

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

IA No. 71/IA/2018
in
Petition No. 121/MP/2017

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

Date of Order : 3rd of September, 2019

In the matter of:

Application under Section 79(1) of the Electricity Act, 2003 for clarification of the order dated 21.2.2018 in Petition No. 121/MP/2017.

And

In the matter of:

1. Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan, Race Course
Vadodara – 390 007
2. Punjab State Power Corporation Limited
PP & R, Shed T-1, Thermal Design
Patiala – 147 001
3. Uttar Haryana Bijli Vitran Nigam Limited
Vidyut Sadan, Plot No. C-16
Sector 6, Panchkula – 134 112
4. Dakshin Haryana Bijli Vitran Nigam Limited
Vidyut Nagar, Vidyut Sadan
Hissar, Haryana – 125 005
5. Ajmer Vidyut Vitran Nigam Limited
Hathi Bhata, Old Power House
Ajmer – 305 001
6. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhavan, Janpath
Jaipur – 302 005
7. Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area
Jodhpur – 342 003

...Applicants



Vs

1. Coastal Gujarat Power Limited
C/o Tata Power Company Limited
34, Sant Tuka Ram Road, Carnac Bunder
Mumbai – 400 021
2. Maharashtra State Electricity Distribution Company Limited
4th Floor, Prakashgad, Plot No. G-9
Bandra (East), Mumbai – 400 051

....Respondents

Parties Present:

For Applicants : Shri M. G. Ramachandran, Advocate, GUVNL
Ms. Anushree Bardhan, Advocate, GUVNL
Shri Anand Ganesan, Advocate, PSPCL

For Respondents : Shri_Tushal Nagar, Advocate, CGPL
Shri Abhishek Munot, Advocate, CGPL
Shri Kunal Kaul, Advocate, CGPL

ORDER

The Applicants, Gujarat Urja Vikas Nigam Limited, Punjab State Power Corporation Limited, Uttar Haryana Bijli Vitran Nigam Limited, Dakshin Haryana Bijli Vitran Nigam Limited, Ajmer Vidyut Vitran Nigam Limited, Jaipur Vidyut Vitran Nigam Limited and Jodhpur Vidyut Vitran Nigam Limited (hereinafter referred to as 'Applicants') have jointly filed the present Interlocutory Application for seeking clarification of the order dated 21.2.2018 in Petition No. 121/MP/2017.

Background of the case

2. The Respondent No. 1, Coastal Gujarat Power Limited (hereinafter referred to as "CGPL") had filed Petition No. 121/MP/2017 for seeking adjustment of tariff for increase/ decrease in cost/ revenue of CGPL due to occurrence of 'Change in Law' events, namely, levy of Swachh Bharat Cess, levy of Krishi Kalyan Cess, levy of



Service Tax on transportation of goods by a vessel from a place outside India to the first Customs Station of landing in India and mandate under Companies Act, 2003 to spend a minimum 2% of the average net profits of the company towards CSR Policy.

3. The Commission, after hearing the parties, in its order dated 21.2.2018 in Petition No. 121/MP/2017, inter alia, allowed the levy of Service Tax, Swachh Bharat Cess and Krishi Kalyan Cess on transportation of goods by a vessel from a place outside India to the first Customs Station of landing in India. The Commission in the said order had observed as under:

“27. It is clarified that the Petitioner shall be entitled to recover on account of service tax on transportation of goods by a vessel from a place outside India to the first Customs Station of landing in India required in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to the Procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of service tax on transportation of goods by a vessel from a place outside India to the first Customs Station of landing in India. The Petitioner and Procurers are directed to carry out reconciliation on account of these claims annually.

50. (b) The increase in Service Tax on transportation of goods by a vessel from a place outside India to the first custom station of landing in India shall be computed based on actual payment subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries pro-rata based on their respective share in the scheduled generation. In case of reduction of Service Tax on transportation of goods by a vessel from a place outside India, the Petitioner shall compensate the procurers on the basis of above principle. If actual generation is less than scheduled generation then compensation payable shall be computed based on actual payment subject to ceiling of coal consumed corresponding to actual generation.”

