

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.8/MP/2014

Subject : Petition for evolving a mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of change in law during Construction and Operating period.

Petitioner : EMCO Energy Limited

Respondent : MSEDCL & ors.

Petition No.284/MP/2018

Subject : Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Article 10 of the Power Supply Agreement dated 17.3.2010 and 21.3.2013 executed between GMR Warora Energy Limited and Distribution Companies of the states of Maharashtra and Dadra & Nagar Haveli for compensation due to change in law.

Petitioner : GMR Warora Energy Limited

Respondent : MSEDCL & ors.

Date of hearing : **12.3.2019**

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

Parties present : Shri Vishrov Mukherjee, Advocate, GMRWEL
Shri Yashaswi Kant, Advocate, GMRWEL
Shri Anup Jain, Advocate, MSEDCL
Shri Anand K. Ganesan, Advocate, DNH
Ms. Poorva Saigal, Advocate, Prayas
Ms. Anushree Bardhan, Advocate, Prayas
Ms. Tanya Sareen, Advocate, Prayas

Record of Proceedings

These Petitions were taken up for hearing today.

2. The learned counsel of the Petitioner submitted that Petition No. 284/MP/2018 has been filed pursuant to the APTEL judgment dated 14.8.2018 in Appeal No. 111 of 2017 for compensation on account of change in law events such as (i) Busy Season Surcharge & Development Surcharge, (ii) Change in coal quantity pursuant to MOEFCC Notification dated 11.7.2017, (iii) Change in NCDP and (iv) Carrying Cost. The learned counsel circulated note of arguments and mainly submitted the following:

(a) The Respondent, DNH has not made any payment in compliance to the Commission's order dated 26.11.2018 in IA No. 77/2018.

(b) The Petitioner had been granted coal linkage from SECL vide LOAs dated 19.10.2006 (for 1.327 MTPA) and 3.6.2010 (for 1.3 MTPA). The Petitioner had premised its bid on the said linkage. Thus, the coal requirement of the Petitioner, having been



assessed prior to NCDP, 2007, the Petitioner is assured of supply of 100% of allocated quantum of coal.

(c) The MOP, GOI letter dated 31.7.2013 and revised tariff policy are statutory documents having force of law and are change in law events. [Energy Watchdog case was referred to].

(d) As regards relief for shortfall in coal supply, the shortfall in coal supply should be computed vis-à-vis the quantum assured in LOA allocated prior to the cut-off dates. The ACQ in terms of the FSA corresponds to the LOA quantity and thus the Petitioner is assured 100% of its normative requirement in terms of the PPAs. [APTEL judgment dated 21.12.2018 in Appeal No. 193/2017 (GMR Kamalanga Energy Ltd vs CERC & ors) was referred to].

(e) As regards compensation for change in law, the Petitioner is required to be restored to the same economic position had the change in law event not occurred. The term 'to restore' would be rendered redundant if the compensation fails to take into account actual expenditure. Reliance was placed on APTEL judgment dated 13.4.2018 in Appeal No. 210 of 2017 (Adani Power Ltd vs CERC & ors) and Hon'ble Supreme Court judgment dated 25.2.2019 in CA No. 5865 of 2018 (UHBNL vs Adani Power Ltd.).

(f) Compensation for change in law cannot be linked to the figures submitted during the bid neither can it be benchmarked. This has been rejected vide Commission's order dated 15.11.2018 in Petition No. 88/MP/2018.

(g) As regards relief for shortfall in coal supply to continue post 31.3.2017, neither the Energy Watchdog judgment nor the judgment in Appeal No. 111 of 2017 limits the compensation up to 31.3.2017. Shakti policy, based on the CCEA decision is in continuation of NCDP, 2007 & 2013 and the same is a change in law event. The Commission vide order dated 16.3.2018 in Petition No. 1/MP/2017 had not restricted compensation for shortfall of linkage coal up to 31.3.2017.

