

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 156/MP/2014

Subject : Petition under section 79 of the Electricity Act, 2003 read with Article 13 of the Power Purchase Agreements dated 7.8.2008 executed between Uttar Haryana Bijli Vitran Nigam Ltd /Dakshin Haryana Bijli Vitran Nigam Ltd. and Adani Power Ltd.

Petitioner : Adani Power Limited

Respondents : Uttar Haryana Bijilli Vitran Nigam Limited
Dakshin Haryana Bijili Nigam Limited

Date of Hearing : 13.4.2016

Coram : Shri Gireesh B Pradhan, Chairperson
Shri A. K. Singhal, Member
Shri A. S. Bakshi, Member
Dr. M.K Iyer, Member

Parties present : Shri Krishnan Venugopal, Senior Advocate, APL
Ms. Poonam Verma, Advocate, APL
Shri Malav Deliwala, APL
Shri Tanmay Vyas, APL
Shri M.G.Ramachandran, Advocate, Haryana Utilities
Ms. Ranjitha Ramachandran, Advocate, Haryana Utilities
Ms. Anushree Bardhan, Advocate, Haryana Utilities
Shri Shubham Arya, Advocate, Haryana Utilities
Shri Ravi Juneja, HPPC
Shri Vikrant Saini, HPPC

Record of Proceedings

Learned senior counsel for the petitioner submitted that the present petition has been filed seeking direction to Haryana Utilities to pay compensation in terms of Article 13 of the PPAs dated 7.8.2008 for change in law events which have adverse financial impact on the cost/revenue of the petitioner at which the petitioner sells electricity to the Procurers under the PPA. He further submitted that subject matter of the present petition is the PPAs dated 7.8.2008 with Haryana utilities. Learned senior counsel submitted as under:

- (a) The petitioner has a composite scheme for generation and sale of electricity in more than one State, which has already been held by the

Commission and upheld by the Hon'ble Appellate Tribunal for Electricity in its Judgment dated 7.4.2016.

(b) The bid deadline was 26.11.2007 and accordingly, as per Article 13 of the PPA, the cutoff date for notifying change in law events was 7 days prior to the bid deadline i.e. 19.11.2007. He submitted that there are 18 events of change in law which are covered in the petition.

(c) Change in law events such as Royalty, Clean Energy Cess, Central Excise Duty and Service Tax have been already recognized and approved by the Commission as change in law events in the orders passed in petitions filed by GMR Kamalanga and Sasan Power Limited.

(d) In respect of levy of Green Energy Cess, the Hon'ble Gujarat High Court vide its judgment dated 21.1.2013 declared the Green Cess Act to be void and presently, pending adjudication before Hon'ble Supreme Court. By interim order dated 3.7.2013, Hon'ble Supreme Court stayed the operation of the Judgment and directed that Govt. of Gujarat will not enforce the demand of payment of Green Cess during pendency of SLPs. As of now, the petitioner is not paying Green Energy Cess but prays for in-principle approval as and when it is payable, the petitioner would be able to get reimbursement from the respondents.

(e) In respect of Busy Season Surcharge and Development Surcharge of Railways, these surcharge rates were linked to basic freight in percentage terms and these rates have increased from cutoff date; Busy Season Surcharge increased from 5% to 15% and Development Surcharge increased from 2% to 5%. This change in law events was not allowed by the Commission in the GMR matters. However, the petitioner feels that it has a strong case for allowing such expenditure under change in law and accordingly, intends to make its submission for consideration of the Commission. The petitioner is not asking for allowing increase in Busy Season Surcharge or Development Surcharge amounts corresponding to increase in basic freight but the additional impact consequent to increase in Busy Season Surcharge rate from 5% to 15% and Development Surcharge Rate from 2% to 5% which qualify as change in law and needs to be passed on to procurers. When the railways, which is a departmental/ government enterprise increases Busy Season/Development Surcharge rates, such increases ought to be allowed by the Commission.

(f) As on date, MAT of 18.5% is applicable along with surcharge of 10% and education cess of 2% and higher education cess of 1%. Therefore, effective MAT applicable is 20.9605%. The increase in MAT rate would result in change of economic position of the petitioner and hence qualifies as change in law.