4. Subsequently, Applicant No.1, Haryana Power Purchase Centre (on behalf of Applicants 3 & 4) and Rajasthan Urja Vikas Nigam Limited (on behalf of Applicants 5 to 7) vide their letters dated 26.3.2018, 28.3.2018 and 2.4.2018 brought to the notice of the Commission that the Commission in its earlier order dated 17.3.2017 read with order dated 31.10.2017 in Petition No. 157/MP/2015 and 22/RP/2017 respectively had allowed the quantum of coal as per actual subject to ceiling of coal based on



normative parameters and sought the clarification in this regard for proper implementation of the order dated 21.2.2018 to avoid any wrongful claim. The Applicant No. 1, was advised to approach the Commission through appropriate application by making CGPL as a party.

5. In this background, the Applicants have filed the present IA seeking clarification as to whether the quantum of coal to be considered for Change in Law as per Order dated 21.2.2018 in Petition No. 121/MP/2017 be based on actual coal consumed subject to the ceiling of the parameters of SHR of 2050 kCal/kWh with 1% degradation every 10 years, Auxiliary Consumption of 4.75% and GCV of 5350 kCal/kg.

Submissions of Applicants

6. The Applicants, have mainly submitted as under:

(a) Applicants, in their submissions to the main Petition, had specifically submitted that the quantum of coal is to be considered based on actual or normative parameters, whichever is lower.

(b) The compensation for change in law cannot be based on actual expenditure incurred by CGPL. The computation has to be necessarily on the normative and prudent coal requirement for generation of electricity or the quantum of coal actually used, whichever is less and not on the actual quantum of coal in excess of the normative requirement. The same is due to CGPL's own inability to conform to the normative parameters and any additional cost related to such coal is due to inefficiencies of CGPL and not a consequence of change in law.

(c) The calculations are to be made based on the actual subject to ceiling of quantum of coal as per the parameters of the Station Heat Rate, Auxiliary Consumption and GCV. CGPL has a contract for procurement of coal at GCV



of 5350 kcal/kg. The parameters of CGPL as admitted by CGPL are SHR of 2050 kCal/kwh with 1% degradation once in every 10 years and Auxiliary Consumption of 4.75%.

(d) The Commission in its earlier order dated 17.3.2017 read with order dated 31.10.2017 in Petition No. 157/MP/2015 and Petition No. 22/RP/2017 respectively involving the Change in Law on coal, had allowed the quantum of coal as per actual subject to ceiling of coal based on parameters as decided by the Commission in Para 84 of the order dated 6.12.2016 in Petition No. 159/MP/2012. CGPL is, accordingly, raising invoices based on the parameters of SHR, Auxiliary Consumption and GCV for the Change in Law covered under this order.

(e) However, pursuant to the order dated 21.2.2018, CGPL has been raising bills as per the actual consumption of coal without considering the ceiling of the coal as per parameters. There cannot be a different methodology for calculation of the quantum of coal for the same generator for different Change in Law.

(f) Even generating companies whose tariff are determined under Section 62 are subjected to normative parameters under applicable Tariff Regulations and where they agree to an improved norm, they are subjected to the same. The norms have been submitted by CGPL itself and incorporated by the Commission in various orders. The Commission in its various orders has allowed the quantum of coal based on normative parameters on a similar basis for Change in Law involving other generators, namely, order dated 19.2.2016 in Petition No. 153/MP/2015; order dated 19.12.2017 in Petition No. 101/MP/2017; order dated 19.12.2017 in Petition No. 229/MP/2017; order dated 22.6.2018 in Petition No. 171/MP/2017; order dated 31.5.2018 in Petition No. 170/MP/2017; order dated 18.4.2018 in Petition No. 18/MP/2017; order dated 15.1.2018 in Petition No. 88/MP/2018; and order dated 16.3.2018 in Petition No. 1/MP/2017.



(g) Reliance on the order of the Commission dated 15.11.2018 in the case of GMR Warora Energy Limited/ EMCO Energy Limited by CGPL is misplaced as even in the said case, the Commission granted the Change in Law based on quantum of coal to be considered on normative parameters.

(h) Reliance placed by CGPL on the Judgment of APTEL dated 12.9.2014 in Appeal No. 288 of 2013 in the case of Wardha Power Company Limited v. Reliance Infrastructure Limited is misplaced as the said judgment is related to base price of coal being calculated on the basis of the bid submitted and not relevant for consideration of normative parameters to be considered for the calculation of quantum of coal required. The quantum of coal required to generate electricity is based on the efficiency or actions of CGPL unlike the price of coal.

7. IA was heard on 18.9.2018 and notice was sent to the Respondents to file their replies. Reply to the IA has been filed by CGPL and MSEDCL.

Reply of CGPL

8. Respondent No.1 CGPL, vide its reply dated 15.10.2018, has submitted as under:

(a) The present IA is not maintainable. The reliefs sought by the Procurers would amount to changing the relief granted by the Commission vide order dated 21.2.2018.

(b) If the Procurers are aggrieved by the finding of this Commission, they ought to have filed an Appeal under Section 111 of the Electricity Act, 2003. The reliefs sought by the Applicants cannot be granted in the present clarification Application.

(c) Once the Commission passed its order dated 21.2.2018 and no Appeal and/or Review against the order was sought by the Procurers, to the extent of the issues not raised by CGPL in its Appeal, has become final and this Commission has been rendered *functus officio*. It is settled law that once a court is rendered *functus officio*, it does not have the jurisdiction to revisit its earlier orders and to amend them to the prejudice of CGPL.



(d) Non-consideration of their submissions as contended by the Applicants is either a ground for Review (error apparent on face of record) or Appeal but cannot amount to a valid ground for seeking clarification of a judicial order.

(e) Relief under Change in Law events is to reconstitute the affected party to the same economic position as if such Change in Law events had not occurred and it is relatable to actuals. There is no justification to reduce the relief for Change in Law, especially when the differential amount (i.e. amount spent by CGPL vis-à-vis the amount calculated after computing the quantum of coal in terms of the operational parameters) has already been incurred by CGPL.

(f) The bidding documents do not contemplate relief to be granted based upon normative parameters, irrespective of the facts that the same does not reconstitute the affected party to the same economic position.

(g) If the relief to be granted is computed on the basis of normative parameters (and not on actual impact), then CGPL would be further penalised by lower relief, in the absence of any fault of CGPL, which in turn defeats the purpose of providing for restitution on account of Change in Law.

(h) The methodology prescribed by the Commission in its order dated 17.3.2017 read with the order dated 31.10.2017 in Petition No. 157/MP/2015 read with Petition No. 22/RP/2017 does not reconstitute CGPL to the same economic position as if such change in law event had not occurred. CGPL has already challenged the said orders, including the Change in Law computation methodology prescribed by the Commission which is pending before the APTEL.

(i) Grant of compensation on actuals would not mean passing on operational inefficiencies as the expenses incurred by CGPL for a Change in Law event are allowed only after a prudence check. CGPL's claims are based on the certificates issued by Auditors who certify the financial statements of CGPL periodically and all efficiency parameters are to be benchmarked with similar units/ configuration under this Commission's jurisdiction.



(j) The Commission in its various orders, namely order dated 15.11.2018 in Petition No. 88/MP/2018, order dated 1.2.2017 in Petition No. 8/MP/2014 and APTEL in its judgment dated 12.9.2014 in Appeal No. 288 of 2013 have held that the compensation for Change in Law is required to be computed on actuals and not on normative.

9. Respondent No.2, Maharashtra State Electricity Distribution Company Limited, vide its reply dated 26.10.2018 has supported the IA on the similar grounds as advanced by the Applicants which are not repeated for the sake of brevity.

Analysis and Decision

10. We have considered the submissions of the Applicants and the Respondents. The issue for our consideration is whether any clarification needs to be issued as regards our order dated 21.2.2018 in as much as quantum of coal to be considered for Change in Law computations is concerned.

