

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 8/MP/2014

Coram:

Shri Gireesh B Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A S Bakshi, Member

Date of Hearing: 20.11.2014

Date of Order : 15.10.2015

In the matter of

Petition for evolving a mechanism for grant of an appropriate adjustment/compensation to offset financial/commercial impact of change in law during construction and operating period

And

In the matter of

EMCO Energy Limited
701/704, 7th Floor, Nirman Centre,
A-Wing, Bandra Kurla Complex,
Bandra, Mumbai-400051

Petitioner

Vs

1. Maharashtra State Electricity Distribution Company Ltd.
Fifth Floor, Prakashgadh,
Plot No. G-9,
Anant Kanekar Marg,
Bandra (East)
Mumbai-400051

2. Electricity Department, Dadra and Nagar Haveli
Vidyut Bhawan,
Opp. Secretariat,
Silvasa – 396230

Respondents

Parties Present:

Shri Amit Kapoor, Advocate, EMCO
Shri Vishrov Mukherjee, Advocate, EMCO
Shri Rohit Venkat, Advocate, EMCO
Shri Varma, EMCO
Shri Anand K. Ganesan, Advocate, DNH Power
Shri G. Sai Kumar, Advocate, MSEDCL
Shri Nitish Gupta, Advocate, MSEDCL

ORDER

The petition has been filed under clause (f) of sub-section (1) of Section 79 of the Electricity Act, 2003 (Act) for adjudication of the disputes between the petitioner and the respondents relating to tariff for supply of electricity.

2. The petitioner a generating company as defined in the Act, has developed a coal-based thermal power plant, comprising two units of 300 MW capacity each (**the generating station**) in Chandrapur District of the State of Maharashtra. The first unit of the generating station was commissioned on 19.3.2013 and the second unit on 1.9.2013. The petitioner entered into longer-term/medium-term arrangements for supply of electricity to the States of Maharashtra (200 MW), Tamil Nadu (150 MW) and Dadra and Nagar Haveli (DNH) (200 MW). Supply of electricity to the State of Maharashtra is at levelised tariff of ₹2.897 per unit and to the Union Territory of Dadra and Nagar Haveli at levelised tariff of ₹4.618 per unit. The tariff in both cases was discovered through the process of competitive bidding and was adopted by the Maharashtra State Electricity Regulatory Commission and the Joint Electricity Regulatory Commission respectively. The petitioner has executed the Power Purchase Agreement dated 17.3.2010 with Respondent No 1, Maharashtra State Electricity Distribution Company Ltd (**MSEDCL**)

and the Power Purchase Agreement dated 21.3.2013 with Respondent No 2, Electricity Department, Dadra and Nagar Haveli (**DNH**) for supply to the Union Territory of Dadra and Nagar Haveli. Supply of power to the State of Tamil Nadu is stated to be sale through GMR Energy Trading Limited.

3. In accordance with the above PPAs, on occurrence of certain events, described under Article 10 of the PPAs as 'Change in Law' events, resulting in additional recurring or non-recurring expenditure, the petitioner is permitted to seek relief of offsetting of the additional expenditure through tariff. According to the petitioner, subsequent to execution of the above PPAs, certain Change in Law events took place during construction period leading to increase in capital cost for setting up the generating station. The petitioner has further submitted that certain other 'Change in Law' events have occurred during the operating period that have led to increase in operating cost. Majority of the Change in Law events referred to by the petitioner are common to both the agreements. Accordingly, the petitioner seeks offsetting of the additional cost/expenditure by the respondents through tariff revision.

4. Based on the averments in the petition that the petitioner has entered into agreements with the distribution utilities in the States of Maharashtra and Tamil Nadu and the Union Territory of DNH for supply of power, the petitioner has claimed that it has the composite scheme for generation and sale of electricity in more than one State. Accordingly, the petitioner has claimed that this Commission as the 'Appropriate Commission' as defined under the PPAs has the exclusive jurisdiction to regulate its

tariff under clause (b) of sub-section (1) of Section 79 of the Act and adjudicate the tariff-related disputes under clause (f) of sub-section (1) of Section 79.

5. MSEDCL and DNH in their replies have objected to the jurisdiction of the Commission to entertain the petition. The respondents have submitted that the PPAs were executed pursuant to competitive bidding process undertaken under Section 63 of the Act, conducted independently of each other at different points of time, with separate tariff under the supervision and control of the respective State Commission. The respondents have submitted that the bidding documents were subject to the approval of the respective State Commission. The respondents have pointed out that in accordance with the competitive bidding guidelines of the Central Government, in particular paragraph 2.4 thereof, the Commission would have jurisdiction only when there is joint procurement by more than one distribution licensee on common terms and conditions including common tariff. The respondents have pointed out that the tariff agreed under the respective PPAs and adopted by the respective State Commission is not uniform. Based on these facts, the respondents have urged that the two PPAs do not have anything in common between them. Therefore, according to the respondents, the petitioner as a generating company cannot be said to have a composite scheme for generation and sale of electricity in more than one State. It has been stated that the petition for adoption of tariff is pending with Tamil Nadu Electricity Regulatory Commission. Since the petitioner has gone to several Commissions, the petitioner has lost its right to approach CERC.

