

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 97/MP/2017

Subject : Petition under Section 79 and 63 of the Electricity Act, 2003 and in the matter of implementation of the Hon'ble Supreme Court judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 and batch matter.

Date of hearing : 10.8.2017

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

Petitioner : Adani Power Limited

Respondents : Uttar Haryana Bijli Vitran Nigam Limited and Others

Parties present : Shri Amit Kapur, Advocate, APL
Ms. Poonam Verma, Advocate, APL
Ms. Abiha Zaidi, Advocate, APL
Shri G. Umopathy, Advocate, UHBVN and DHBVN
Ms. Ranjitha Ramachandran, Advocate, Prayas
Ms. Anushree Barshan, Advocate, Prayas

Record of Proceedings

Learned counsel for the petitioner submitted that the present petition has been filed pursuant to the direction of the Hon'ble Supreme Court in judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 seeking relief with effect from 7.8.2012 under para 4.7 of the Competitive Bidding Guidelines and Article 13 of the PPA to restore Adani Power Limited (APL) to the same economic position as if the Change in Law event had not occurred. Learned counsel further submitted as under:

(a) The Commission has the general regulatory power under Section 79(1)(b) of the Electricity Act, 2003 (Act) which is the source of the power to regulate, which includes the power to determine or adopt tariff. Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Section 79(1)(b) is a wider source of power to "regulate" tariff and in a situation where the guidelines issued by the Central Government under Section 63 of the Act cover the situation, the Central Commission is bound by those guidelines and in a situation where there are no guidelines framed at all or where the guidelines do

not deal with a given situation, the Commission's general regulatory powers under Section 79(1) (b) can be exercised.

(b) The Supreme Court has held that both the letters of the Ministry of Power dated 31.7.2013 and the revised Tariff Policy are statutory documents issued under Section 3 of the Act and have the force of law. The Supreme Court allowed the change in policies of the Government with respect to availability of domestic coal to the generating companies as an event of change in law in terms of Article 13 of the PPA dated 7.8.2008 entered into between the petitioner and Haryana Utilities. The Supreme Court has observed that the party affected by the change in law event will be compensated to restore the affected party to the same economic position as if the change in law event has not occurred. The Supreme Court directed that the compensation/relief under Article 13 will be determined by the Commission.

(c) The petitioner has adopted the same methodology for computation of relief as approved by the Commission in order dated 3.2.2016 in Petition No. 79 of 2013 titled as GMR Kamalanga Energy Ltd. & Anr. Vs. Dakshin Haryana Bijli Vitran Nigam Ltd. & Others.

(d) Article 13 of the PPA contemplates that the affected party is to be restored to the same economic position as if Change in Law event has not occurred and therefore, the petitioner is entitled to be compensated not only with respect to the adjustment in tariff but also the carrying cost or interest over the delayed payment for the compensation. It is a settled principle of law that the person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by whatever name it may be called viz, interest, compensation or damages.

(e) The right of the petitioner for the compensation has always been upheld by the Commission, APTEL and finally by the Hon'ble Supreme Court though under different names. The petitioner is yet to receive any monetary relief while it has continued to perform its obligations since 2012 and is incurring losses to the extent that the economic position of the petitioner is such that the entire equity has been wiped out and operation of the power plant cannot be continued without immediate payment being made to the petitioner.

2. Learned counsel for Haryana Utilities submitted as under:

(a) The Supreme Court vide judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 has held that the shortage in domestic coal supply from CIL in modification of the assurance given under NCDP is Change in Law. Therefore, the consequential relief shall be applicable from the period of June 2013 only. Accordingly, the petitioner even if considered eligible for relief, shall be entitled for relief under Article 13 of the PPA from June 2013, even though the supply under PPA had commenced from August 2012.

(b) With regard to the consumption of coal, respondents relied on the affidavit of the petitioner dated 8.5.2015 filed before APTEL where the petitioner admitted that the entire actual domestic coal received from MCL would be allocated towards the power supplied under the Haryana PPAs for the purpose of computation of compensatory tariff. Therefore, the actual coal received from MCL is required to be considered by the Commission towards power supplied under Haryana PPAs for the purpose of relief under force majeure.

(c) The petitioner has not furnished the details with regard to supply of coal by the MCL. The petitioner did not suffer any hardship with respect to transportation of coal via sea (from the Paradip Port, Orissa to the Mundra Port, Gujarat) and instead profited further on account of the low cost of transportation involved. Therefore, petitioner's claim is not maintainable.

(d) The petitioner is not entitled to carrying costs in line with the decision taken by the Commission vide orders dated 6.2.2017 and 4.5.2017 in Petition Nos. 156/MP/2014 and 235/MP/2015 respectively.

(e) With regard to the Petitioner's prayer for interim relief, learned counsel submitted the Commission may consider to grant interim relief.

3. In response to the Commission's query as to whether the methodology adopted by the Petitioner in the light of the methodology given in GMR case is acceptable to the Haryana Utilities, learned counsel replied in the positive.

