

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 235/MP/2015

**Coram:
Shri P K Pujari, Chairperson
Dr. M. K. Iyer, Member**

Date of order: 17th of September, 2018

In the matter of

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 Ltd. with Gujarat Urja Vikas Nigam Ltd. and the Power Purchase Agreement dated 7.8.2008 executed by Adani Power Ltd. with Uttar Haryana Bijli Vitran Nigam Limited/Dakshin Haryana Bijli Vitran Nigam Limited during the operating period.

**And
In the matter of**

Adani Power (Mundra) Limited
“Adani House”, Near Mithakhali Six Roads,
Navarangpura, Ahmedabad
Gujarat-380009

...Petitioner

Vs

1. Uttar Haryana Bijli Vitran Nigam Limited,
Shakti Bhawan, Sector 6 Panchkula,
Haryana– 134 109

2. Dakshin Haryana Bijli Vitran Nigam Limited,
Vidyut Sadan, Vidyut Nagar Hisar,
Haryana-125005

3. Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhavan,
Race Course Circle,
Vadodara – 390007

...Respondents

Parties Present:

Ms. Poonam Verma, Advocate for the Petitioner



Shri J.Sharma, Advocate for the Petitioner
Shri Shashank Kumar, APL
Shri Jignesh Langalia, APL

ORDER

The Petitioner, Adani Power (Mundra) Limited has set up a 4620 MW Thermal Power Plant (hereinafter referred to as “Mundra Power Project”) within Special Economic Zone at Mundra, Gujarat consisting of four Units of 330 MW in Phase-I and II, two Units of 660 MW in Phase-III and three Units of 660 MW in Phase-IV. The Petitioner has entered into the following long term Power Purchase Agreements (“PPAs”) for supply of electricity from the generating station:

- a) PPA dated 2.2.2007 with Gujarat Urja Vikas Nigam Limited (GUVNL) for supply of 1000 MW from Units 5 & 6 (Gujarat Bid-02 PPA).
- b) PPA dated 6.2.2007 with Gujarat Urja Vikas Nigam Limited (GUVNL) for supply of 1000 MW from Units 1 to 4 (Gujarat Bid-01 PPA).
- c) PPAs dated 7.8.2008 with Uttar Haryana Bijli Vitran Nigam Ltd. and Dakshin Haryana Bijli Vitran Nigam Ltd. for supply of 1424 MW (712 MW each to UHBVNL and DHBVNL) from Units 7 to 9. (Haryana PPAs).

2. The Petitioner filed Petition No. 235/MP/2015 seeking Change in Law relief during the operating period as per Article 13 of the respective PPAs on account of withdrawal of exemption of all the duties under the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944 and/or the Central Excise Tariff Act, 1985 w.e.f. 1.4.2015 pursuant to Notification dated 6.4.2015 and withdrawal of exemption of service tax



pursuant to the Notification dated 16.2.2016 issued by Ministry of Commerce and Industry, Government of India.

3. The Commission in its order dated 4.5.2017 in Petition No. 235/MP/2015 held that the Notifications dated 6.4.2015 and 16.2.2016 issued by Ministry of Commerce and Industry would not amount to Change in Law in terms of the provisions of the PPAs. However, the change in rates of custom duty, excise duty, withholding tax and service tax on taxable services which have been imposed pursuant to the Acts passed by the Parliament shall be covered under Change in Law.

4. The Commission decided the other issues as under:

(a) The Petitioner shall not be entitled to reimbursement of impact of levy of duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1985 on impact/procurement of goods and service tax on the taxable services for supply of power to GUVNL under Bid-01 PPA.

(b) For computing Change in Law relief, the Gross Station Heat Rate of 2150 kcal / kWh and 2206 kcal / kWh shall be applicable for Gujarat PPAs and Haryana PPA respectively.

(c) The Petitioner shall not be entitled to Carrying Cost in view of absence of any specific provision for the same in the PPAs.

5. The Petitioner challenged the above order of the Commission in Appeal No. 210 of 2017 before the Appellate Tribunal for Electricity (Appellate Tribunal). The Appellate



Tribunal in its order dated 13.4.2018 upheld the decision of the Commission with regard to matters relating to denial of impact of duties for import / procurement of any other goods/ spares and service tax on the taxable service in respect of Bid 1 PPA of GUVNL and the Gross Station Heat Rate. The Appellate Tribunal allowed the appeal with regard to reimbursement of impact of levy and duties under the Custom Act, 1962, Custom Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1955 in respect of all the PPAs and the relief regarding carrying cost in respect of Bid-02 and Haryana PPAs. The Appellate Tribunal in its judgement dated 13.4.2018 partially set aside the order of the Commission and remanded the matter to pass consequential order in terms of its observation at Paragraphs 12 (b) and 12(d). The directions of the Appellate Tribunal in its judgement dated 13.4.2018 are extracted as under:

“12. (b) XV. The notifications issued by the Ministry of Commerce and Industry from 2009 to 2016 qualify as Change in Law event and Adani Power is required to be compensated for the same considering that all exemptions were available to it as on cut-off date for the respective PPAs,

12 (d) x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgment of the Hon`ble Supreme Court in case of Indian Council for Enviro-Legal Action Vs. Union of India & Ors, we are of considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying cost will not be applicable to the Gujarat Bid-01 PPA.

ORDER



We are of the considered opinion that the issues raised in the present Appeal have merits as discussed in paragraphs Nos. 12 (b) and 12 (d) above and accordingly, the Appeal and IA No. 05 of 2018 are hereby partly allowed.

The Impugned Order dated 4.5.2017 passed by the Central Commission is hereby set aside to the extent as indicated above and remanded to the Central Commission to pass consequential orders in terms of our observations at paragraph Nos. 12 b) and 12 d) above.”

6. Pursuant to the remand, the matter was listed for hearing. None was present on behalf of the Respondents. The counsel for the Petitioner argued the matters on merit. The Commission directed the Petitioner and the Respondents to file their submissions as per Proceedings dated 29.5.2018. The Petition was further heard on 6.9.2018, since one of the Members of the Commission who heard the Petition demitted office before issue of order. The Petitioner and the Respondent, Gujarat Urja Vikas Nigam Limited (GUVNL) have filed their submissions. We are now proceeding to deal with the rival submissions of the Petitioner and GUVNL.

Submission of the Petitioner and the Respondent

7. The Petitioner, vide its affidavit dated 30.5.2018, has submitted that on account of Change in Law pertaining to Clean Energy Cess, Basic Custom Duty (for Non-AFTA country), Countervailing Duty and Customs Duty payable on coal, spares and consumables etc., an amount of Rs. 416.38 crore is outstanding from GUVNL for the period upto March, 2018 under Bid-01 and Bid-02 PPAs which is payable in terms of the Appellate Tribunal's order dated 13.4.2018. The Petitioner has placed on record the details of the claim under Bid-01 and Bid-02 as Annexure-B to the affidavit dated 30.5.2018 which is summarised as under:



Pending Custom Duty change in law amount from GUVNL for the period from April, 2015 to March, 2018, Bid-01

Month	Basic Custom Duty (for Non AFTA countries) (A)	Countervailing Duty (B)	Clean Energy Cess payable (C)	Clean Energy Cess paid (D)	Balance clean Energy Cess payable (E)=(C-D)	Total change in law amount pending (F)=(A+B+E)
April, 2015 to March, 2018	6,807,184	899,163,774	3,123,870,686	1,692,436,915	1,431,433,771	2,337,404,729

Pending Custom Duty change in law amount from GUVNL for the period from April, 2015 to March, 2018, Bid-02

Month	Basic Custom Duty (for Non AFTA countries) (A)	Countervailing Duty (B)	Clean Energy Cess payable (C)	Clean Energy Cess paid (D)	Balance clean Energy Cess payable (E)=(C-D)	Spares and Consumables (F)	Total change in law amount pending (G)=(A+B+E+F)
April, 2015 to March, 2018	9,017,519	720,949,635	2,869,986,166	1,864,452,026	1,005,534,140	90,930,992	1,826,432,287

8. The Petitioner has sought direction to GUVNL to pay the amount of Rs. 416.38 crore immediately and future claims regularly in accordance with terms and conditions for payment in respective PPAs. However, the Petitioner has not submitted any claim against the Haryana Utilities in the light of the judgment of the Appellate Tribunal.