6. The respondents, by relying upon the Commission's order in Petition No 103/2005 (Uttaranchal Jal Vidyut Nigam Ltd Vs Uttaranchal Power Corporation Ltd), have stated that in order to invoke composite scheme, the two conditions that need to be satisfied are (a) power supply from the generating stations would be the identified States and (b) tariff for such sale should be uniform for all the States. In the light of narrated facts, it has been urged, these two conditions are not satisfied and therefore, the petitioner does have the composite scheme. It has been urged that adjudication of disputes raised in the petition falls within the jurisdiction of the respective State Commission under clause (f) of sub-section (1) of Section 86 of the Act.

Analysis and Decision:

7. At this stage, the Commission is considering the maintainability of the petition before the Commission. In the present case, there is no dispute that the petitioner has directly executed agreements for supply of power in the State of Maharashtra and Union Territory of DNH (which is State as defined under the General Clauses Act). The petitioner is also supplying power to the State of Tamil Nadu through GMR Energy Trading Company Ltd.

8. At the outset it may be stated that under the PPAs signed between the petitioner and the respondents, all disputes arising out of thereunder are to be decided by the 'Appropriate Commission'. The term 'Appropriate Commission' has been defined to mean as "*the CERC, or the SERC or the Joint Commission referred to in Section 83 of the Electricity Act, 2003, as the case may be.*" Therefore, it is to be seen whether in the facts and circumstances of the case, this Commission is the 'Appropriate Commission'.

The matter can be examined in the light of functions assigned to this Commission under the Act.

9. Section 79 of the Act enlists the functions of this Commission. Clause (b) of sub-section (1) of Section 79 of the Act is extracted below:

“79. Functions of Central Commission.- (1) The Central Commission shall discharge the following functions, namely:-

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State”

10. A reading of clause (b) of sub-section (1) of Section 79 of the Act reveals that the following conditions need to be satisfied for invoking the provision:

- (i) The generating companies are not owned or controlled by the Central Government.
- (ii) Such generating companies “enter into” “or otherwise” have a “composite” scheme.
- (iii) Generation and sale of electricity is in more than one State.

11. The Commission has already examined the issue of composite scheme under Section 79 (1) (b) of the Act in the case of Mundra Power Project where the project developer, Adani Power Ltd. had entered into PPAs with Gujarat and Haryana at different point of time. The Commission after examining the provisions of the Act and

the submission of the generating company came to the following conclusion in the order dated 16.10.2012 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 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 sub-section (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.”

12. In the present case, the petitioner has directly executed PPAs for supply of power to the State of Maharashtra and Union Territory of DNH and PPA with Tamil Nadu through GMR Energy Trading Company Ltd. which are located in three different States. In the light of the above decision, there can be no doubt that the petitioner has the

composite scheme for generation and sale of electricity in more than one State and as such falls within the jurisdiction of this Commission under clause (b) of sub-section (1) of Section 79 of the Electricity Act. Therefore, any dispute on tariff related matters is to be adjudicated by this Commission or referred for arbitration under clause (f) of sub-section (1) of Section 79 of the Electricity Act. Even in case of this generating station, the Commission has decided the issue of jurisdiction in order dated 17.9.2015 in Petition No. 54/MP/2014 as under:

“27. In the present case, there is no dispute that the petitioner has directly executed agreements for supply of power to the State of Maharashtra and Union Territory of DNH (which is a „State“ as defined under the General Clauses Act). The petitioner is also supplying power to the State of Tamil Nadu through GMR Energy Trading Company Ltd. In the light of the earlier decisions of this Commission noted above, there can be no doubt that the petitioner has the composite scheme for generation and sale of electricity in more than one State and as such falls within the jurisdiction of this Commission under clause (b) of sub-section (1) of Section 79 of the Electricity Act. Therefore, any dispute on tariff related matters is to be adjudicated by this Commission or referred for arbitration under clause (f) of sub-section (1) of Section 79 of the Electricity Act.”

13. It is pertinent to mention that the subsequent orders dated 2.4.2013 and 21.2.2014 in Petition No. 155/MP/2012 have been challenged in appeal before the Hon`ble Appellate Tribunal for Electricity in which the issue of composite scheme has been raised. Therefore, we are deciding the issue of composite scheme in the present case in the light of our decisions quoted above, subject to the final decision by the Appellate Tribunal in the appeals.

14. DNH has not filed reply to the petition on merits. DNH is, therefore, directed to file its reply on merits of the petitioner’s claim latest by 15.11.2015. The petitioner may file its rejoinder, if any, by 4.12.2015 with advance copy to DNH.

15. The petition shall be set down for hearing on 10.12.2015.

Sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson