

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 28/MP/2018

Subject : Petition under Section 61, 63 and 79 of the Electricity Act, 2003 read with the statutory framework and Article 12 of the Transmission Service Agreement dated 10.8.2009 executed between East North Interconnection Company Limited and its Long-term Transmission Customers for claiming compensation due to Change in Law.
And
Evolving a mechanism for grant of an appropriate adjustment/compensation to offset financial/commercial impact of Change in Law Events during Construction Period.

Date of Hearing : 5.7.2018

Coram : Shri P.K. Pujari, Chairperson
Shri A.K. Singhal, Member
Dr. M.K. Iyer, Member

Petitioner : East North Interconnection Company Limited

Respondents : Jodhpur Vidyut Vitran Nigam Limited and Others

Parties present : Shri Sitesh Mukherjee, Advocate, ENICL
Shri Deep Rao Palepu, Advocate, ENICL
Shri Divyanshu Bhatt, Advocate, ENICL
Ms. Anisha Chopra, ENICL
Ms. Swapna Seshadri, Advocate, PSPCL
Shri R.B. Sharma, Advocate, BRPL & BYPL
Shri Mohit Mudgal, Advocate, BRPL & BYPL
Shri S.K. Agarwal, Advocate, Rajasthan Discoms

Record of Proceedings

At the outset, learned counsel for the Petitioner submitted that the present petition has been filed *inter-alia* for seeking adjustment in the tariff to compensate the Petitioner and to offset the financial/ commercial impact of Change in Law events during the construction period. Learned counsel for the Petitioner further submitted as under:

(a) The Petitioner is a special purpose vehicle which has been developing the project and constructing the transmission lines namely, Bongaigaon-Siliguri 400 kV quad D/c line and Purnia-Biharsharief 400 kV quad D/c line.

(b) On 16.3.2012, the Ministry of Finance vide its notification increased the rate of Service Tax from 10% to 12% and Excise Duty from 8% to 12% w.e.f. 1.4.2012. Therefore, the change in Excise Duty and change in Service Tax have increased the cost of the project during the construction period which amounts to Change in Law events as per Article 12 of the TSA.

(c) On 31.7.2012, the Petitioner issued notices to the LTTCs and to the CEA in terms of Article 12, in respect of Change in Law due to increase in Service Tax and Excise Duty which resulted into substantial increase in the capital cost of the project and the transmission charges. Subsequently, on 23.12.2013, the Petitioner issued Change in Law notice to lead LTTC i.e. Punjab State Power Corporation Ltd. (PSPCL) and intimated that due to the increase in taxes and duties, the project has become commercially unviable as it is very difficult for the Petitioner to implement the project in terms of the tariff as adopted by the Commission unless the situation is redressed keeping in view principles of restitution as recognized by TSA.

(d) The total impact of increase/ levy of taxes on the capital cost of the project is ₹13.57 crore as per the Auditor's certificate dated 27.11.2017. Therefore, under Article 12.2.1, the Petitioner is entitled to claim increase in the cost of the project for every cumulative increase of ₹4 crore in the cost of the project.

(e) With regard to the relief to be granted under Change in Law, learned counsel for the Petitioner placed its reliance upon Hon'ble Appellate Tribunal for Electricity judgement dated 19.4.2017 in Appeal No.161 of 2015 alongwith Appeal No.205 of 2015 and the Commission's order dated 25.6.2018 in Petition No.216/MP/2016 wherein it was observed that changes in the rates of Service Tax and Excise duty qualify as a Change in Law event and the expenditure incurred by the Petitioner in this regard is admissible under Change in Law.

2. Learned counsel for PSPCL submitted that there is no merit in the present petition and is liable to be rejected. Learned counsel for PSPCL further submitted as under:

(a) In terms of last bullet of Article 12.1, every change in tax or introduction of any tax is not covered under Change in Law, but only such taxes that are imposed for transmission services is permissible. Therefore, the contention of the Petitioner that Change in Law is defined in the TSA includes the amendment or modification of any law or change in tax is wrong and denied as any other interpretation to include any imposition of taxes and duties apart from that related to transmission services would render the last bullet meaningless, which is against the basic principles of interpretation.

(b) Under Article 12.1 of the TSA, any change in tax or introduction of tax has to be made applicable for providing the transmission services i.e. after the declaration of commercial operation of the project and not during the construction period. The taxes and duties which are not applicable in "transmission services" cannot be allowed as a pass through under the Change in Law clause. The Petitioner cannot make a claim *de-hors* of the agreement.

(c) Both the taxes i.e. Service Tax and Excise Duty which have been increased vide notification dated 1.4.2012 have now been subsumed under the GST. Therefore, the impact of change in the rate if these taxes cannot be seen as Change in Law under the TSA and consequently no relief for change in taxes can be claimed for.

(d) Since, the Petitioner has not identified the taxable services in respect of which the excise duty and service tax is payable, therefore, the Petitioner has to

demonstrate the link between the increase in the taxes and the income/ expenditure of the Petitioner.

3. Learned counsel for BRPL and BYPL submitted that the present petition is not maintainable and is liable to be rejected. Learned counsel further submitted as under:

(a) Under Article 16.2.1 of the TSA, a notice is required to be given to other party which shall furnish its counter claim regarding the disputes within 30 days from the issue of notice. However, if the other party does not furnish its counter claims then both the parties shall meet to settle such dispute amicably and if still the parties fail to resolve the dispute amicably, the dispute shall be referred to Appropriate Commission. Therefore, the Petitioner cannot approach the Commission without following the procedure prescribed by the TSA to resolve the dispute.

(b) The notices dated 31.7.2012 and 23.12.2013 to LTTCs and lead LTTC respectively, could not be taken to its logical conclusion in accordance with the "Governing Law and Dispute Resolution" covered under Article 16 within the time frame prescribed in the TSA. The notices are vague and the Petitioner has no inclination to claim any relief under the Change in Law events under Article 12 of the TSA.

(c) The copy of the Auditor's certificate dated 27.11.2017, clearly shows that the Petitioner has no idea of loss and it shows that the cost incurred is supported by invoices which are not enclosed with the petition.

4. After hearing the learned counsel for the Petitioner, PSPCL, BRPL and BYPL, the Commission directed the Petitioner and respondents to file their written submission, by 30.7.2018 with a copy to each other.

5. The Commission directed that due date of filing the written submissions should be strictly complied with failing which the order shall be passed on the basis of the documents available on record.

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

By order of the Commission

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