

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 19/RP/2019
In Petition No. 269/MP/2018**

**Coram:
Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member
Shri I.S. Jha, Member**

Date of Order: 9th December, 2019

In the matter of:

Review of the judgment and order dated 8.7.2019 passed in Petition No. 269/MP/2018.

And

In the matter of

- 1) Uttar Haryana Bijli Vitaran Nigam Limited
VidyutSadan, Plot No. C-16, Sector-6
Panchkula-134112
Haryana
- 2) Dakshin Haryana Bijli Vitaran Nigam Limited
Vidyut Nagar, Vidyut Sadan
Hissar- 125005
Haryana

....Review Petitioners

Vs

Adani Power (Mundra) Limited
Shikar, Near Mubhakali Circle
Navrangpura
Ahmedabad-390009

.....Respondent

Parties present:

- 1) Shri M.G. Ramachandran, Senior Advocate, UHBVNL, DHBVNL
- 2) Ms. Ranjitha Ramachandran, Advocate, UHBVNL, DHBVNL
- 3) Shri Shubham Arya, Advocate, UHBVNL, DHBVNL
- 4) Ms. Tanya Sareen, Advocate, UHBVNL, DHBVNL
- 5) Ms. Poonam Verma, Advocate, APMUL
- 6) Shri Sidhant, Advocate, APMUL
- 7) Shri Saunak Rajguru, Advocate, APMUL

ORDER

The Review Petitioners, Uttar Haryana Bijli Vitaran Nigam Limited and Dakshin Haryana Bijli Vitaran Nigam Limited represented through Haryana Power Purchase Centre have filed the present Review Petition seeking review of the order dated 8.7.2019 in Petition No. 269/MP/2018. In the said order, the Commission had held that payment of taxes and duties for Inter Plant Transfer of coal shall be on the basis of the deemed consumption of coal on account of the original power plant and the shortfall in domestic coal shall be calculated on the basis of the difference in ACQ and coal actually supplied by the coal companies.

2. The Review Petitioners have sought review of the order dated 8.7.2019 on the following grounds:

(a) Implications of New Coal Distribution Policy, 2013 (hereinafter referred to as "NCDP, 2013") and the claim regarding the shortage of domestic coal availability under the Fuel Supply Agreement dated 9.6.2012 signed between Adani Power and Mahanadi Coalfields Limited (hereinafter referred to as MCL)/ South Eastern Coalfields Limited (hereinafter referred to as SECL) and whether the alleged non-availability of Railway Wagons can be considered under the implications of NCDP, 2013;

(b) The scope and extent to which the non-availability of Railway Wagon, if any, need to be considered for granting relief to Adani Power under the Change in Law provisions of the PPA;

- (c) Implications of Inter Plant Transfer (IPT) being allowed in the use of domestic coal and passing of the benefits derived therefrom by Adani Power to the Review Petitioner under the Change in Law provisions of the PPAs;
- (d) The claim for Change in Law on account of taxes and duties payable when the coal used by Adani Power for generation in Units 7, 8 and 9 of Mundra Power Project is imported coal in place of domestic coal under the Inter Plant Transfer Scheme; and
- (e) Maintainability of the Petition under Section 142 of the Electricity Act, 2003.

3. The Petition was listed for admission on 6.12.2019. Learned Senior Counsel for the Review Petitioners and Learned Counsel for Adani Power advanced extensive arguments which have been recorded in the RoP for the said date of hearing. The Commission after hearing reserved the order on maintainability of the Review Petition.

4. Based on the pleadings in the Review Petition and the submissions of the Learned Senior Counsel for the Review Petitioners and Learned Counsel for the Adani Power, we proceed to decide whether the present Petition is maintainable under Order 47 Rule 1 of the CPC read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 as amended from time to time (hereinafter referred to as 'Conduct of Business Regulations').

5. The order in Petition No. 269/MP/2018 was issued on 8.7.2019. The Review Petitioners have filed the Review Petition on 23.8.2019 which is within a period of limitation of 45 days specified in the Conduct of Business Regulations. Hence, the Review Petitioner is not barred by limitation.

6. Under Order 47 Rule 1 of CPC, a person aggrieved by the order of the Court can file a review on the following grounds:

(a) Discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.

(b) On account of some mistake or error apparent on the face of record.

(c) For any other sufficient reason.

In the light of the above provisions, we are considering the various grounds raised in the Review Petition for review of the order dated 8.7.2019 in Petition No. 269/MP/2019.