4. Learned counsel for Prayas adopted the submissions made by the learned counsel for Haryana Utilities and made the following additional submissions:

(a) The petitioner has willfully and voluntarily assumed a proportion of 70% domestic coal and 30% imported coal for running the concerned units under the PPA. While submitting its bid, the petitioner had relied on imported coal as one of the fuel sources. The petitioner always had plans to use imported coal for running the project. Therefore, the petitioner's claim that the PPA tariff assumes 100% domestic coal allocation based on the 2007 NCDP is erroneous.

(b) During the period from 2012 to 2015, when the country was facing coal shortage, FSAs were signed by CIL with only those generators that had a valid PPA. Thus, the petitioner could sign the FSA with MCL on account of the PPA it had with the Haryana Utilities. Accordingly, all the coal supplied by MCL should be used for meeting generation obligation as per the PPA.

(c) The obligation of the petitioner is to generate and sell electricity to the Haryana Utilities qua the contracted capacity of 1424 MW. The petitioner has been supplying electricity to the Haryana Utilities only to the targeted availability of 80% and not in excess thereof. The 80% of the contracted capacity works out to 1139 MW, namely, 79.98% of 1424 MW.

(d) The Coal Supply Agreement with MCL provides for supply of domestic coal to the extent of 70% of unit capacity, namely 70% of 1980 MW which is 1386 MW. The assured quantum is 80% of the 70% (1386) =1109 MW. This is sufficient to meet Targeted PLF qua Haryana of 1139 MW. 30% of power needs to be generated by use of imputed coal. Therefore, the Petitioner requires domestic coal for 79% of MW (i.e. 70% of 1139 MW).

(e) As per the terms of the allocation of coal by the Government of India to the petitioner, the entire quantum of domestic coal available is to be utilized for generation and sale of electricity to the Haryana Utilities. The petitioner has confirmed this in the affidavit dated 8.5.2015 filed before the APTEL. In any event, from the dates of COD of the three generating units till date, the petitioner has not entered into a Long Term PPA with any procurer. Accordingly, the entire quantum of domestic coal available from MCL is required to be used towards fulfillment of the obligation assumed by the petitioner to Haryana Utilities.

(f) In the RCCC Meeting held on 27.6.2013, it was stated by the representative of the petitioner that the quantity of coal received from MCL is sufficient and only in few instances, there was shortfall in supply which is very negligible. Therefore, it is clear that there was no shortfall in supply of coal from MCL and the entire coal which is received under the FSA should first be utilized by the petitioner to meet the requirement under the PPA.

(g) Adani Power has not given the exact quantum of coal which MCL was willing to supply to Adani Power during the relevant period and if there was a shortage in the supply, the reasons for the same. Adani Power has, so far, not given the month-wise opening and closing stock of the domestic coal.

(h) If the domestic coal availability is sufficient to generate 797.3 MW, there is no adverse implication on account of any change in the NCDP of the Government of India and accordingly, no relief is admissible to the petitioner in pursuance to the directions given by the Supreme Court in judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016.

(i) The petitioner has also not placed on record any details regarding shortage in availability of coal from MCL.

(j) The Supreme Court's order granting relief in case of domestic coal non-availability is restricted to such quantum, which MCL having issued the Letter of Assurance and entered into a FSA does not supply by reason of the policy decisions taken by the Government of India. It does not apply to contractual issues between the petitioner and MCL and non-fulfillment of the obligation by MCL in making available the requisite quantum of coal when the same is not by reason of any policy decision taken by the Government of India. The petitioner, instead of taking action against MCL towards the short supply of coal agreed under the FSA, is seeking compensation from Haryana Utilities under the agreement between it and MCL.

(k) The petitioner is not entitled to claim any interest for the deferred payment. No interim relief should be granted to the petitioner as the petitioner is seeking to narrowly interpret the order of the Supreme Court dated 11.4.2017 in a manner advantageous to it.

5. In response to the Commission's query whether Prayas has any objection regarding the methodology adopted by the petitioner which was approved by the Commission in GMR-Kamalanga matter, learned counsel for Prayas requested for time to file its response in this regard.

6. In rebuttal to the submissions made by learned counsels for Haryana Utilities and Prayas, learned counsel for the petitioner submitted that the petitioner is seeking relief on 70% of the energy based on domestic coal and not on 100%. The coal details, as contended by Prayas as not submitted, have already been provided to the Commission and the same have been recorded in the Commission's order dated 6.12.2016 in Petition No. 155/MP/2012. As per the Commission's directions dated 6.12.2016, the petitioner has provided the Haryana Utilities, the copies of MCL coal invoices for the period upto March 2017 and the procurers have released the payment for the change in law events such as clean energy cess and Royalty, etc. as approved by the Commission in order dated 6.2.2017 in Petition No.156/MP/2014.

7. The Commission directed the petitioner to submit on affidavit by 15.9.2017 detailed note on order booking and delivery of coal clearly bringing out making requisition/requirement of coal to the fuel supplier, consent of the fuel supplier for quantum of coal/allotment of rakes, and specific indent and offers made to Railways for supply of coal and actual supply of coal on daily basis, with copy to the Respondents and Prayas.

8. The Commission reserved the order in the petition in terms of the above.

By order of the Commission

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