

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 6/MP/2013

Sub: Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Articles 13.2.(b) of the Power Purchase Agreement dated 7.8.2007 executed between Sasan Power Limited and the procurers for compensation due to change in law impacting and costs during the operating period .

Date of Hearing : 10.10.2013

Coram : Shri V. S. Verma, Member
Shri M. Deena Dayalan, Member
Shri A. K. Singhal, Member

Petitioner : Sasan Power Limited, Mumbai

Respondents: : MP Power Management Company Ltd. & Others

Parties present : Shri J.J.Bhatt, Senior Advocate, SPL
Shri Vishrov Mukherjee, Advocate, SPL
Ms. Ritika Arora, Advocate, SPL
Shri P.Venkatarao, SPL
Shri Arun, Dhillon, SPL
Shri N. K. Deo, SPL
Shri Raj Verma, SPL
Shri Sandeep S. Mysetty, SPL
Shri Mayank Gupta, SPL
Shri Srikant, SPL
Shri Vivek Kejirwal, SPL
Shri R.S.Johri, SPL
Shri G.Umapathy, Advocate, MPPMC
Shri M.G.Ramchandran, Advocate, HPPC
Shri Poorva Saigal, Advocate, HPPC
Shri Apoorve Karol, Advocate, HPPC
Shri Padamjit Singh, PSPCL
Shri T.P.S.Bawa, PSPCL
Ms. Shobana Masters, Advocate, BRPL and BYPL
Shri Himansu Chauhan, BRPL
Shri Alok Shankar, Advocate, TPDDL
Shri S.S.Barpanda, NLDC
Ms. Jyoti Prasad, NLDC

Record of Proceedings

Learned senior counsel for the petitioner submitted that the present petition has been filed under Section 79 (1) (b) of the Electricity Act, 2003 read with Article 13 (1) (b) of the Power Purchase Agreement for compensation on account of changes in law during the operation period which have financial implication on the cost and revenue of Sasan UMPP. Learned senior counsel explained the claims in respect of the following items as under:

(a) The Water Resources Department, Government of Madhya Pradesh increased the water charges ₹1.8/m³ at the time of bid to ₹5.50/m³ pursuant to the notification dated 21.4.2010. As a result the impact on account of this change will range from ₹1.77 crore to ₹63.9 crore based on actual utilization of water.

(b) Royalty on coal has been increased from ₹ 85/MT (for Moher and Moher-Amlohri Coal) and ₹ 65/MT (for Chhatrasal Coal) to an ad-valorem rate of 14% vide notification No. 349 (E) issued by Ministry of Coal, Government of India. The impact due to royalty on coal is estimated to range between ₹5.93 crore to ₹60.7 crore based on the likely coal production levels.

(c) At the time of submission of bid there was no Clean Energy Cess on coal. However, Government of India has introduced Clean Energy Cess in the Finance Act, 2010 whereby a statutory cess of ₹100 per ton was levied on coal, lignite and peat which has been reduced to ₹50 per ton vide Ministry of Finance notification dated 22.6.2010. The actual impact of the levy of clean energy cess is expected to range from ₹12.25 crore to ₹125 crore based on the coal production levels.

(d) Excise duty on coal:- At the time of submission of bid there was no excise duty on coal. The Government of India vide Finance Act, 2012 has levied excise duty @ 6% on the determined sale price of coal for captive use. The actual estimated impact on account of levy of excise duty is expected to range from ₹11.8 crore to about ₹116.2 crore.

(e) Increased expenditure on account of the Mine Closure Plan:- On 11.1.2012, Ministry of Coal, Government of India issued notification relating to guidelines for preparation of mine closure plan according to which the project proponent is required to deposit ₹6 lakh per hectare annually in an escrow account towards Mine Closure Fund Creation. As per the petitioner's approved Mine Closure Plan, the amount required to be deposited in the first year is approximately ₹4.67 crore which would increase to ₹18.32 crore in the 29th year.

(f) Reduction in Income Tax Rates:- As per the Finance Act, 2012, income tax rate has been reduced from 33.99% to 32.45% which the petitioner wants to pass on to the procurers.

(g) Increase in Minimum Alternate Tax Rates: As per Finance Act, 2012, the minimum alternate tax rate has been increased from 11.33% to the prevailing 20.01% which needs to be suitably adjusted.

(h) Reduction in Merit Rate of Excise Duty: - Ministry of Finance, Government of India vide notification dated 17.3.2012 has changed the merit rate of excise duty from 16% at the time of bid submission to 12% which petitioner intends to pass on to the procurers.

(i) Reduction in rate of Central Sales Tax:- Ministry of Finance, Government of India has reduced the central sales tax rate vide its notification dated 30.5.2008 from 3% at the time of submission of bid to currently prevailing 2% which the petitioner intends to pass on to the procurers.

(j) Increase in Value Added Tax Rates: - MP VAT (Amendment) Act, 2010 notified on 1.4.2010 has made certain changes in the value added tax rate for which the petitioner needs to be compensated.

Learned senior counsel submitted that since these developments have taken place after the submission of bids and have an impact on the cost of the project, the same needs to be compensated by the procurers in terms of Article 13 of the PPA.

2. Learned counsel for the MPPCL submitted that since Sasan UMPP has not achieved commercial operation, the claims of the petitioner are premature and should be considered after the issue of commercial operation is settled.

3. Learned counsel for Haryana Power Purchase Centre submitted as under:

(a) Article 13.1.1 provides that change in law refers to the occurrences as noted in the said article "which results in change in any cost or revenue from the business of selling electricity by the seller to the procurers under the terms of this agreement." Therefore, mere enactment of any law or change in interpretation of any law or change in the consent, approval, licences etc. will not amount to change in law unless there is any change in the cost or revenue from the business of generation and sale of electricity by the petitioner under the terms of the agreement.

(b) The petitioner is required to declare on affidavit all the decreases before claiming any relief under change in law.

(c) As regards the increase in water charges, the impact of change in law cannot be considered on the basis of allocation of water by the Govt. of MP or on the basis of actual charges payable by the petitioner to the Govt. of MP, but on the basis of the rate increase qua the normal quantum of water actually required to be used for generation of electricity as envisaged at the time of submission of the bid. The calculation given by the petitioner is not admitted by the respondent and the petitioner is required to give the full details.

(d) The royalty paid by the petitioner for use of coal is not an increase in the cost of electricity. Royalty is payable for the use and exploitation of coal mines by the petitioner. The petitioner is using the coal mines for purposes other than generation of electricity for supply to the procurers in terms of the PPA. The petitioner has significant financial benefits out of the coal used for other purposes and such advantage derived by the petitioner needs to be accounted for before adjusting any increase in royalty and allowing it as a pass through to the procurers.

(e) Clean Energy Cess is not on the business of generation and sale of electricity to the procurers and is clearly inadmissible. This Cess is levied on the production of coal and as in the case of royalty, the petitioner is deriving substantial benefits from the coal block being used for other purposes and therefore, the impact of this Cess should be adjusted against the benefits so derived.

(f) The expenditure on mine closure plan is not admissible under change in law. The mine closure plan is a condition precedent for development of the mine. The obligation for mine closure plan existed even at the time for bidding for the power project and the petitioner should have taken into consideration such expenditure on mine closure plan. Since there is no statutory levy under mine closure plan, it is clearly inadmissible under change in law.

(g) Impact of change in the rate in MAT and Income Tax is clearly inadmissible. Income Tax and MAT are post revenue appropriation to the Government based on the operating profit or net profit of the business and does not affect either the cost or revenue from the business of selling electricity. Accordingly, imposition of MAT or tax on income or any increase or decrease of rate of such tax cannot be construed as change in law under Article 13.1 of the PPA. Gujarat Electricity Regulatory Commission has given a decision on the issue in the case of Adani Power Limited Vs Gujarat Urja Vikas Nigam Limited and the said order will be placed on record.

(h) Change in the Merit Rate of Excise Duty and change in the rate of Central Sales Tax need to be passed on to the procurers as per the provisions of the PPA.

(i) The Value Added Tax notified by the Madhya Pradesh Government under Madhya Pradesh Value Added Tax (Amendment) Act, 2010 is imposable on the procurement of material by the petitioner and is not imposable on the business of the petitioner for generation and sale of electricity under the PPA. The change in the Value Added Tax cannot be a pass through in tariff under the provisions of Article 13 of the PPA.

4. The representative of Punjab State Power Corporation Limited (PSPCL) submitted that in case of clean energy cess and royalty on coal, the entire amount claimed cannot be allowed as the coal mines are also utilized for purposes other than the generating station. He further submitted that the excise duty on coal should be confined to the quantity of coal consumed in the power plant. He further submitted that the petitioner should clarify whether it is earning any carbon credit and how it is accounted for.