(h) The APTEL in Appeal No. 111 of 2017 had held that change in coal quality on account of MOEFCC notification dated 11.7.2012 is change in law event and the Petitioner is entitled to compensation on the said ground. It was also held in the said judgment that levy of busy season surcharge and development surcharge qualify as change in law events and the Petitioner ought to be compensated for the same.

(i) The principle of carrying cost has been settled by the Hon'ble Supreme Court by its judgment dated 25.2.2019 in CA No. 5865 of 2018, wherein the Supreme Court has allowed carrying cost as a restitution element which is part of 'restoration to same economic position'. Accordingly, the Petitioner is entitled to carrying cost in these petitions.

3. In response, the learned counsel for the Respondent, DNH made the following submissions:

(a) The Commission is required to determine the impact, if any, on the supply of coal by the Petitioner under each of the PPAs to the Procurers and the extent of compensation thereof.

(b) The contention of the Petitioner that Shakti scheme is continuation of NCDP, 2013 is misplaced. The Hon'ble Supreme Court in Energy Watchdog judgment has rendered its findings only taking into account the MOP letter dated 31.7.2013 and revised tariff policy, 2016, holding the same to be change in law events which are applicable till 31.3.2017. Thus, the Petitioner cannot make any claim beyond 31.3.2017. The claim for relief on account of shortfall in supply of coal under Shakti Policy cannot form part of the present proceedings. Even otherwise, it is not open to the Petitioner to claim any relief which travels beyond the scope of remand.



(c) There is no impact of NCDP as the fuel arrangement by the Petitioner at the time of bid was in line as prescribed in the NCDP and the Petitioner cannot claim compensation on account of change in law.

(d) Since the petitioner has been claiming compensation under the principle of restitution as envisaged in the PPA, the same can be tested on the basis of what could be the consequences if NCDP, 2013 had not occurred.

(e) As regards change in coal quality on account of MOEFCC notification, the Petitioner has not submitted any computation of the impact on account of change in coal quality to be used.

(f) The Petitioner in terms of presentation made in July, 2012 submitted that there was commitment to only supply 65% of the assured quantum of coal. Further, the said shortfall would have to be met by developers through e-auction coal or imported coal to avoid penalty.

4. The learned counsel for the Respondent, Prayas adopted the submissions made by DNH. In addition, she submitted the following:

(a) The Petitioner has not furnished complete information and supporting documents for computation of compensation and the same is contrary to Article 10.3.3 of the PPA. Hence, when the principal amount has not been computed, there cannot be any computation of carrying cost. [APTEL's judgment dated 19.9.2007 in Appeal No. 70 of 2007 (MSEDCL vs MERC) was referred to].

(b) There was no change in law notice as regards Shakti Policy in terms of Article 10.4.1 of the PPA.

(c) As regards change in coal quality pursuant to MOEFCC notification, the Petitioner is relying on notification dated 11.7.2012 which was draft rules for public consultation. The draft rules have no force of law and hence the claim of the Petitioner on this ground may be rejected.

5. In response, the learned counsel for the Petitioner clarified as following:

(a) The coal assurance to the Petitioner falls within the pre-NCDP category and therefore is covered under Para 2.2 of NCDP, 2007. [APTEL judgment dated 21.12.2018 in Appeal No. 193 of 2017 (GMR Kamalanga Energy Limited vs. CERC & Ors.) was referred to].

(b) DNH reliance on presentation made by the Petitioner is misplaced. The presentation was made in July, 2012 which is after the cut-off date under the DNH PPA. The presentation does not state that the Petitioner has factored in shortfall in coal supply and submitted its bid accordingly but merely refers to the overall scenario of power sector.

(c) The MERC in its order dated 7.2.2019 in Case No. 290 of 2018 has allowed shortfall in SHAKTI linkage coal as change in law. In any event, the Petitioner has pleaded continuing shortfall as a separate change in law event.

6. At the request of the learned counsel for DNH, time to file written submissions was granted till **30.3.2019**. Subject to this, the Commission reserved its order in the matter.

By order of the Commission

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