Issue of shortage of coal

7. The Review Petitioners have submitted that NCDP, 2013 does not deal with the issue of the availability or non-availability of railway wagons for transportation of coal to the power project site and therefore, the said aspect relating to Indian Railways cannot be considered as a Change in Law event under Article 13 of the PPAs between Adani Power and Haryana Utilities. The Review Petitioners have further submitted that the non-supply of coal to Adani Power on the ground of non-availability of railway wagons has been considered in the order dated 8.7.2019 without the plea having been raised by Adani Power at any stage of the proceedings or in the earlier proceedings. It has been further submitted that as the FSA itself envisages the alternative mode of transportation, namely, through road/sea and Adani Power had itself undertaken such transportation through road/sea, the non-availability of railway wagons cannot be considered either as a Change in Law Event

or even under the Force Majeure provisions in terms of the PPAs. According to the Review Petitioners, as per the NDCP, 2013 as interpreted and applied by the Hon'ble Supreme Court in Energy Watchdog case, the shortage of coal to be considered for procurement of alternate coal under the Change in Law Event is restricted to the quantum of coal made available by the Coal Companies, and not for any other reason such as non-availability of railway wagons to transport the coal through Indian Railways.

8. Learned Counsel for Adani Power submitted that the Review Petitioners have again raised the issues of IPT and shortage of domestic coal under Change in Law which were argued in Petition No. 269/MP/2018 and dealt with in detail by the Commission in its order dated 8.7.2019. The Review Petitioners have failed to point out any error apparent in the order of the Commission. The attempt of the Review Petitioner to re-argue the case on merit cannot be allowed in a Review Petition.

9. We have considered the submission of the Review Petitioners and Adani Power. In para 41 of the impugned order, the Commission had framed the issue "whether the quantum of coal made available by the coal companies which the Petitioner for its own reasons might have chosen not to take, instead of actual supply of coal at the plant shall be treated as shortfall of coal to be considered under change in law in terms of the PPAs". In this connection, the Commission has analyzed Clause 7 of the FSA in Para 42 of the said order and came to the conclusion that subject to the fulfillment of payment obligations pursuant to Clause 12.1.2 of the FSA by the Purchaser/Generator, it is the Seller's (coal company's) responsibility to submit specific indent/offer based on the valid rail programme(s) to the Railways as per the extant Railway rules for the allotment and placement of

wagons during the concerned month. Further, the Commission also analyzed Clause 4.7 of the FSA and came to the conclusion that quantity of coal that could not be supplied by the sellers or coal companies on account of Railways not allotting wagons or not placing wagons for loading in spite of demand by the Sellers/coal companies shall be considered as delivered. The Commission further came to the conclusion that Adani Power had no role as far as the coal supply is concerned after the demand is raised through submission of programmes. The Commission in Para 44 of the impugned order has observed as under:

“44. Further, the Respondents have contended that as MCL/ SECL have not paid any compensation, there was no shortfall of coal. In this regard, clause 4.7 of the FSA defines the “Level of Delivery” as under:

“Level of Delivery with respect to a Year shall be calculated in the form of percentages as per the following formula:

Level of Delivery (LD)= [(DQ+DDQ+FM+RF)×100]/ACQ

Where:

LD= Level of Delivery of Coal by the Seller during the Year

DQ= Delivered Quantity, namely, aggregate actual quantities of Coal delivered by the Seller during the year.

DDQ= Deemed Delivered Quantity, reckoned in the manner stated in Clause 4.11

FM- Proportionate quantity of Coal which could not be delivered by the Seller in a Year due to occurrence of Force Majeure event effecting the Seller and/or the Purchaser, calculated as under:

.....

RF= Quantity of Coal that could not be supplied by the Seller during the Year owing to the Railways not allotting wagons or not placing wagons for loading, in spite of specific valid indent/offer submitted by the Seller to the Railways against valid program(s) submitted by the Purchaser for the purpose.”

10. The observations and conclusions of the Commission are based on the appreciation of the various provisions of the FSA. The Review Petitioners have not pointed out any error apparent on the face of the said findings of the Commission. The Review Petitioners have sought to advance fresh arguments by submitting that NCDP, 2013 did not deal with the aspect of availability or non-availability of wagons

from Indian Railways side. If the Review Petitioners are aggrieved by the decision of the Commission, then the proper course of action available is to file an appeal before the Appellate Tribunal for Electricity under Section 111 of the Electricity Act, 2003. It is a settled principle of law that the Review Petition cannot be an appeal in disguise. In our view, the Review Petitioners have failed to substantiate that their case is covered under any of the grounds enunciated in Order 47 Rule 1 of the CPC and therefore, the ground for review on account of issue of shortage of coal cannot be sustained.

