

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 214/MP/2018
alongwith
I.A.Nos.70/2018 and 101/2018**

Subject : Petition under Section 79 of the Electricity Act, 2003 read with Article 13 of the PPAs dated 7.8.2008 in order dated 28.3.2018 in Case No. 104/MP/2017(Interlocutory Application moved by the Petitioner for clarification and for approval of Rs.106.95 Cr of IDC and FERV as against provisionally approved)

Date of Hearing : 27.2.2019

Coram : Shri P. K. Pujari, Chairperson
Dr. M. K. Iyer, Member
Shri I.S.Jha, Member

Petitioner : Adani Power (Mundra) Limited

Respondents : Uttar Haryana Bijli Vitran Nigam Limited & Ors.

Parties present : Shri Amit Kapoor, Advocate, APML
Ms. Abiha Zaidi, Advocate, APML
Shri Jagnish Langalia, APML
Ms. Ranjita Ramachandran, Advocate, Haryana Utilities
Ms. Ansushree Bardhan, Advocate, Haryana Utilities

Record of Proceeding

At the outset, learned counsel for the Petitioner submitted as under:

(a) The Commission in its order dated 28.3.2018 in Petition No. 104/MP/2017 approved change in law relief to the Petitioner towards installation and operation of FGD in terms of additional Capital cost, O&M Expenses and additional Auxiliary Power Consumption. Accordingly, the Petitioner raised invoices dated 29.3.2018 including claim for additional Auxiliary Consumption on capacity charges and energy charges. However, the Respondents, vide letter dated 27.4.2018, denied the claim of the Petitioner by asserting that the order dated 28.3.2018 was limited to the grant of auxiliary consumption on the capacity charges and that it cannot be read to include quoted energy charges.

(b) The Petitioner has filed the present Petition seeking clarification that the Petitioner is entitled for relief towards additional auxiliary consumption of FGD on energy charges and direction to the respondents to pay applicable compensation.

(c) The Petitioner has to generate more power and incur additional expenditure to supply the contracted quantum to the beneficiaries on account of additional auxiliary energy consumed by FGD. Therefore, the auxiliary

consumption has to be considered for the project as a whole and not separately for fixed charges and energy charges.

(d) The interpretation of the Respondents that the decision of the Commission on additional auxiliary consumption is restricted to relief for the capacity charges amounts to adding words in the order dated 28.3.2018. In support of his contention, learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of Islamic Academy of Education vs State of Karnataka [(2003) 6 SCC 697] and submitted that if the relief is not granted on energy charge, the Petitioner will not be put to the same economic condition as envisaged under Article 13.2 of the PPA.

(e) The Petitioner has also filed IA No. 70 of 2018 seeking carrying cost pursuant to the Appellate Tribunal's judgment dated 13.4.2018 in Appeal No. 2010 of 2017. Subsequently, the Hon'ble Supreme Court has also held in its judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 that 'carrying cost' is an integral component of the restitutive principle envisaged under Article 13.2 read with Article 13.4 and the same ought to be granted in terms of the PPA. The Hon'ble Supreme Court has held that Article 13.2 has an in-built principle of restitution and the aggrieved party must be given the benefit of restitution as understood in civil law.

(f) As regards rate of carrying cost, it would be prudent to consider actual interest rate of 10.89% for recovery of carrying cost since it is cheaper than the applicable interest rate for working capital as per the Commission's Tariff Regulations during corresponding period. With regards to contention of the Respondents for grant of carrying cost as per order dated 28.9.2017, learned counsel submitted that the relief granted by the Commission was only interim. Therefore, the rate of 9% was merely ad-hoc subject to final decision.

(g) Regulation 114 of Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 empowers the Commission to amend its order and rectify it so as to stand itself corrected on the settled legal position with respect to carrying cost. Further, the Regulation clearly indicates that the Commission is not barred to entertain such a claim for amendment of the decree by way of an IA.

(h) Pursuant to the liberty granted by the Commission in the order dated 28.3.2018, the Petitioner has filed IA No. 101 Of 2018 in Petition No. 214/MP/2018 for truing-up of IDC and FERV. In this regard, SRBC & Co. LLP was requested to conduct an audit of IDC and FERV incurred. The auditor vide certificate dated 4.10.2018 has certified the IDC and FERV of Rs. 106.95 crore as against the provisionally approved 75.74 crore in order dated 28.3.2018. The Commission may, therefore, allow the consequential impact on capital cost.