5. In response to a query of the Commission as to how carbon credit is linked with clean energy cess, the representative of PSPCL submitted that the plant is a super critical technology and a supercritical plant uses less coal and generates less carbon dioxide. Therefore, carbon credit is related to supercritical nature of plant. Learned senior counsel for the petitioner submitted that RfP dealt with the carbon credit according to which the bidders may factor the carbon credit in their bid. The Commission directed the petitioner to place on affidavit that the carbon credit has been considered by the petitioner at the time of the submission of bid and that all savings have been considered and passed on to the beneficiaries.

6. Learned counsel for the Tata Power Delhi Distribution Ltd submitted that increase in cost should be proportionate to the contracted capacity and not to the entire capacity of the project. He further submitted that mine closure plan is required to be submitted before the mine is allotted and therefore, expenditure in mine closure plan form an integral part of the cost of the mine. The notification by Ministry of Coal dated 11.11.2012 pertains to building of the corpus fund for mine closure by the project proponent and cannot be considered as a change in law. Learned counsel further submitted that the notice of change in law should have been given as soon as possible. However, the changes in law occurred as far back as 2008 and the petitioner has given notice to the procurers in 2013, after a gap of more than 4 years. The petitioner should either give up their claims or give explanation for not giving notice in time.

7. Learned counsel for BRPL and BYPL submitted that the claims made by the petitioner be considered as change in law events under the PPA.

8. Learned senior counsel for the petitioner in response to the submissions of the respondents submitted as under:

(a) As regards the construction of Article 13.1.1 by the respondents that the change in law should relate to change in cost or revenue from the business of electricity, learned

senior counsel submitted that this construction is not correct as the events enumerated under the said article are mutually exclusive and the words “which results in any change in any cost of or revenue from the business of selling electricity by the seller to the procurers under the terms of this Agreement” is relatable to sub-clause (iii) only which provides for “change in any consents or approvals or licenses available or obtained for the project, otherwise than the default of the seller”. It is corroborated by the fact that sub-clause (iv) of Article 13.1.1 is a separate clause by itself. The interpretation that everything should be judged on the benchmark of change in cost or revenue from the business of selling electricity is not the correct interpretation.

(b) The petitioner’s claims are based only on actual and undertaking to that effect has been given in the petition.

(c) Carbon credit has got nothing to do with clean energy cess. RFP clearly provides that any benefit on account of carbon credits would be to the account of the petitioner.

(d) As regards the water charges, learned senior counsel read out an extract from the Agreement executed between the petitioner and the Government of MP regarding the take or pay clause and submitted that as per the said agreement, the petitioner is required to pay water charges for at least 90% of the total quantum of water allowed to be drawn though the actual quantity drawn is less than 90%.

(e) As regards the notice regarding occurrence of change in law, learned senior counsel submitted that under Article 13.3.2, both the seller and procurers have the rights under the PPA to give notice if they are beneficially affected by any change in law. Notice is an ongoing process throughout the period of the PPA.

9. In reply to the query of the Commission as to whether the petitioner is drawing 90% of the whole allocation of water or more, learned senior counsel submitted that the actual quantity drawn would depend on extent of generation. In response to another question as to whether the petitioner is paying full charge from the date of operation of the unit of the generating station, learned senior counsel submitted that water allocation is unit-wise and presently water charges are paid for one unit. The Commission directed the petitioner to file an affidavit the quantum of water contracted, the quantum of water used and other relevant details.

10. The representative of PSPCL further submitted that that as per WRLDC records from 16.8.2013 up to 31.8.2013, the plant had been operating at 35% PLF as per the scheduled generation figure. In response, the representative of the petitioner submitted that there were certain problems with the coal conveyor belt due to which the unit was tripping. He further submitted that whenever the unit was in operation, it was operating at supercritical parameters. However, the representative of PSPCL is only talking about the cumulative generation. Learned counsel for HPPC relying on the data regarding PLF of the generating station submitted that the unit is operating at an average of 33% PLF. In response to a query of the Commission as to whether it is due to grid restriction,

learned counsel submitted that there is no grid restriction. The Commission directed the petitioner to explain this aspect on affidavit.

11. After hearing the learned senior counsel for the petitioner, learned counsels for MPPCL, HPPC, TPDDL BRPL and BYPL and representative of PSPCL, the Commission directed the petitioner and the respondents to file the required information on affidavit and written submissions, if any, within one week with advance copy to the other party.

12. Subject to the above, the Commission reserved order in the petition.

By order of the Commission

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