

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.179/MP/2016

- Subject : Petition under Section 79(1)(b) and (f) of the Electricity Act, 2003 for adjudication claims towards compensation arising out of Change in law and consequential relief as per PPA dated 27.11.2013 between the Petitioner and the Respondent during the operating period (remand from APTEL).
- Petitioner : KSKMPCL
- Respondent : TANGEDCO
- Date of Hearing : **15.5.2023**
- Coram : Shri Jishnu Barua, Chairperson
Shri I.S Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member
- Parties Present : Shri Anand K. Ganesan, Advocate, KSKMPCL
Ms. Swapna Seshadri, Advocate, KSKMPCL
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Shri Rahul Ranjan, Advocate, TANGEDCO
Ms. Aakanksha Bhola, Advocate, TANGEDCO

Record of Proceedings

Pursuant to remand by APTEL, the petition was taken up for hearing

2. During the hearing, the learned counsel for the Petitioner made detailed oral submissions, mainly as under:

- (a) The Commission in its order dated 8.1.2018 had rejected the claims of the Petitioner on the grounds that (a) cancellation of the coal blocks by the Hon'ble Supreme Court cannot be considered as a change in law event as it was an illegal action quashed by the Hon'ble Supreme Court; and (b) NCDP, 2013 also cannot be treated as a change in law, as NCDP, 2007 and the Letter of Assurance (LOA) had itself envisaged procurement of imported coal;
- (b) Similar view taken by the Commission in GMRKEL case, was reversed by the APTEL vide its judgment dated 21.12.2018 in Appeal No. 193 of 2017, wherein it held that the cancellation of the coal blocks and the consequent cancellation/ termination of tapering linkage is a change in law. Further, the reduction of coal quantum by virtue of NCDP, 2013 was held to be change in law vis-à-vis NCDP, 2007 which had assured 100% coal supply; This position was reiterated by the Hon'ble Supreme Court vide its judgment dated 20.4.2023 in GMR Warora case.



- (c) In addition, the issue of NCDP, 2013 is also covered by the decisions of the Hon'ble Supreme Court in Energy Watchdog case and also in JVVNL v Adani Power Rajasthan Limited case (judgment dated 31.8.2020 in CA No. 8625-8626 of 2019).
- (d) Supply to TANGEDCO commenced on 2.8.2015 and the Petitioner, after assessing the impact of the change in law, gave a notice to TANGEDCO, on 12.7.2016, but there was no response from TANGEDCO. The question of issuance of notice of the change in law events, was also not raised by TANGEDCO in the earlier proceedings. Unlike force majeure, change in law does not provide for a specific time period within which notice is to be issued. Notice itself is only procedural and cannot affect the vested rights of the parties;
- (e) In the case of *GMRKEL*, the delay in development of the coal block prior to its cancellation was also held to be a force majeure event. In the present case, the issue does not arise as the coal blocks were cancelled prior to the commencement of supply by the Petitioner to TANGEDCO.
- (f) The Commission vide its order dated 29.1.2020 in Petition No.305/MP/2020 (*Adhunik Power and Natural Resources v. WBSEDCL & ors*) has held that the cancellation of coal blocks and the consequent tapering linkage by the judgement of the Hon'ble Supreme Court is a change in law under the PPA between the parties.
- (g) TANGEDCO is seeking to distinguish the present case with the case of *GMRKEL* stating that in the case of *GMRKEL*, the coal block was allotted to the generator, whereas in the present case the coal block was allotted to GMDC and GIDC, is misconceived. The issue of change in law is on account of the cancellation of the coal block allotted by the Government of India, by virtue of the decision of the Hon'ble Supreme Court. GMDC is an Indian Governmental Instrumentality in terms of PPA. Thus, the cancellation of the Coal Supply Agreement (CSA) by GMDC is change in law event, coupled with the fact that the said cancellation of the CSA was on account of the cancellation of the coal blocks by the Hon'ble Supreme Court.
- (h) The bid of the Petitioner was based on linkage coal to be sourced from GMDC/ GIDC and TANGEDCO evaluated the bid using the parameters applicable for the domestic linkage coal; Upon cancellation of CSA and Tapering Linkage, the Petitioner was allocated MoU coal at a premium, which also was on account of the change in law;
- (i) The Commission had earlier proceeded on the basis that since LOA had envisaged import of coal, there was no change in law. The issue was the change in policy from NCDP, 2007 which had assured 100% coal supply as against NCDP, 2013 which had assured reduced supply;
- (j) The Petitioner is therefore entitled to the declaration of coal block cancellation and the consequent cancellation of CSA with GMDC/ GIDC and the cancellation of tapering linkage as being a change in law under the PPA with TANGEDCO with consequential reliefs.



3. In response, the learned counsel for the Respondent, TANGEDCO made detailed oral submissions, mainly as under:

(a) The Petitioner is not entitled to any relief for change in law, since it has failed to comply with the condition that notice was to be issued as soon as reasonably practicable;

(b) In so far as the tapering linkage is concerned, the NCDP, 2013 cannot be said to constitute a change in law event, since cases of tapering linkage would get coal supplies as per the Tapering Linkage Policy. Since the promulgation of NCDP, 2013 had no bearing upon the Petitioner's arrangements for sourcing of coal, no compensation can be claimed by the Petitioner on this basis;

(c) The Petitioner cannot claim to have been affected by the change in law that occurred by virtue of promulgation of the NCDP 2013, since (i) the details of coal arrangement as submitted by the Petitioner during the bidding process, as incorporated in Schedule 5 of the PPA, specifies the coal supply agreements with GMDC and GIDC as the source of coal. Therefore, the Petitioner's bid was not based on linkage under the NCDP 2007. (ii) No regular linkage was granted to the Petitioner at any stage after the cut-off date. (iii) The FSAs executed by SECL and ECL on 19.03.2014 and 12.08.2014 were expressly for tapering linkage. As per FSAs, the Petitioner's plant was approved for grant of tapering linkage on the basis of the Morga-II coal block allotment made to GMDC.

(d) The Petitioner had filed Petition No. 176/MP/2016, before this Commission claiming identical reliefs against the Telangana and Andhra Pradesh distribution licensees, with the PPAs being premised upon the same CSA entered into with GIDC and GMDC and the Commission vide its order dated 28.10.2019 had disallowed the same and held that since the coal blocks of GMDC and GIDC, based on which tapering linkage was granted, were not developed, the Petitioner was not entitled to any relief in respect of Presidential Directives dated 17.7.2013. It was also observed that the ratio in GMRKEL case had no bearing on the facts and circumstances of the said case.

(e) The termination of the Petitioner's CSAs with GMDC & GIDC and the Coal India Limited tapering linkage dated 11.6.2009, consequent upon the judgment, of the Hon'ble Supreme Court cannot fall within the scope of change in law as claimed by the Petitioner.

(f) The grant of tapering linkage to the Petitioner took place after the cut-off date, upon execution of the FSAs on 19.3.2014. Therefore, the replacement of such tapering linkage through the MOU route, would not constitute change in law, inasmuch as the bid of the Petitioner was not based on subsistence of tapering linkage.

(g) The judgments relied upon by the Petitioner has no application in the present case.

4. The Commission, after hearing the learned counsel for the parties, permitted both the parties to file their short submissions (not exceeding three pages) along with the judgments relied upon by them, on or before **15.6.2023**, with copy to the other. The parties shall complete their submissions within the due date mentioned and no further extension of time shall be granted.



5. The petition shall be listed for hearing on **19.7.2023**.

By order of the Commission

Sd/-
(B. Sreekumar)
Joint Chief (Law)