9. With regard to carrying cost, the Petitioner has submitted that it arranged funds at an average rate of 10.89% for the period from April, 2015 to March, 2018 as under:

Period	Actual Interest Rate
2015-16	10.68%



2016-17	10.95%
2017-18	10.97%
April, 2015 to March, 2018	10.89%

The Petitioner in support of the above has placed on record the copy of Auditor Certificate.

10. The Petitioner has submitted that the Commission considers SBI Base Rate + 350 basis points as working capital interest rate under Tariff Regulations. Further, the Late Payment Surcharge (LPS) is levied at the rate of SBAR + 2%. The Petitioner has submitted the calculation of applicable interest rate on working capital (IWC) as per 2014 Tariff Regulations and LPS as per PPAs as under:

Period	Working capital interest rate as per CERC Regulations	LPS Rate as per PPA
2015-16	13.04%	16.29%
2016-17	12.79%	16.04%
2017-18	12.43%	15.68%

11. The Petitioner has submitted that since its proposed interest rate of 10.89% per annum is cheaper than the applicable rate for IWC as per 2014 Tariff Regulations and LPS as per the PPAs, the same may be considered for awarding the carrying cost in terms of the judgment of the Appellate Tribunal.

Reply of GUVNL

12. GUVNL vide its reply dated 13.6.2018 has not commented on the Change in Law claims of the Petitioner. However, with regard to carrying cost, GUVNL has submitted that in order dated 28.9.2017 in IA No. 57/2017 in Petition No. 97/MP/2017, the Commission

granted interim relief to the Petitioner against Haryana Utilities subject to refund of excess amount, if any based on final order @ 9% interest per annum. GUVNL has submitted that once the Commission has already considered 9% for refund of excess amount under change in law in one petition, the Petitioner cannot be allowed carrying cost at rate more than 9%.

13. None was present on behalf of the respondents despite notice.

Analysis and Decision

14. We have considered the submissions of both the parties and judgment of the Appellate Tribunal dated 13.4.2018. The Appellate Tribunal has decided that the Notifications issued by the Ministry of Commerce and Industry from 2009 to 2016 qualify as Change in Law events and the Petitioner is required to be compensated for the same considering that all exemptions were available to it as on cut-off date under the respective PPAs.

15. In the light of the judgment of the Appellate Tribunal, the claims of the Petitioner are examined as under:

(a) Levy of Basic Customs Duty on imported coal:

16. The Commission in its order dated 4.5.2017 had held that the Petitioner shall be entitled for relief of custom duty on the entire quantum of imported coal irrespective of the source of import. Further, the Commission observed that import of coal from AFTA countries (Indonesia included) is not subject to custom duty. Therefore, the Petitioner was allowed reimbursement of customs duty on coal imported from non AFTA countries on the



differential in the rate of custom duty prevailing as on the bid deadline in each of the PPAs and the prevailing custom duty as on 1.4.2015 or thereafter. In view of the decision of the Appellate Tribunal that all exemptions were available to the Petitioner as on cut-off date, the Petitioner is entitled for reimbursement of customs duty on the imported coal from non-AFTA countries from 1.4.2015 onwards. As on 1.4.2015, the rate of Basic Custom Duty on imported coal was 2.5% of assessable value. The Petitioner shall be entitled to recover Basic Custom duty on imported coal used in Gujarat PPAs Bid-01 and Bid-02 in proportion to the actual coal consumed (calculated on the basis of actual GCV of imported coal) or as per the operating parameters in accordance with the applicable Tariff Regulations of the Commission or actual whichever is lower, corresponding to the scheduled generation for supply of electricity to GUVNL. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Custom duty on coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment of duty and computations duly certified by the auditor to GUVNL. The Petitioner and GUVNL are directed to carry out reconciliation on account of these claims annually.

