

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 104/MP/2017

Subject : Petition under Section 79 of the Electricity Act, 2003 read with Article 13 (Change in Law) of the Power Purchase Agreements (PPAs) dated 7.8.2008 executed between Uttar Haryana Bijli Vitran Nigam Limited/ Dakshin Haryana Bijli Vitran Nigam Limited and Adani Power Limited.

Date of hearing : **29.8.2017**

Coram : Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Petitioner : Adani Power Limited (APL)

Respondents : Uttar Haryana Bijli Vitran Nigam Limited and
Dakshin Haryana Bijli Vitran Nigam Limited

Parties present : Shri Amit Kapur, Advocate, APL
Ms. Abiha Zaidi, Advocate, APL
Shri Jignesh Langalia, APL
Shri G. Umapathy, Advocate, HPPC
Shri Aditya Singh, Advocate, HPPC
Shri Avinash Mirajkar, HPPC
Shri Ravi Juneja, HPPC
Shri M.G. Ramachandran, Advocate, Prayas
Ms. Ranjitha Ramachandran, Advocate, Prayas
Ms. Anushree Bardhan, Advocate, Prayas

Record of Proceedings

At the outset, Learned counsel for the Petitioner submitted as under:

- (a) The Change in Law events relates to the revised National Ambient Air Quality (NAAQ) Standards Notification No. G.S.R. 826 (E) dated 16.11.2009 notified by Ministry of Environment and Forests (MOEF) under Sections 6 and 25 of the Environment (Protection) Act, 1986. The said notification had replaced Notification No. S.O. 384 (E) dated 11.4.1994 which was applicable on the cut-off date for the PPAs.
- (b) The NAAQ Standards have been revised by Central Pollution Control Board vide its Notification dated 16.11.2009.
- (c) Consequently, the MOEF imposed a condition in Environment Clearance dated 20.5.2010 requiring Adani Power to install FGD for Units 7 to 9 of the Mundra Power Plant which entitled an additional capital expenditure of Rs 646.22 crore. The said condition qualifies as a Change in Law event in terms of the Article 13 of the PPA dated 7.8.2008.

- (d) The installation of FGD system has further resulted in higher expected operating expenses amounting to Rs 48 crore per annum.
- (e) The Commission in order dated 6.2.2017 in Petition No. 156/MP/2014 had directed the Petitioner to submit additional information with regard to claim of the Petitioner under Change in Law for compensation for the installation and operation of FGD in Phase III of the Mundra Power Project which have been filed on 15.5.2017.
- (f) Learned counsel requested the Commission to direct the respondents to pay in the interim 95% of the amount payable from the date of commencement of supply till date subject to adjustment based on final order.

2. Learned counsel for HPPC submitted as under:

- (a) Environment Clearance (EC) dated 20.5.2010 cannot be considered as Change in Law in terms of the Article 13 of PPA as the petitioner was fully aware from the beginning, viz., at the time of issuance of RFQ, RFP, receipt of bidding documents and participation at the Competitive bidding process that the petitioner is required to obtain all the relevant consents for the operation of the power station.
- (b) It is the obligation of the Petitioner to apply for and obtain all ECs for establishing, operation and maintenance of the project as per the provisions of the Environment Protection Act, 1986.
- (c) The petitioner has applied and obtained the consent from MOEF subsequent to the bid deadline date and in first instance, the Environment Ministry in the clearance dated 20.5.2010 has specified the condition of FGD to be installed. Such conditions imposed by the Environment Ministry are related to the Law of Environment existing as on cut-off date. Accordingly, the above cannot be considered as a subsequent Change in Law within the meaning of Article 13.1.1 of PPA.

3. Learned counsel for Prayas submitted as under:

- (a) The Petitioner has not claimed Change in Law in National Ambient Air Quality Standards and had only claimed the imposition of requirement of installation of FGD in the Environmental Clearance (EC) as Change in Law.
- (b) There is no change in conditions imposed under the EC. Further, there was no EC granted to the Petitioner as on cut-off date and any condition imposed by the environmental authority for the grant of EC will not qualify as Change in Law.
- (c) The Petitioner had claimed that the Change in Law in respect of the EC for its Phase-III generating units on the basis that the clearances granted to Phase-I and Phase-II did not provide for FGD. The Petitioner could not have proceeded on such assumptions that the Ministry of Environment and Forests would impose same conditions on Phase-III units as per the EC granted to Phase-I units.
- (d) The Hon'ble Appellate Tribunal for Electricity in its judgment dated 21.1.2013 in Appeal No. 105 of 2011 (M/s. JSW Energy Limited vs. Maharashtra State Electricity Distribution Co. Ltd. and Another) held that the condition of installation of FGD at a later stage in the EC meant that the generator was aware of the requirement of FGD. Therefore, there is no Change in Law due to subsequent confirmation of installation of FGD.

4. In his rebuttal, learned counsel for the Petitioner submitted that the installation of FGD is pursuant to revision in NAAQ Standard. As per the PPA, the petitioner is obligated to apply for and obtain EC for establishing, operation and maintenance of the project. Learned counsel for the petitioner distinguished the judgment of the Appellate Tribunal in JSW case from the present case. Learned counsel submitted that in JSW case, provisions for funds for implementation of environmental measures and installation of FGD was for the same phase. In case of the Petitioner, the Environmental Clearance for first phase and second phase carried a requirement to make provisions for land for FGD and funds for implementation of environmental measures at a subsequent stage. The Petitioner was not asked to implement the FGD for first and second phase. Only for the third phase, the Petitioner was asked to implement the FGD in the first Environmental Clearance itself. At the time of bid, there was no condition or stipulation requiring the petitioner to install FGD for installing and operating Units 7 to 9 of Mundra Power Plant. The Environmental Clearance making it mandatory for installation of FGD in the third phase is clearly considered under Change in Law.

5. After hearing the learned counsels for the parties, the Commission directed the petitioner to file the following details on affidavit by 22.9.2017 with an advance copy to the respondents:

- i) Whether the Petitioner has adopted the transparent process of ICB/ DCB for carrying out the procedure for selection of successful bidder for installation of FGD. If not, justify how the cost of FGD installation was competitive and reasonable.
- ii) Copy of the NIT alongwith bid documents with regards to installation of FGD.
- iii) Name of the bidders participated in the bid. Copy of the Evaluation Report of Technical & Financial Bid.
- iv) Copy of the contract executed with the successful bidder.

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

By order of the Commission

**-Sd/-
(T. Rout)
Chief (Law)**