% of the non-escalable capacity charge, the allowable compensation would only be ₹169 crore.

(b) Had the petitioner sought 100% compensation while submitting the bid, it would have been seen as a major technical deviation and the bid would not have been considered in the first place. The petitioner is seeking relief beyond the scope of the PPA.

(c) The expenditures incurred by the petitioner with regard to increase in cost of geological report for coal blocks and increase in cost of water intake system exceed the estimates given by procurers' authorized representative prior to bid submission and, hence they are not covered under change in law.

11. The Commission observed that the first study of the water intake system was undertaken by WAPCO at the behest of the procurers but subsequently WAPCOs have clarified that the earlier system was not an appropriate system and enquired whether the petitioner is responsible for the change of water intake system. Learned Counsel for MPPMCL clarified that shifting of the water intake system cannot be covered under 'change in law'.

12. Learned counsel for HPPC referring to the affidavit dated 3.6.2013 submitted as under:

(a) Unless the construction period is completed, there is no question of taking up the issues as to whether change in law has occurred and how far the capital cost has to be adjusted under change in law. The petition is premature at this stage.

(b) The issue of commercial operation date is under the consideration of the Commission. If the construction period lingers on for some more time, then the petitioner would be required to pay additional compensation to the procurers which should be adjusted before any relief under change in law is granted.

(c) It is not merely a petition for change in law but it is a petition for compensatory tariff. On the one hand, the petitioner is seeking relief under the PPA and on the other hand, it is seeking exemption from the conditions of change in law.

(d) The petitioner was aware that relief allowed under change in law is limited to 0.267% of non-escalable capacity charge quoted for every increase of each ₹50 crores in the capital cost. No objections were taken by the petitioner at the time of participation in the bid. Having accepted the terms and conditions the petitioner cannot seek the relief under Section 79 (1) (b) of the Act over the above the limitations placed in favor of the petitioner.

(e) In terms of Article 13.1.1 of the PPA, the petitioner can claim any change in (a) declared price of land for the project or (b) the cost of implementation of the resettlement and (c) rehabilitation package of the land for the project specified in RFP.

(f) As regards the charges claimed in respect of mining activities, at the first instance are not applicable as per law prevalent at the time of bidding, besides the coal mined from linked mines is not exclusively for the project and the fact that the petitioner can use the coal for other purposes needs to be taken into account. The financial benefits accruing from mines should be taken into account to reduce the cost of acquisition of land required for the mines.

(g) Water intake is a judgment by Bid Process Coordinator and is covered under disclaimer clause in the PPA. The petitioner was required to take into account the actual requirement before making the bid.

(h) The Finance Act clarifies that cement and steel going into construction activity of the power plant are not eligible for the benefit of custom and excise duty exemption. The petitioner should produce a notification allowing exemption of cement and steel for construction of power plant from excise and custom duty which has been withdrawn in order to qualify under change in law.

(i) Article 13 of the PPA does not provide for any exemption from customs duty on mining equipment. Ministry of Power vide its letter dated 16.5.2011 clarifies the position that the exemption is available only for power equipment. The clarification does not amount to imposition of customs duty on mining equipments which was till then exempted.

(j) A news item has occurred that although the petitioner is claiming expenditure on afforestation, nothing has been done on ground. The respondent will place the said news item on afforestation on record.

13. The representative of PSPCL adopted the submission of the learned counsel for Haryana. He submitted that the construction period has not been frozen and therefore the petition is premature. The representative of the PSPCL further submitted that the captive coal block is not exclusive for the project which is clear from the CAG report that coal from this project is being utilized in the Chhitrangi projects of the petitioner for supply of power to Madhya Pradesh and Uttar Pradesh. Therefore, the coal mines are not exclusive to the project and the expenditure on development of mines cannot be considered to the procurers of Sasan UMPP. He further referred to a report in the Economics Times regarding a CAG report tabled in the Parliament which records that exemption from afforestation was granted to the petitioner.

14. Learned counsel for the Tata Power Delhi Distribution Ltd submitted that while the rated capacity of each unit is 660 MW, the contracted capacity is 620.4 MW. Even if compensation is going to be allowed only, the quantum proportionate to the contracted capacity should be charged from the procurers and the balance should be borne by the petitioner. Learned Counsel further submitted that change in cost of geological report of coal mines, increase in the cost of water intake system, levy of excise duty and custom duty are not covered under change in law. Learned Counsel further submitted that the PPA provides that the tariff would be revised only to the extent of 0.267% of non-

escalable component of capacity charges for every cumulative increase of ₹50 crores in the capital cost. If that calculation is not working today, it is on account of the petitioner and cannot be recovered from the procurers. He further submitted that Para 2.7.2.3 of the RFP does not permit any change in financial adjustment arising due to lack of clear information on site conditions, laws and regulations and other related information or its effect on the bid. In the event WAPCOs study was not upto the mark, it was the risk of the petitioner and therefore, the claim is not in accordance with the PPA or RFP. If WAPCOS report had any difficulty, then the petitioner should raise a dispute with WAPCOS for deficiency of service and cannot be claimed under change in law.

15. Learned counsel for BRPL and BYPL submitted that the claims made by the petitioner should be considered as 'Change in law' events under the PPA and necessary reliefs be granted.

16. Learned Senior Counsel for the petitioner in his rejoinder submitted as under:-

- (a) As regards the contention of the respondent that this petition is premature till the COD question is decided, learned senior counsel submitted that COD issue is different from the claims under 'change in law', and whatever the Commission decides regarding change in law would be effective from the date of COD.
- (b) So far as the increase in cost of land is concerned which the petitioner has purchased, the petitioner can approach the Commission any time even before the declaration of COD. Therefore, the COD is not relevant for adjudication of the claims of the petitioner.
- (c) As regards the custom duty, custom notification merely says that goods required for setting up of Mega Power Project so certified. Mega Power Project is not defined in the custom notification. Learned Counsel refers to Ultra Mega Power Project Policy and submitted that the policy itself includes the coal mines as part of the Ultra Mega Power Project.
- (d) The e-mail from PFC dated 23.10.2006 to all bidders give the indicative declared price of land of the project including the water pipelines corridor. This information was given under Article 13.2.1. When there is a change in the cost, the petitioner is entitled for relief under Change in Law.
- (e) As regards the respondent's contention that both the reports of WAPCOs was obtained by Sasan Power Limited, Learned Senior Counsel clarified that the first report was obtained by Sasan Power Limited as representative of the procurers and second report was obtained by Sasan Power Limited as fully owned subsidiary of Reliance Power Limited.
- (f) As regards the construction of Article 13.2 of the PPA, Learned senior counsel submitted that the said provision contemplates to cover the entire Article 13 and is not confined to Article 13.2 only. Learned Senior Counsel submitted that

Article 13.2 is an indicative formula and if the relief is less compared to the actual expenditure, then the Commission can compensate the petitioner in terms of its power under Article 13 of the PPA and regulatory power of the Commission.

17. After hearing the learned senior counsel for the petitioner, learned counsels for the MPPC, HPPC, TPDDL BRPL and BYPL and representative of the PSPCL, the Commission directed the respondents to file their written submissions, if any, with an advance copy to the petitioner, by 31.10.2013. The Commission also directed PSPCL to file the CAG report and the petition to file the customs notification.

18. Subject to the above, the Commission reserved order in the petition.

**By order of the Commission**

**sd/-  
(T. Rout)  
Chief (Legal)**