(b) Levy of countervailing Duty on imported coal:

17. The Commission in its order dated 4.5.2017 held that since Countervailing Duty is the additional duty on customs duty equivalent to Central Excise Duty levied on similar goods produced in India and no such levy was applicable as on the date of bid guidelines, the Petitioner shall be entitled for reimbursement of the same. In view of the decision of the Appellate Tribunal that all exemptions were available to the Petitioner as on cut-off date, the Petitioner shall be entitled for reimbursement of countervailing Duty on imported coal.



Countervailing Duty was imposed @1% with effect from 1.2.2011 and @2% with effect from 1.2.2013. Therefore, the Petitioner shall be entitled for reimbursement of Countervailing Duty at @2% with effect from 1.4.2015. The Petitioner shall be entitled to recover Countervailing Duty on imported coal used in Gujarat PPAs Bid-01 and Bid-02 in proportion to the actual coal consumed (calculated on the basis of actual GCV of imported coal) or as per the operating parameters in accordance with the applicable Tariff Regulations of the Commission or actual whichever is lower, corresponding to the scheduled generation for supply of electricity to GUVNL. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Countervailing Duty on coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment of duty and computations duly certified by the auditor to GUVNL. The Petitioner and GUVNL are directed to carry out reconciliation on account of these claims annually.

(c) Levy of Clean Energy Cess on imported Coal

18. Levy of Clean Energy Cess was not challenged before the Appellate Tribunal. Therefore, Clean Energy Cess as allowed in order dated 4.5.2017 shall be applicable. Clean Energy Cess shall be admissible till 30.6.2017.

(d) Levy of duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1985 on import/ procurement of any other goods & Withdrawal of exemption from Service Tax:

19. The Commission in its order dated 4.5.2017 held that the Petitioner shall be entitled for reimbursement of the impact of duties/service tax to the extent of differential between the rates prevailing as on the cut-off date and the rates prevailing as on 1.4.2015 or



thereafter. In respect of services which are not included in the list of specified non-taxable services after the cut-off date, the Petitioner was allowed reimbursement of the service tax at the rate prevailing on or after 1.4.2015. The Appellate Tribunal has decided that the Petitioner was exempted from paying such duties and taxes as on cut-off date, the Petitioner shall be entitled for reimbursement of the impact of levy of duties and service tax at the applicable rates from 1.4.2015 onwards. This will be applicable in case of Bid-02 PPA with GUVNL. Therefore, the Petitioner shall be entitled for Custom Duty on import/procurement of any other goods and service tax at the rate prevailing as on 1.4.2015 or thereafter in case of Bid-02 PPA with GUVNL. Change in law compensation towards Customs and Central Excise Duties on spares consumables and other goods approved in this order shall be proportionately allocated on the basis of gross contracted capacity of the PPA to the installed capacity of the respective phase or phases , as the case may be, for which the spares/consumables has been procured.

(e) Carrying Cost

20. The Appellate Tribunal has further held that the Petitioner is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law, except for Gujarat Bid-01 PPA which has no provision for restoration to the same economic position as if Change in Law has not occurred. The relevant portion of the judgment is extracted as under:

“12(d)...

vii. After going through the SLS case we find that this Tribunal has held that the principle of carrying cost has been well established in the various judgments of this Tribunal and the carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time and accordingly, the developers are entitled to interest on the differential amount due to them as a



consequence of re-determination of tariff by the State Commission on the principles laid down in the said judgment.

viii. After perusal of the NTPC case we find that the interest was not payable as there was no enabling provision either through Regulations or in terms of the PPA. In the SECL case the Hon'ble Supreme Court has also gone into the principle of Restitution and has held that in Law, the term 'restitution' is used in three senses (i) Return or restoration of some specific thing to its rightful owner or status (ii) compensation for benefits derived from wrong done to another (iii) compensation or reparation for loss caused to another. Further, after perusal of the SECL case we find that the matter was related to payment of interest for the period after the expiry of date fixed by the State Government for payment of royalty till the actual payment. Here the case is regarding payment of interest from the effective date of Change in Law till the approval of Change in Law by the Central Commission and not from the date of payment of raising of bill till the actual payment of bill after the expiry of the payment date. In our view both the cases viz SECL case and NTPC case are not applicable to the present case in view of their facts and circumstances.

ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:

“13.4 Tariff Adjustment Payment on account of Change in Law 13.4.1_Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from

(a) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

(b) the date of order/ judgement of the Competent Court or tribunal or Indian Government instrumentality, if the Change in Law is on account of a change in interpretation of Law.



(c) the date of impact resulting from the occurrence of Article 13.1.1.

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff.

To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.

xi. Accordingly, this issue is decided in favour of the Appellant in respect of above mentioned PPAs other than Gujarat Bid – 01 PPA.”

21. Therefore, the Petitioner is entitled for carrying cost from effective date of change in law till the date of this order on the change in law events approved by the Commission in terms of provisions of Bid-02 and Haryana PPAs which mandate restoration of the affected party to the same economic position as if the change in law has not occurred.

22. The Petitioner has sought carrying cost at the actual interest rate of 10.89% for the period from April, 2015 to March, 2018 supported with Auditor's Certificate. The Petitioner has also submitted that the actual interest rate claimed is cheaper as compared to SBI Base Rate + 350 basis points being considered by the Commission as working capital interest rate under Tariff Regulations as well as Late Payment Surcharge (LPS) of SBAR + 2% under the PPAs. GUVNL contended the claim of the Petitioner in terms of the decision



of the Commission's order in IA No. 57/2017 in Petition No. 97/MP/2017 where interim relief was granted subject to refund of excess amount to Haryana Utilities, if any, based on final order @ 9% interest.

23. The Commission in its order dated 28.9.2017 in IA No. 57/2017 in Petition No. 97/MP/2017 considered interest rate of 9% for adjustment of final relief as compared to payment allowed as an interim relief. However, the Appellate Tribunal has observed that carrying cost ought to be granted following the Restitution Principle in terms of provision of Article 13.2 of the PPA which provides that the party affected by change in law shall be restituted to the same economic position as if change in law has not occurred. In terms of the judgment of Appellate Tribunal, the restitution principle shall be adopted for awarding the carrying cost. Therefore, we do not agree with GUVNL that 9% carrying cost should be allowed in this case.

24. After the bills are received by the Petitioner from the concerned authorities with regard to the imposition of new taxes, duties and cess, etc. or change in rates of existing taxes, duties and cess, etc., the Petitioner is required to make payment within a stipulated period. Therefore, the Petitioner has to arrange funds for such payments. The Petitioner has given the rates at which it arranged funds during the relevant period. The Petitioner has compared the same with the interest rates of IWC as per the Tariff Regulations of the Commission and late payment surcharge as per the PPA as under:-

Period	Actual interest rate paid by the Petitioner	Working capital interest rate as per CERC Regulations	LPS Rate as per the PPA
2015-16	10.68%	13.04%	16.29%
2016-17	10.95%	12.79%	16.04%
2017-18	10.97%	12.43%	15.68%



25. It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.

26. The Petitioner shall work out the Change in Law claims and carrying cost in terms of this order. As regards the carrying cost, the same shall cover the period starting with the date when the actual payments were made to the authorities till the date of issue of this order. The Petitioner shall raise the bill in terms of the PPA supported by the calculation sheet and Auditor's Certificate within a period of 15 days from the date of this order. In case, delay in payment is beyond 30 days from the date of raising of bills, the Petitioner shall be entitled for late payment surcharge on the outstanding amount.

27. Any claims with regard to Basic Custom Duty in imported coal, Countervailing Duty on imported coal, Clean Energy Cess, levy of duties under the Custom Act, 1982, Custom Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1985, Service Tax and Carrying Cost in respect of the electricity supplied to Haryana Utilities shall be regulated in accordance with the decision in this order.

28. Petition No. 235/MP/2015 is disposed of in terms of the above.

Sd/-
(M.K. Iyer)
Member

Sd/-
(P.K.Pujari)
Chairperson

