

**CENTRAL ELECTRICITY REGULATORY COMMISSION,
NEW DELHI**

**Petition No.156/MP/2014
with I.A. No. 35/2014**

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

**Date of Hearing: 27.11.2014
Date of Order: 13.10.2015**

In the matter of

Petition under section 79 of the Electricity Act, 2003 read with Article 13 of the Power Purchase Agreements dated 7.8.2008 executed between Uttar Haryana Bijli Vitran Nigam Ltd /Dakshin Haryana Bijli Vitran Nigam Ltd. and Adani Power Ltd.

And

In the matter of

Adani Power Limited
Shikhar, Near Mithakhali Circle,
Navrangpura, Ahmedabad-380 009

.....Petitioner

Vs.

1. Uttar Haryana Bijilli Vitran Nigam Limited

2. Dakshin Haryana Bijili Nigam Limited

Through their joint forum:
Haryana Power Purchase Centre,
Shakti Bhawan, Sector-6,
Panchkula, Haryana

Respondents

Parties Present:

Shri Amit Kapur, Advocate, APL
Ms. Poonam Verma, Advocate, APL
Shri Gaurav Dudeja, Advocate, APL
Shri Malav Deliwala, APL
Shri M.G.Raamchandran, Advocate, Haryana Utilities
Ms. Anushree Bardhan, Advocate, Haryana Utilities

ORDER

The petitioner, Adani Power Limited, has filed the present petition under section 79 of the Electricity Act, 2003 (the Act) read with Article 13 of the Power

Purchase Agreements dated 7.8.2008 claiming compensation for 'Change in Law' events which have adverse financial impact on the cost and revenue of the petitioner for sale of electricity to the respondents. The petitioner has made the following prayers:

(a) Declare that the subsequent events as mentioned above are events of 'Change in Law';

(b) Direct the Respondents to make the payment of the compensation in accordance with the methodology as indicated in the petition for the aforementioned Change in Law events from the date of commencement of power supply under the respective PPA's till the date of order;

(c) Direct the Respondents to pay in the interim 95% of the amount payable towards Change in Law from the date of commencement of supply till date subject to adjustment based on final order of Hon`ble Commission;

(d) Direct the Respondents to pay Late Payment Surcharge as applicable under the PPAs for the period of delay from the date of notification of Change in Law;

(e) Direct the Respondents to make payment for the future claims of Change in Law events mentioned in this petition at applicable rates prevailing from time to time as per the methodology approved and in accordance with the terms and conditions of the PPA.

(f) Pass such further order(s) as this Hon`ble Commission may deem just and proper in the fact and circumstances of the case and in the interest of justice."

2. The petitioner, a subsidiary of Adani Enterprises Ltd, has set up a generating station with a total capacity of 4620 MW in the Special Economic Zone at Mundra in District Kutch in the State of Gujarat (hereinafter "Mundra Power Project"). Mundra Power Project of the petitioner consists of 4 units of 330 MW each subcritical and 5 units of 660 MW each supercritical technology.

3. Based on the Competitive Bidding carried out by Haryana Power Generation Corporation Ltd. (HPGCL) on behalf of the distribution companies in the State of Haryana, namely, Uttar Haryana Bijli Vitran Nigam Ltd. and Dakshin Haryana Bijli Vitran Nigam Ltd., the petitioner emerged as the successful bidder for supply of 1424 MW to Haryana Utilities. Accordingly, PPAs were executed between Adani

Power Ltd. and UHBVNL/DHBVNL on 7.8.2008 for supply of 1424 MW of power from Units 7,8 & 9 of the Mundra Power Project.

4. The petitioner has submitted that certain events have occurred after 7 days prior to the bid deadline (i.e. 19.11.2007) which qualify as change in law for the purpose of compensation under Article 13.1.1 of the PPA. These events are as under:

- (a) Installation of Flue Gas Desulphurizer (FGD) as a condition imposed by Environment Clearance dated 20.5.2010;
- (b) Increase in Auxiliary Consumption from 6.5% to 8.42% on account of increase in Auxiliary Consumption due to FGD impacting Capacity Charges;
- (c) Additional Operational Expenditure on FGD;
- (d) Levy of Customs Duty on electricity exported from SEZ to Domestic Tariff Area as imposed by section 60 of the Finance Act, 2010;
- (e) Levy of Green Energy Cess pursuant to enactment of Gujarat Green Cess Act, 2011 read with Gujarat Green Cess Rules, 2011;
- (f) Change in rate of royalty payable on domestic coal as imposed by Government of India Notification dated 10.5.2012 @ 14% ad-valorem on the price of coal;
- (g) Increase in sizing charges of coal charged by Coal India Ltd. Vide notification dated 17.6.2014;

