

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 235/MP/2015

Subject : Petition under Section 79 of the Electricity Act, 2003 read with Article 13 of the Power Purchase Agreements dated 2.2.2007 and 6.2.2007 executed by Adani Power Limited with Gujarat Urja Vikas Nigam Limited and the Power Purchase Agreements dated 7.8.2008 executed by Adani Power Limited with Uttar Haryana Bijli Vitran Nigam Limited/ Dakshin Haryana Bijli Vitran Nigam Limited.

Petitioner : Adani Power Limited

Respondents : Uttar Haryana Bijli Vitran Nigam Limited and others

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 Tanmay Vyas, APL
Shri G.Umapathy, Advocate, Haryana Utilities
Shri Anand K.Ganesan, Advocate, GUVNL
Shri N.A.Patel, GUVNL
Shri S.K.Nair, GUVNL
Shri Ravi Juneja, HPPC
Shri Vikrant Saini, HPPC

Record of Proceedings

Learned senior counsel for the petitioner and learned counsels for Haryana utilities and GUVNL argued at length.

2. Learned senior counsel for the petitioner submitted that the present petition has been filed seeking direction to the respondents to pay compensation in terms of Article 13 of the PPAs for Change in Law events which have adverse financial impact on the cost and revenue of the petitioner. Learned senior counsel submitted as under:

(a) The subject matter of the present Petition is the PPAs dated 6.2.2007 with Gujarat Urja for supply of 1000 MW from Units 1 to 4 of the Petitioner's power plant, PPA dated 2.2.2007 with GUVNL for 1000 MW from units 5 & 6 and PPAs dated 7.8.2008 with DHBVNL & UHBVNL for 1424 MW from units 7 to 9 of the Power Plant at Mundra.

(b) The Mundra TPS was exempted from duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985; and Service Tax on taxable service provided to Adani Power/Developer to carry on the authorized operations in a Special Economic Zone as on the cut-off dates of respective PPAs.

(c) Due to withdrawal of exemptions from the duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 and service tax, the petitioner is required to pay basic custom duty on imported coal, clean energy cess on import of coal, countervailing duty on import of coal, procurement of any goods required for generation of electricity and taxable service.

(d) On 23.6.2005, Special Economic Zone Act, 2005 (Special Economic Zone Act) was enacted. Section 26 of the Special Economic Zone Act provides that every Developer (which includes Co-Developer) shall be entitled to exemption from any duty leviable under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 on goods imported/ procured for authorized operation and Service Tax on taxable services.

(e) On 6.4.2015, Ministry of Commerce and Industry issued two notifications withdrawing 2012 Guidelines and restoring 2009 Guidelines, w.e.f. 1.4.2015 and stipulating that those power plants which are presently situated in processing areas shall be demarcated as non-processing area and no operation and maintenance benefits would now be available for such plants. The effect of Notifications dated 6.4.2015 was that the exemption of all the duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 on goods imported/procured by the petitioner for authorized operations was withdrawn w.e.f.1.4.2015.

(f) Ministry of Commerce and Industry vide its Notification dated 16.2.2016 also withdrawn the exemption of service tax which it was entitled to as on the cut-off date

(g) While submitting the bid, the petitioner was aware that the project would be located in the Special Economic Zone at Mundra, Gujarat and had factored all the concessions/ benefits of the SEZ while quoting the tariff.

3. In response to the Commission's query whether these documents/notifications were a part of the bid, learned senior counsel clarified that Gujarat Urja was aware about the SEZ status of the petitioner as admitted by GUVNL in the order annexed with GUVNL's reply and the issue was duly considered by Gujarat Electricity Regulations Commission in its order dated 21.10.2011 in Petition No. 1080/2011.

4. Learned counsel for Haryana Utilities submitted that the petitioner has filed an affidavit dated 8.5.2015 before the Hon'ble Appellate Tribunal in Appeal No. 98 of 2014 stating that it would utilize entire domestic coal under linkage for Units 7, 8 and 9 till the time the petitioner executes any long term PPA or the Govt. of India permits use of

linkage coal for short term/medium term PPA or any change in government policy. Change in law for domestic coal shall be in accordance with the decision of the Commission in Petition No. 156/MP/2014. Learned counsel for Haryana Utilities further submitted that Mundra Phase III was the identified source of supply under the PPA for supply to Haryana Utilities. Though the RfP documents did not require specifying prevailing duties, taxes and levies, it was mandatory for the bidder to quote tariff in case-I bidding considering such applicable duty/taxes/levies. The Commission ought to consider the applicability of basic custom duty on imported coal at the time of bid and accordingly, consider allowing the change in law.

5. Learned counsel for GUVNL submitted that the petitioner's claim under change in law should be restricted to the items mentioned in Article 13 and no other claim is admissible including claim towards duty on import of consumables and spares.

6. Learned senior counsel in his rebuttal submitted that the bid invited by the Procurers did not specify that the petitioner needs to specify the special exemptions/concessions available to the petitioner while submitting its bid. The change in law provision in the PPA is provided so that in case the cost/revenue of the petitioner was affected due to the events mentioned in the PPA, the petitioner could claim the same under the change in law provisions. Learned senior counsel further submitted that the contention of the procurers that the petitioner was expected to factor all the future changes in taxes, duties, and other levies is erroneous and renders Article 13 of the PPA otiose.

7. The Commission observed that the petitioner was awarded the project on the basis of certain concessions factored in the bid which was only known to the petitioner. However, when such concessions were withdrawn, the petitioner seeks to claim them as change in law events. The Commission further observed that such an approach may be unfair to the other bidders who might have bid differently, had they known that concessions available to the project located in the SEZ would be required to be factored in the bid. The Commission directed the petitioner to file written submissions within one week on the limited aspect of the concessions being availed at the time of the bid and its effect on the bid of the petitioner, with an advance copy to the respondents who may file their response within a week thereafter.

8. The petition shall be listed for hearing on 19.5.2016.

By order of the Commission

Sd/-

**(T. Rout)
Chief (Law)**