Passing Inter Plant Transfer Benefits to the Review Petitioners

11. The next ground on which review has been sought is that the Commission has not considered the case of the Review Petitioners for passing on the benefits of Inter Plant Transfer of coal to the Haryana Utilities. The Review Petitioners have submitted that since the Commission has come to the conclusion that notwithstanding the Inter Plant Transfer of coal from Mundra Power Project to the Tirodaand Kawai Plants of Adani Power, the coal available from MCL/SECL should be accounted towards the Units 7, 8 and 9 of Mundra Power Project. The Review Petitioners have submitted that in such a situation, the financial benefits arising out of Inter Plant Transfer should be accounted for as decrease in the cost of supply of power in favour of the Review Petitioners. The Review Petitioners have submitted that the Commission has wrongly deferred the consideration of the benefits of Inter Plant Transfer in the impugned order.

12. We have considered the submission of the Review Petitioners. The Commission in Para 28 of the impugned order has dealt with the issue as under:

“28. We have considered the submissions of the Respondents for treating IPT Policy of Coal India Ltd. as change in law and its request for sharing of benefits accrued to the Petitioner on account of IPT. In Petition No. 97/MP/2017 and the instant Petition, we have given directions as to how IPT coal has to be considered for the purpose of calculation of coal shortfall as well for taxes and duties. Consideration of the IPT Policy of Coal India Ltd. as a change in law event has not been discussed by the Commission in its previous orders. We note that transfer of coal by the Petitioner under IPT Policy also affects other generating stations (that are consuming the IPT coal) and other distribution companies (who are supplied power by the generating stations that have used IPT coal). Since, they are not parties to the present Petition, we do not find it appropriate to deal with the issue in the present Petition.”

Since other generating stations of Adani Power who are affected by Inter State Transfer of coal are not parties to the Petition No. 269/MP/2018, the Commission did not consider it appropriate to deal with the issue in the said Petition. The Commission has recorded reasons for not considering passing on of benefits of Inter State Transfer to the Review Petitioners in Petition No.269/MP/2018. If the Review Petitioner are aggrieved, the proper course of action is to file an appeal before the Appellate Tribunal. The Review Petitioners have sought to reargue the matter on merit which is not permissible under review.

Taxes and Duties

13. The Review Petitioners have submitted that the Commission has patently erred in holding that the payment of taxes and duties for Inter Plant Transfer of coal would be on “deemed consumption” basis, whereas in the order dated 6.2.2017 in Petition No. 156/MP/2014, the Commission has held that the taxes and duties are to be computed based on the actual subject to the ceiling of coal consumed. The Review Petitioners further submitted that the Commission has ignored the fact that if Adani Power did not actually consume domestic coal and did not make the actual payment towards Change in Law in taxes/duties under PPAs with Haryana Utilities, Adani Power cannot claim such compensation from the Review Petitioners.

14. Learned Counsel for Adani Power reiterated that the Review Petitioners are trying to reargue the matter on merit which cannot be allowed in a review petition.

15. We have considered the submissions of the Review Petitioners and Adani Power. The Commission has considered the provisions of the Inter Plant Transfer scheme evolved by the Coal India Limited which provides as under:

“(a) Transfer of coal shall be allowed only between the power plants wholly owned by the Purchaser or its wholly owned subsidiary. No transfer of coal shall be allowed for a Joint Venture (JV) company of the Purchaser. The supply of coal, shall for the commercial purpose under the FSA remain unchanged and on account of the original Power Plant.”

In the light of the above provisions, the Commission has come to the following conclusion:

“Thus, there is a clear provision in the IPT Policy contemplating that supply of coal under the FSA shall remain unchanged for the commercial purpose and shall be on account of the original Power Plant. In view of the above paragraph in Order dated 6.2.2017 in Petition No. 156/MP/2014, it is evident that coal supply under FSA dated 9.6.2012 to other plants shall be accounted for generation and supply of power to Haryana Utilities from Units 7,8 and 9 of Mundra TPP for all commercial purposes. Therefore, the contention of the Respondents that it is liable to pay taxes and duties only for the coal that it has actually consumed and not for IPT coal, is not sustainable and is, therefore, rejected.”