(g) The petitioner has incurred expenditure of Rs. 646.22 crore to install FGD pursuant to the condition imposed in Environment Clearance dated 20.5.2010. While the environmental clearances granted for Units 1 to 6 do not require installation of FGD, the environment clearance granted for Units 7, 8 and 9 of the Power Plant stipulates installation of FGD. Since the requirement of FGD has been imposed vide environment clearance dated 20.5.2010 which is after the bid deadline, it qualifies as change in law.

2. The Commission desired to know whether National Mineral Exploration Trust and District Mineral Fund would be covered under change in law since the petitioner does not own mine like is the case of Sasan Power Ltd., learned senior counsel submitted that in terms of the change in law provisions in the PPA these events qualify as a change in laws event. These events are nothing but part of royalty on coal which has already been allowed by the Commission vide its order dated 3.2.2016 in Petition No. 79/MP/2013.

3. Learned senior counsel submitted that impact for March 2014 due to the aforementioned change in law events amounted Rs. 0.439/kWh and it would keep on changing from month to month. He further submitted that the events which have earlier been allowed as Change in Law events by the Commission be allowed as an interim measure keeping in view the fact that continuous loss is being suffered by the petitioner and the respondents would be spared from payment of late payment surcharge. Therefore, the petitioner has a prima-facie case. He further submitted that interim payment would also help respondents as it will allow them to project their ARR accurately, avoid distortion in Merit Order purchase process and tariff shock to end-consumers.

4. Learned counsel for Haryana Utilities submitted as under:

(a) Clean Energy Cess, Royalty and Central Excise Duty have already been considered by the Commission and hence, the Haryana Utilities have no objection for interim payment or to finally allow the above events as change in law with the same methodology of recovery which the Commission has allowed earlier in Sasan and GMR cases on the basis of normative SHR.

(b) Swachh Bharat Cess is a new imposition and if the petitioner could show that there is link between the Swachh Bharat Cess and the cost/revenue of the petitioner from the business of selling electricity to the procurers and the petitioner has already paid such cess for generation of power, then the Commission may consider it under change in law.

(c) As regards the FGD, the approval for Phase-III of Mundra Power Project was given by MOEF under EIA notification dated 14.9.2006 subject to compliance with specific and general conditions. One of the conditions is the installation of FGD for Phase-III units. Since the approval has been issued under the EIA notification dated 14.9.2006 which was prior to the bid deadline, the said expenditure cannot be covered under change in law.

(d) The impact of the amendments to MMDR Act, 1957 has to be considered as against the existing obligations of the leaseholder to contribute for interest and benefit of persons and areas affected by mining related operations, etc. To the extent that the contribution in pursuance to amendments reduce the obligations of the leaseholders to otherwise contribute to the benefit, there is no impact of the introduction of the amendments to MMDR Act.

5. After hearing the learned senior counsel for the petitioner and learned counsel for the respondents at length, the Commission declined to grant *ad interim* relief to the petitioner. The Commission directed the petitioner to file its written submissions on the following aspects within two weeks i.e. by 5.5.2016 with an advance copy to the respondents who may file their response, if any, within one week thereafter i.e. by 12.5.2016:

- (a) Submission in support of contention that Busy Season Surcharge and Development Surcharge qualify as Change in Law under the PPA.
- (b) Submit details containing (a) when Adani Power Ltd. applied for environment clearance for Phase-III, (ii) what was the result of the environment impact assessment and (iii) the zone in which Mundra project falls as per the notification dated 16.11.2009 regarding National Ambient Air Quality Standards.
- (c) Submission on the contention that installation of FGD is covered under change in law supported by relevant documents.
- (d) Explain how the petitioner is liable to contribute to National Payment of National Mineral Exploration Trust and District Mineral Fund, particularly when the petitioner does not own a coal mine. The details of invoices received from MCL and the payment made by the petitioner.
- (e) Explain with legal provisions as to how MAT qualifies as Change in Law under the PPA.

6. The Commission directed that the details be strictly adhered to by the parties.

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

By order of the Commission

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