- (h) Change in Surface Transportation charges charged by Coal India Ltd.;
- (i) Levy of Central Excise Duty on domestic coal imposed by Finance Act, 2011 and 2012;
- (j) Levy of clean energy cess on coal by Finance Act, 2010 and Notification No.20 of 2014 dated 11.7.2014;
- (k) Increase in Busy Season Surcharge on transportation of coal through railways;
- (l) Increase in Developmental Surcharge levied on transportation of coal by railways;
- (m) Levy of service tax on transportation of goods by railways;
- (n) Change in pricing of coal from Useful Heat Value basis to Gross Calorific value with effect from 1.1.2012;
- (o) Change in classification of coal for trainload movement;
- (p) Levy of minimum alternate tax on power plants situated in SEZ under sub-section (6) of section 115JB of Income Tax Act, 1961;
- (q) Linking railways tariff revision with movement in cost of fuel.

5. The petitioner has submitted that the expenditures on the above accounts result in the change in the cost of or revenue from the business of selling electricity by the petitioner to the beneficiaries in terms of the PPAs and therefore, the petitioner needs to be compensated for such change in law events in accordance

with the provisions of the PPAs. The petitioner has submitted that the present petition has been filed seeking directions to Haryana Utilities to make payment of the Change in Law events mentioned in the petition.

6. The petitioner has submitted that the Commission while disposing of Petition No. 155/MP/2012, vide order dated 21.02.2014 observed that allowing the impact of the Change in Law events would enlarge the scope of the petition and directed Haryana Utilities to consider the Change in Law claims of the petitioner within two months. The Commission had also given liberty to the petitioner to approach the Commission if the claims were not amicably settled. Accordingly, the petitioner raised the invoice dated 14.4.2014 towards the compensation for 'Change in Law' events for the month of March, 2014. Thereafter, the petitioner also raised invoices for the months of March, April and May 2014 as well as for the period from 7.8.2012 to 28.2.2014. However, Haryana Utilities have till date not made any payment. Haryana utilities vide letter dated 8.7.2014 denied the claims of the petitioner towards 'Change in Law' on the ground that the PPA provides for Appropriate Commission to determine the quantum of increase/decrease in tariff consequent to claims of 'Change in Law' and in this case Haryana Electricity Regulatory Commission is the Appropriate Commission. The petitioner has submitted that the objections raised by Haryana Utilities cannot be sustained as the present petition has been filed by the petitioner in compliance with the directions of the Commission in order dated 21.2.2014. Haryana Utilities are re-agitating the issues already settled by this Commission. Moreover, the petitioner has a composite scheme for generation and supply of power in more than one State and hence the Commission has the jurisdiction to adjudicate the dispute.

7. After hearing the petitioner and respondents, the petition was admitted and the respondents were directed to file their replies. The respondents vide affidavit dated 10.9.2014 have filed a joint reply to the petition and the petitioner has filed its rejoinder on 19.11.2014. The matter was heard on 27.11.2014 on the issue of maintainability of the petition.

8. The main objections of Haryana Utilities in their reply and during the hearing on the issue of maintainability of the claims in the petition before this Commission are as under:

(a) The petitioner is wrongly claiming jurisdiction of this Commission under section 79(1)(b) of the Act when the claims raised by the petitioner are in respect of Haryana Utilities only, and therefore, there is no composite scheme for generation and sale of electricity in more than two States;

(b) The petitioner had earlier filed Petition No.1210 of 2012 for the effect of change in law in regard to generation and sale of electricity under the PPA dated 2.2.2007 with GUVNL before the Gujarat Electricity Regulatory Commission (Gujarat Commission). The petitioner proceeded with the said petition before Gujarat Commission even after filing of the Petition No.155/MP/2012 in regard to relief for the impact of Indonesian Regulations. The filing of petitions before the Gujarat Commission by the petitioner was clearly on the basis that in so far as the Change in Law issues are concerned, there is no composite scheme within the meaning of section 79 of the Act even though there was generation and sale of electricity from Mundra Power Project as a whole (Units 1 to 9) to more than one State.