16. The Commission has given a categorical finding that the coal supply under FSA dated 9.6.2012 to other plants of Adani Power shall be accounted for against the generation and supply of power to Haryana Utilities from Unit 7, 8 and 9 of Mundra Power Plant for all commercial purposes. Accordingly, Adani Power was found entitled to reimbursement of taxes and duties by the Review Petitioners for the coal meant for Unit 7, 8 and 9 of Mundra Power Plant which were diverted to other plants of Adani Power under Inter Plant Transfer scheme. The Review Petitioners have submitted that the Commission in order dated 6.2.2017 in Petition No. 156/MP/2014 had taken the view that the taxes and duties under Change in Law

shall be payable and computed on actual consumption of coal subject to the ceiling of coal consumed corresponding to scheduled generation and therefore, the coal under Inter Plant Transfer which was not actually consumed by Unit 7, 8 and 9 of Mundra Power Plant cannot be considered for grant of taxes and duties under Change in Law. Since as per the policy of Inter Plant Transfer of coal, the supply of coal shall be for all commercial purposes under the FSA remain unchanged and on account of the original power plant, the Commission has taken a conscious call by allowing taxes and duties on the coal which were diverted under Inter Plant Transfer. Correspondingly, imported coal consumed by Adani Power in substitution of the coal diverted under Inter Plant Transfer shall not be entitled for any relief under Change in Law. Therefore, there is no error apparent in the impugned order. It is clarified that the Review Petitioners shall not be liable to pay the taxes and duties on imported coal which has been issued in substitution of the coal diverted under Inter Plant Transfer.

Maintainability of the proceedings under Section 142 of the Electricity Act, 2003

17. The Review Petitioners have submitted that though Adani Power had filed the Petition No. 269/MP/2018 under Section 142 of the Electricity Act, 2003, the Commission decided not to pursue the proceedings under Section 142 of the Act and considered the said petition as adjudication of disputes between the parties in regard to Change in Law events. The Review Petitioners have submitted that in such circumstances, the Commission should have considered the adjudication of all claims and counter-claims, increases and decreases on account of Change in Law events claimed by the parties and comprehensively decided the matter. The Review Petitioners have further submitted that the Commission has wrongly deferred part of

the claim and has adjudicated all other claims which is contrary to the scheme under Article 13 of the PPAs providing that all increases and decreases in cost of account of Change in Law events should be considered cumulatively and the net increase and net decrease, as the case may be, should be decided.

18. We have considered the submissions of the Review Petitioners. The Commission in Para 18 of the impugned order has observed as under:-

“18. We note that even though the Petition was filed under Section 142 of the Act, the prayers pertain to seeking clarification with regard to the applicability of the directions in para 61 of order dated 31.5.2018 in Petition No. 97/MP/2017, in case of order dated 6.2.2017 in Petition No. 156/MP/2014 and payment of dues arising out of the implementation of these two orders. Keeping in view the prayers made in the Petition and the submission of the parties during the hearing, we are of the view that it is appropriate to adjudicate the dispute between the parties arising out of the directions in Petition No.156/MP/2014 and Petition No.97/MP/2017 instead of proceeding with Section 142 of the Act. Accordingly, we proceed to adjudicate the matter as a dispute with regard to the compensation payable by the Respondents in terms of order dated 6.2.2017 in Petition No. 156/MP/2014 and order dated 31.5.2018 in Petition No. 97/MP/2017. Therefore, there shall be no direction as regards Section 142 of the Act.”

The Commission after considering the prayers made in the Petition No. 269/MP/2018 and the submissions made by both the Review Petitioners and Adani Power during the course of hearing decided to adjudicate the dispute between the parties arising out of the directions in Petition No. 156/M/2014 and Petition No. 97/MP/2017 instead of proceeding under Section 142 of the Act. The Commission has recorded cogent reasons for not proceeding with Section 142 of the Act. As regards the contentions of the Review Petitioners that the Commission has not considered the decrease in the tariff on account of Inter Plant Transfer of coal, it is pertinent to mention that the Commission did not consider to deal with the said issue, as the distribution companies who are taking power from the Tiroda and Kawai generating stations of Adani Power and are likely to be affected by the outcome of the adjudication for passing on the benefits of Inter Plant Transfer of coal, were not

parties to the Petition No.269/MP/2018. We do not find any error in the finding of the Commission as recorded in the impugned order. Therefore, review on this ground is not maintainable.

19. In view of the above discussion, none of the grounds raised by the Review Petitioners in the present Review Petition are maintainable under Order 47 Rule 1 of CPC read with Regulation 103 of the Conduct of Business Regulations. The Review Petition No.19/RP/2019 in Petition No.269/MP/2018 is disposed of accordingly.

Sd/-
(I.S. Jha)
Member

sd/-
(Dr. M.K. Iyer)
Member

sd/-
(P.K. Pujari)
Chairperson