11. The Applicants have submitted that the computation of coal requirement has to be necessarily on the normative and prudent coal requirement for generation of electricity or the quantum of coal actually used, whichever is less and not on the actual quantum of coal in excess of normative requirement. The Applicants have contended that if CGPL consumes coal in excess of the normative requirement, it is attributable to its own inability to conform to the normative parameters. The Procurers and ultimate consumers are not liable to bear additional cost related to such coal which is due to inefficiencies of CGPL and not a consequence of Change in Law. According to the Applicants, the Commission in its order dated 17.3.2017 read with 31.10.2017 in Petition Nos. 157/MP/2015 and 22/RP/2017 has already allowed the quantum of coal as per actuals subject to ceiling of coal based on the parameters as decided by the Commission in Para 84 of the order dated 6.12.2016



in Petition No. 159/MP/2012. Since, there cannot be different methodology for computation of coal for different Change in Law events, clarification is required to be issued in this regard.

12. *Per contra*, CGPL has submitted that the present IA is not maintainable as the application seeks to substantially change/ alter the findings of the Commission in order dated 21.2.2018 and for any grievance, the Applicants should have preferred a review or an Appeal. CGPL has submitted that the relief for Change in Law is to reconstitute the affected party to the same economic position as if such Change in Law event had not occurred. There is no justification to reduce the relief for Change in Law especially when the differential amount i.e. amount spent by CGPL vis-à-vis the amount calculated after computing the quantum of coal in terms of operation parameters has already been incurred by CGPL. CGPL has submitted that the bidding documents do not contemplate relief to be granted based upon normative parameters and if the relief to be granted is to be computed on the basis of normative parameters, then CGPL would be further penalised by lower relief, without any fault of CGPL and would defeat the purpose of providing for restitution on account of Change in Law.

13. CGPL had filed Petition No. 157/MP/2015 seeking adjustment of tariff for increase/ decrease in cost/ revenue due to occurrence of Change in Law events, namely, levy of Clean Energy Cess, changes in Custom Duty on imported coal, increase in Gujarat VAT, increase in rate of Service Tax, levy of Green Cess, etc. The Commission in its order dated 17.3.2017 decided that CGPL *“shall be entitled to recover clean energy cess [and other claims] on coal in proportion to the actual coal consumed in accordance with the parameters as decided by the Commission in Para*



82 (d) of the order dated 6.12.2015 in Petition No. 159/MP/2012 corresponding to the scheduled generation for supply of electricity to the procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of clean energy cess on coal.”

14. Aggrieved by the said decision of the Commission, Gujarat Urja Vikas Nigam Limited filed Review Petition No. 22/RP/2017. The Commission in its order dated 31.10.2017 in the Review Petition corrected the order as under:

“18. We have examined the matter. It is observed that certain clerical errors as pointed above by the Petitioner had crept in the order dated 17.3.2017 and the same is required to be corrected by this order. Accordingly, the review on this ground is allowed and the para 20 of the order dated 17.3.2017 stands corrected as under:

(a) The order dated 6.12.2015 is corrected as “6.12.2016”.

(b) The sentence, “the parameters as decided by the Commission in Para 82(d) of the order dated 6.12.2016 in Petition No. 159/MP/2012” is corrected as “the parameters as decided by the Commission in Para 84 of the order dated 6.12.2016 in Petition No. 159/MP/2012.”

15. Thus, the order dated 17.3.2017 in Petition No. 157/MP/2015 read with order dated 31.10.2017 in above Review Petition No. 22/RP/2017 states that CGPL “shall be entitled to recover clean energy cess [and other claims] on coal in proportion to the actual coal consumed in accordance with the parameters as decided by the Commission in Para [84] of the order dated [6.12.2016] in Petition No. 159/MP/2012 corresponding to the scheduled generation for supply of electricity to the procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of clean energy cess on coal.” Based on this, CGPL is raising the supplementary



invoices as per the aforesaid methodology for the Change in Law events decided in Petition No. 157/MP/2015.

16. Subsequently, CGPL filed Petition No. 121/MP/2017 for seeking approval of certain other Change in Law events. The Commission in its order dated 21.2.2018, while allowing the Service Tax (inclusive of Swachh Bharat Cess and Krishi Kalyan Cess) on transportation of goods by a vessel from a place outside India to the first Customs Station of landing in India, observed as under:

27. It is clarified that the Petitioner shall be entitled to recover on account of service tax on transportation of goods by a vessel from a place outside India to the first Customs Station of landing in India required in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to the Procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of service tax on transportation of goods by a vessel from a place outside India to the first Customs Station of landing in India. The Petitioner and Procurers are directed to carry out reconciliation on account of these claims annually.

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50 (b). The increase in Service Tax on transportation of goods by a vessel from a place outside India to the first custom station of landing in India shall be computed based on actual payment subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries pro-rata based on their respective share in the scheduled generation. In case of reduction of Service Tax on transportation of goods by a vessel from a place outside India, the Petitioner shall compensate the procurers on the basis of above principle. If actual generation is less than scheduled generation then compensation payable shall be computed based on actual payment subject to ceiling of coal consumed corresponding to actual generation.”

17. The Commission in its order dated 17.3.2017 in Petition Nos. 157/MP/2015 read with order dated 31.10.2017 in Petition No. 22/RP/2017 allowed CGPL to recover claims of change in law in proportion to the actual coal consumed in accordance with the parameters as decided by the Commission in Para 84 of the order dated 6.12.2016 in Petition No. 159/MP/2012 corresponding to scheduled generation. However, in the order dated 21.2.2018 in the Petition No. 121/MP/2017,



the Commission allowed CGPL to recover claims of change in law in proportion to the actual coal consumed corresponding to the scheduled generation. We note that the latter order (dated 21.2.2018 in Petition No. 121/MP/2017) is silent as regards the parameters while the earlier order (dated 17.3.2017 in Petition Nos. 157/MP/2015 read with order dated 31.10.2017 in Petition No. 22/RP/2017) states that the actual coal consumed (corresponding to scheduled generation) has to be as per parameters decided by the Commission in another order of CGPL dated 159/MP/2012 dated 6.12.2016. Thus, there appears to be an aberration in the methodology decided by the Commission for computing the impact of Change in Law with respect to the quantum of coal.

18. We find a force in the submissions of the Applicants and are of the view that there is need for clarification as regards the parameters based on which the calculations for change in law claims have to be done.

19. The Applicants have relied upon various orders of this Commission to submit that the Commission has allowed the quantum of coal based on the normative parameters only in case of other generators as well. On other hand, CGPL has relied upon certain other orders of this Commission and judgment of APTEL to submit that the compensation for Change in Law is to be computed on the actual consumption and not on normative parameters. We have perused the orders/ judgments relied upon by the parties. In some recent orders, the Commission has relied upon parameters as laid down in the Tariff Regulations of the Commission. On the other hand, the Commission had specified parameters for computation of quantum of coal for the Change in Law events for CGPL in its earlier order dated 17.3.2017 in Petition No. 157/MP/2015 read with order dated 31.10.2017 in Petition No.



22/RP/2017. In our view, the parameters specified in the earlier order dated 17.3.2017 in Petition No. 157/MP/2015 read with order dated 31.10.2017 in Petition No. 22/RP/2017 needs to be adopted with respect to Change in Law claims allowed in order dated 21.2.2018 in Petition No. 121/MP/2017, petitions being of similar vintage.

20. CGPL has submitted that the issue of computation of impact of Change in Law as decided by the Commission in order dated 17.3.2017 read with order dated 31.10.2017 in Petition Nos. 157/MP/2015 and 22/RP/2017 respectively has been challenged before the APTEL in Appeal No. 172 of 2017, which is pending for adjudication.

21. Therefore, the decision in the said appeal on the aspect of computation methodology will squarely apply to the present case. Till such time APTEL delivers judgement, the methodology prescribed by the Commission vide orders dated 17.3.2017 read with order dated 31.10.2017 in Petition Nos. 157/MP/2015 and 22/RP/2017 respectively will also apply in the present case.

22. In view of the above, we clarify that the Petitioner shall be entitled to recover the compensation on account of Service Tax including Swachh Bharat Cess and Krishi Kalyan Cess on quantum of coal as per actual subject to ceiling based on parameters as decided by the Commission in Para 84 of the order dated 6.12.2016 in Petition No. 159/MP/2012 corresponding to the scheduled generation for supply of electricity to the Procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation based on normative parameters



or actual quantum of coal consumed, whichever is lower, shall be considered for the purpose of computation of impact of change in law events.

23. IA No.71/2018 is disposed of in terms of the above.

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

Sd/-
(P.K. Pujari)
Chairperson

