

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 77/MP/2016

Subject: Petition under Article 13 of the Power Purchase Agreement dated 22.4.2007 read with clause 4.7 of the competitive Bidding Guidelines and Section 79 of the Electricity Act, 2003

Petitioner: Coastal Gujarat Power Limited

Respondents: GUVNL & others

Date of hearing: 23.4.2018

Coram: Shri P.K. Pujari, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member
Shri Ravindra Kumar Verma, Member (E.O)

Parties present: Shri Amit Kapur, Advocate, CGPL
Shri Abhishek Munot, Advocate, CGPL
Shri Kunal Kaul, Advocate, CGPL
Shri Abhay Kumar, CGPL
Shri Bijay Mohanty, CGPL
Ms. Swapna Seshadri, Advocate, PSPCL
Ms. Ranjitha Ramachandran, Advocate, GUVNL, Haryana & Rajasthan Discoms

Record of Proceedings

During the hearing, the learned counsel for the Petitioner, CGPL mainly submitted the following:

- (i) The Petitioner owns & operates Mundra UMPP (4000 MW) which was commissioned on 31.3.2013 and has been generating and supplying the contracted capacity to the procurers.
- (ii) The MOEFCC notification dated 7.12.2015 mandatorily require all thermal power plants installed till December, 2016 to comply with the revised norms on or before 6.12.2017. The said notification is a mandatory Change in law event which requires the Petitioner to carry out major capital works / modifications.



(iii) In view of this, the Petitioner has filed this Petition to seek regulatory certainty qua the treatment of such costs and tariff impact for its recovery and therefore, in- principle approval of these additional investments is necessary to secure finance from financial institutions.

(iv) On 19.1.2005, MOP, GoI issued guidelines for determination of tariff by bidding process for procurement of power by distribution licensees. PFC is the nodal agency for selection of developers through tariff based competitive bidding process.

(v) Request for proposal was issued on 22.6.2006 and the last date of submission of bid was 7.12.2006. Hence, in terms of the provisions of PPA, the cut-off date is 30.11.2006, i.e 7 days prior to the bid deadline date.

(vi) On 22.6.2006, the Request for Proposal (“RFP”) was issued to the interested bidders. In terms of the RFP, the Procurers were required to obtain the Environmental Clearance (EC) prior to the issuance of the Letter of Intent. Further, the draft environment management plan was to be made available to the bidders 90 days prior to the Bid Deadline date. The Bid Deadline date was 7.12.2006, therefore the Cut-Off Date in terms of Article 13 of the PPA is 30.11.2006. The Letter of Intent was issued to the Petitioner on 28.12.2006. On 2.3.2007 (i.e. after the Cut-Off Date), the EC was issued by the Ministry of Environment to the Petitioner. The said EC was made available to the Petitioner only on the date of execution of the PPA.

(vii) The Petitioner could never envisage any further expenses to be incurred by way of any notification issued by the MOEFCC. Thus, any expenditure incurred by the Petitioner towards setting up of additional plant such as FGD, etc. issued after the cut-off date, in terms of the any notification/ clearance issued, will be squarely covered as a Change in Law event in terms of Article 13 of the PPA, and the Petitioner needs to be compensated for the same.

(viii) Change in condition which required installation of FGD after the Cut-Off date is a Change in Law in terms of the provisions of the PPA. Commission’s order dated 28.3.2018 in Petition No. 104/MP/2017 (Adani case) was referred to.

(ix) In order to comply with the revised emission norms, the Petitioner is required to retrofit and install certain equipment, which would also have an adverse impact on the operational norms. Further, the Petitioner would also have to shut down its plant at the time of retrofit and hence should not be penalized for loss of Capacity Charges due to non-availability of Unit/ Power Station and/ or liable to pay liquidated damages on account of its failure to comply with PPA provision due to such shutdown. Accordingly, in terms of the provisions of the PPA read with the Supreme Court Judgment in the matter of *Energy Watchdog* this Commission is required to exercise its regulatory powers to grant relief to the Petitioner to such an extent that the Petitioner is restituted to the same economic impact as if such a Change in Law event



has not occurred.

Accordingly, the learned counsel for the Petitioner prayed to declare MOEFCC notification dated 7.1.2015 as Change in law event and grant in-principle approval to incur any consequential capital cost to comply with the same.

2. In response, the learned counsel for the respondents, GUVNL submitted the following:

(i) Under Article 13.2 (b) of the PPA, the compensation for any increase/ decrease in the revenues or cost needs to be determined with reference to Change in law having an effect on the revenue or cost of business of sale of electricity. The compensation is payable under Article 13 only after the expenditure has been incurred and therefore the instant Petition is premature at this stage.

(ii) The EC dated 7.12.2015 envisaged installation of FGD on the cut-off date and provision for the same was required to be made and hence if the Petitioner is required to install the FGD subsequently, for any reason, the same cannot be considered as Change in law.

(iii) The Tribunal in its judgment dated 21.1.2013 in JSW Energy Limited v/s MSEDCL & Anr (JSW case) has held that the condition of installation of FGD at a later stage in the EC would mean that the generator was aware of the requirement of FGD and there is no change in law because of a subsequent confirmation on installation of FGD. Similarly in the present case, the installation of FGD was already envisaged in the EC granted to the Petitioner prior to the cut-off date.

(iv) The Petitioner is required to submit the existing consents/ approvals and standards as on cut-off date to substantiate its claim that the revised norms were not applicable prior to 7.12.2015.

3. The learned counsel for the respondent, PSPCL adopted the above submissions of GUVNL and submitted that the obligation to comply with the environmental norms is that of the Petitioner and the same is not subject to any approval of this Commission or reimbursement. Moreover, there is no concept of in-principle approval for such compensation under the PPA.

4. In response, the learned counsel for the Petitioner clarified that the present Petition has been filed under Section 79 of the Electricity Act read with Article 13 of the PPA for seeking the reliefs as stated in the Petition. This Commission has sufficient regulatory powers under Section 79(1)(b) of the Electricity Act to grant relief as sought for by the Petitioner. He further submitted that all the relevant documents for the purpose of adjudication of the present matter have already been filed. As regards JSW case, the learned counsel submitted that the same cannot be applied to the present case as the findings of the Tribunal was based on the facts of JSW case, which are completely different from the facts of the present matter.



4. The Commission after hearing the parties, reserved its order in the Petition. However, at the request of the learned counsel for the parties, time to file written submissions, with copy to the other, has been granted till **4.6.2018**.

By order of the Commission

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