2. Learned counsel for the respondents, Haryana Utilities, submitted as under:

(a) As a preliminary objection, the Commission needs to decide if IAs, seeking relief beyond the scope of the main petition, can be allowed as maintainable.

(b) The Petitioner did not seek relief in terms of increase in energy charges due to higher auxiliary consumption in Petition No. 104/MP/2017. The claim of the

Petitioner was limited to increase in capacity charges for auxiliary consumption. Accordingly, the Commission has granted specific relief to the Petitioner as contained in para 45 to 49 and 53 of the order dated 28.3.2018 in Petition No. 104/MP/2017. Therefore, the Petitioner is not entitled to any amount in excess of what has been allowed in the order dated 28.3.2018. Referring to the judgment of the Hon`ble Supreme Court in the case of Manohar Lal vs. Ugrasen and Ors. [(2010) 11 SCC 557], learned counsel submitted that the decree cannot go beyond what was asked for by the parties.

(c) The Commission has rejected the plea of the Petitioner relating to carrying cost in its order dated 28.3.2018 and the decision on carrying cost has attained finality, unless challenged in the Appellate Tribunal. The order of the Commission cannot be amended based on the fact that it has become erroneous after judgment of the Hon`ble Supreme Court at a later date. It is a settled principle of law that a Judgment cannot be reviewed in light of a change in the legal position on account of a subsequent judgment. In this regard, learned counsel relied upon the Hon`ble Supreme Court judgments in cases of State of West Bengal vs. Kamal Sen Gupta [(2008) 8 SCC 612] and State of West Bengal vs. Hemant Kumar Bhattacharjee [AIR 1966 SC 1061]. Further, carrying cost cannot be claimed for delay in submitting documents by the Petitioner. In this regard, learned counsel relied on the Appellate Tribunal's order dated 22.4.2015 in Appeal No. 174 of 2013 in the case of PSPCL vs. PSERC.

(d) Without prejudice to the above, the Commission should not discriminate in the rate of interest in case the Petitioner is required to pay i.e. at 9% and when Haryana Utilities are required to pay i.e. at 10.89% as claimed by the Petitioner.

(e) The CERC(Conduct of Business) Regulations, 1999 empowers the Commission with general power to amend defects or errors in proceedings but not to review its decision at a later date.

(f) The Commission in its order dated 28.3.2018 has observed that the cost on FERV and IDC constitutes around 14% of the capital cost. In its submission for truing up of cost of FERV and IDC, the Petitioner has claimed Rs 106.95 crore which is 19.76% of the capital cost. The Commission must do prudence check as to why the claim of FERV and IDC is so much higher than the normative numbers. Such high claim may not be allowed.

(g) The PPA provides that for every cumulative increase of Rs 8.9 crore in the capital cost, the capacity charge shall be increased by 0.227%. Accordingly, the capacity charges shall be increased by 0.227% only when the threshold of Rs 8.9 crore is achieved each time. If the block of increase is less than 8.9 crore, there is no relief for such increase until the amount crosses 8.9 crore. Based on the said principle, the computation of relief granted at 12.44% increase in capacity charges is incorrect. The same may be corrected by the Commission.

3. Learned counsel for the Petitioner, in his rebuttal, submitted as under:

(a) The respondents have contended that the Commission cannot amend its order in terms of grant of carrying cost based on the decision of Supreme Court.

However, the Respondents themselves seek amendment in the order with respect to the computation of capacity charges without filing any petition before the Commission.

(b) The Commission cannot be inhibited with procedures and technicalities of the Civil Procedure Code since the Commission operates on the principles of substantive justice.

(c) As regards claim of auxiliary consumption on energy charges, the Petitioner has only sought clarification from the Commission and not modification of the order. In support of its contention, learned counsel relied on the Hon`ble judgments of Supreme court in case of Energy Watchdog vs CERC & Ors [(2017) 14 SCC 80] and judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 where the principle of restitution has been held under Article 13.2 of the PPA.

4. On the request of the parties, time to file written submissions was granted till 14.3.2019. Subject to this, order in the Petition and IAs was reserved.

By order of the Commission

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