(c) The present case does not fall within the scope of section 79(1)(b) of the Act due to several reasons. Firstly, Simpliciter sale of electricity from a generating station to more than one State does not constitute a composite scheme. The Commission's jurisdiction is envisaged under section 79(1)(b) of the Act for combined procurement process envisaged in para 2.4 of the Competitive Bidding Guidelines. Secondly, there is no common procurement nor common tariff for the composite scheme to come into being as held by the Appellate Tribunal in Appeal Nos. 228 & 230 of 2006 (M/s PTC India Ltd Vs. CERC & Others) and Appeal No. 94 of 2012 (BSES Rajdhani Power Ltd. Vs DERC).

(d) Order dated 16.12.2010 in Petition No.155/MP/2012 and order dated 16.1.2013 in Review Petition No. 26/2012 are not applicable to the facts of the present petition. In the order dated 16.12.2012, this Commission held that the petition No.155/MP/2012 was maintainable before the Commission since the petitioner raised issues which were common to both States namely, Haryana and Gujarat whereas in the present case the issues raised are not common to both States.

(e) As regards the contention that Haryana Utilities did not challenge the orders dated 16.10.2012 and 16.1.2013 and therefore, they were estopped from raising the above issues, it has been submitted that the said orders are not decrees in terms of section 2(2) of the Code of Civil Procedure, 1908, since there is no formal adjudication of the rights of the parties in the said orders. Haryana Utilities have relied on the judgement in Barkat Ram Vs Sardar Bhagwan Singh {AIR 1943 LAHORE 143} to contend that finding on

the question of jurisdiction and limitation cannot be treated as a decree. Haryana Utilities have further submitted that as decided by the Supreme Court in a number of cases, every order passed by a court cannot be challenged and all issues of such challenges to the interlocutory order can be taken up with the final order.

9. The submissions of the petitioner in the written pleadings and during the course of hearing on the issue of maintainability are as under:

(a) The present petition has been filed by the petitioner in compliance with the directions of the Commission in order dated 21.2.2014 in Petition No.155/MP/2012 wherein the Commission in para 95 has held that “the petitioner may approach the utilities under the provisions of the PPA for compensation on account of change in law and may approach this Commission if the matter is not amicably settled.” In Appeal No.98 of 2014 filed by the Haryana Utilities challenging the said order, no challenge has been made to the above quoted directions of the Commission. Therefore, the finding of the Commission at para 95 of the said order has attained finality.

(b) Haryana Utilities are re-agitating the issue of maintainability which has already been decided by the Commission in the order dated 16.10.2012 in Petition No.155/MP/2012 wherein Haryana Utilities were parties. Therefore, the issue of jurisdiction of the Commission over Mundra Power Project cannot be re-agitated by Haryana Utilities as the same is barred by the principle of res judicata.

(c) The interpretation of Haryana Utilities that the order dated 16.10.2012 was limited to the common issues of Haryana and Gujarat related to Indonesian Regulations is totally out of place since the observations of the Commission in the said order were with respect to Adani Power as a generating company and not restricted to any State. The Commission in order dated 16.10.2012 also took note of the petitions filed by the petitioner before Gujarat Commission and reprimanded the petitioner for the same. After issuance of the order dated 16.12.2012, the petitioner has not filed any petition before the Gujarat Commission.

(d) In order to have jurisdiction under section 79(1)(b) of the Act, three requirements are to be fulfilled, namely, (i) the case must relate to a Generating Company which either “enter into” or “otherwise have”, (ii) “a Composite Scheme”, (iii) for generation and sale of electricity in more than one State. The above conditions are satisfied in the present case as the petitioner entered into two PPAs dated 2.7.2007 and 6.7.2007 with GUVNL and subsequently entered into PPA dated 7.8.2008 with Haryana Utilities for generation and supply of electricity from Mundra Power Project.

(e) Section 79(1)(b) of the Act categorically uses the words of expansion, inclusion and enlargement like ‘enter into’, or ‘otherwise have’. Assuming without conceding that ‘enter into’ indicates formal documentary position at inception, the disjunctive category ‘or otherwise have’ clearly contemplates a timeline evolution of the project. The inherently dynamic and ever evolving situation empowers the Commission to consider further developments regarding multi State composite scheme.

(f) Clause 2.4 of Competitive Bidding Guidelines refers to combined bidding process and does not refer to a composite scheme and therefore, cannot restrict the scope of Section 79 of the Act.

(g) The judgment of Appellate Tribunal for Electricity in Appeal Nos. 228 & 230 of 2006 (M/s PTC India Limited Vs CERC & Others) and judgement dated 4.9.2012 in Appeal No.94 of 2012 (BSES Rajdhani Power Limited Vs. DERC) relied upon by GUVNL are not applicable to the facts of present case.

10. We have considered the submission of parties. The present petition is an off-shoot of the Petition No.155/MP/2012. In fact, the Commission had granted liberty to the petitioner to approach the Commission. In order dated 16.10.2012 in Petition No. 155/MP/2012, the issue of Mundra Power Project of the Petitioner being a composite scheme and the jurisdiction of the Commission to regulate its tariff and adjudicate the disputes was decided. Relevant paragraph of the said order is extracted as under:

“23.... The generating company can be said to have entered into the composite scheme of generation and sale of electricity in more than one State once it commits sale of electricity in more than one State. Such a stage is reached when the generating company makes the binding commercial arrangement for supply of electricity to more than one State, that is, when it executes the PPAs in more than one State or enters into any other similar arrangement. To say that the composite scheme should be only at the inception stage will amount to frustrating the legislative intent of the Act. Such a course is not open while interpreting a statutory provision. Further, such an interpretation will defeat the legislative mandate since in that case jurisdiction of this Commission can be ousted at the whims of the generating company. To illustrate this point, the generating company may initially sell electricity to one State and later on it may supply power to another State. Another situation is that the generating station may be commissioned as captive power plant but at subsequent stage the generating company may enter into the arrangement for sale of power to more than one State. If it is held that the composite scheme should be at the inception stage, such like cases would be taken out of the jurisdiction of this Commission. This could never be the intention of enacting clause (b) of sub-section (1) of Section 79. Therefore, it is our considered opinion that a generating company may enter into the

composite scheme for generation and sale of electricity in more than one State at any time during the life of the generating station(s) owned by it. Any other interpretation will also impinge on the policy of common approach on the matters of tariff of the generating companies supplying electricity to more than one State enshrined in clause (b) of subsection 1) of Section 79. In this view of the matter, it is concluded that Adani entered into composite scheme for generation and sale of electricity in more than one State on 7.8.2008 when it signed PPAs with the distribution companies in the State of Haryana. Adani has also stated that it is in the process of establishing generating stations in different States. For this reason also, Adani as a generating company, has the composite scheme for generation and sale of electricity in more than one State. Therefore, regulation of tariff of Adani as a generating company is within the jurisdiction of this Commission.”

11. Further in order dated 16.1.2013 in Review Petition No. 26/2012, the Commission affirmed the decision in order dated 16.10.2012. The above two orders of the Commission have not been challenged by either GUVNL or Haryana Utilities. In fact, both participated in the subsequent proceedings which led to passing of the orders dated 2.4.2013 and 21.2.2014. The Commission is of the view that the Commission cannot revisit its own decision dated 16.10.2012 with regard to the composite scheme in respect of Mudra Power Project based on the pleadings in the present petition since the same is barred by the principle of res judicata. We are also not in agreement with learned counsel for the Haryana Utilities that there is no formal adjudication of the rights of the parties in the said orders. In our view, the order dated 16.10.2012 conclusively decided the issue of Mudra Power Project having a composite scheme and the jurisdiction of the Commission to regulate the tariff of the said project. Moreover, section 111 of the Act provides for appeal against any order of the Commission within a period of 45 days and does not distinguish between interlocutory or final order. Accordingly, it is held that the Commission has jurisdiction to adjudicate the disputes between the petitioner and respondent which is subject matter of the present proceedings. The Commission is conscious that Haryana Utilities while challenging the orders dated 2.4.2013 and 21.2.2014 in Petition No.155/MP/2012 have agitated the issue of composite scheme

in respect of Mundra Power Project of the petitioner before the Appellate Tribunal for Electricity. Therefore, the decision in this order shall be subject to the decision in the said appeal with regard to composite scheme.

12. Since the petition has already been admitted by the Commission, the respondents are directed to file their replies on merit of the claims by 30.10.2015 with an advance copy to the petitioner who may file its rejoinder, if any, by 15.11.2015.

13. The petition shall be listed for hearing on 24.11.2015.

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson