

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 367/MP/2019

Subject : Petition for execution of order dated 30.4.2019 read with corrigendum dated 29.5.2019 in Petition No.255/MP/2017 and initiation of proceedings/appropriate action under Section 142 read with Section 149 of the Electricity Act, 2003 and Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations against the Respondents for non-compliance of the Order dated 30.4.2019 read with corrigendum dated 29.5.2019 passed by the Commission in Petition No. 255/MP/2017.

Petitioner : Adhunik Power and Natural Resources Limited (APNRL)

Respondents : West Bengal State Electricity Distribution Company Limited (WBSEDCL) and Anr.

Date of Hearing : 21.5.2020

Coram : Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member

Parties present : Shri M. G. Ramachandran, Sr. Advocate, APNRL
Shri Deepak Khurana, Advocate, APNRL
Shri Tejasv Anand, Advocate, APNRL
Shri Amit Griwan, APNRL
Shri Vishrov Mukerjee, Advocate, WBSEDCL
Ms. Raveena, Advocate, WBSEDCL

Record of Proceedings

The matter was listed for hearing through video conferencing.

2. Learned senior counsel for the Petitioner submitted that the instant Petition has been filed under Sections 79, 142 and 149 of the Electricity Act, 2003 (the Act) read with Regulation 111 of Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for execution of order dated 30.4.2019 read with corrigendum dated 29.5.2019 in Petition No. 255/MP/2017 and seeking action against the Respondents for non-compliance of the Commission's directions contained in the said order. Learned senior counsel submitted as under:

(a) The Commission, in its order dated 30.4.2019 in Petition No. 255/MP/2017, had adjudicated certain Change in Law claims of the Petitioner related to generation and sale of electricity to the Respondents.



(b) Pursuant to the said order, the Petitioner had raised supplementary invoices on the Respondents. As on April, 2020, Rs.138.56 crore is outstanding against the Respondents.

(c) The Petitioner has given the requisite clarification, information and details as sought for by the Respondent, WBSEDCL by its various communications and in particular, vide its letters dated 1.7.2019, 25.7.2019 and 16.8.2019. However, only Rs. 10 crore has been paid by WBSEDCL in August, 2019.

(d) WBSEDCL, in its reply, has raised certain issues, namely (i) Petition filed under Sections 142 and 149 of the Act is not maintainable, (ii) PSA is under negotiated route, (iii) no Change in Law claim in relation to coal from sources other than captive source can be considered in view of the Commission's order dated 29.1.2020 in Petition No. 305/MP/2015, and (iv) non-furnishing of proof of payment.

(e) As regards the maintainability of the Petition under Section 142 of the Act, it is not the case of inability to pay money and discharge the liability. The conduct of WBSEDCL shows that it is deliberately avoiding to comply with the order and direction of the Commission dated 30.4.2019.

(g) Independent of Section 142 of the Act, the Commission has power to execute and enforce its order and undertake all such steps as may be considered appropriate to ensure the implementation of the order. It is well settled that the power to execute and implement the order is inherent in the jurisdiction of the authority which has passed such order. In this regard, reliance has been placed on the judgments of the Hon'ble Supreme Court in the cases of (i) State of Karnataka v. Vishwabharathi House Building Coop. Society, [(2003) 2 SCC 412], (ii) Union of India v. Paras Laminates (P) Ltd. [(1990) 4 SCC 453], (iii) Gindlays Bank Ltd. v. Central Govt. Industrial Tribunal, [1980 Supp, SCC 420], (iv) Grid Corporation of Orissa Ltd. v. Transmission Corp. of Andhra Pradesh, [2007 SCC Online CERC 132], (v) Hal v. Commnr. Of Commercia, [2014 SCC Online Ori 71].

(h) The Commission exercises regulatory powers in terms of Section 79 read with the applicable provisions of the Act, which includes, within its scope, power to enforce and to do all the things as may be necessary to ensure the enforcement and implementation of its orders. In this regard, reliance has been placed on the judgments of the Hon'ble Supreme Court in the cases of (i) Central Power Dist. Co. and Ors. v. Central Electricity Regulatory Commission and Anr. [2007 8 SCC 197], and (ii) Deepak Theatre v. State of Punjab [1992 1 Suppl. SCC 684].

(i) Contention of WBSEDCL that the principle of allowing Change in Law claims for PPA governed under Section 63 is different for a negotiated tariff PPA, is without any basis. PPA and PSA considered together have clear provisions of what constitutes Change in Law. In any event, such plea cannot be raised in the present execution proceeding and its scope is limited. The said contention was also raised by WBSEDCL in Petition No. 255/MP/2017 and the same was rejected by the Commission. Therefore, it cannot be again raised in the present proceeding.



(j) Contention of WBSEDCL that in view of the order dated 29.1.2020 in Petition No.305/MP/2015, the Petitioner's Change in Law claims are restricted to the extent related to captive coal or price of captive coal only, is misplaced. The Commission has already categorically rejected such plea in its order dated 30.4.2019 in Petition No. 255/MP/2017. The order dated 29.1.2020 has no relevance for the present Petition as the Commission has consistently held that the Change in Law claims have to be considered on the basis of actual price of the coal including in the order dated 30.4.2019 in Petition No. 255/MP/2017.

(k) Contention of WBSEDCL that no proof of payment has been given is also incorrect. The Change in Law claims relate to payments to be made by the Petitioner to coal companies/railways and not directly to any statutory authority. The Petitioner has furnished the details of payment to coal companies/railway authorities in terms of bills raised by them along with its communications dated 1.7.2019 and 16.8.2019. WBSEDCL has not sought any further information from the Petitioner.

3. Learned counsel for the Respondent, WBSEDCL mainly submitted as under:

(a) The proceedings under Section 142 read with Section 149 of the Act cannot be used for the purpose of recovery of amounts purportedly due.

(b) WBSEDCL has not denied to pay the amount due to the Petitioner in terms of order dated 30.4.2019 in Petition No. 255/MP/2017. However, in the said order, the Commission has not determined any amount as payable by WBSEDCL to the Petitioner. The issue in dispute is the claim amount and its calculation, which is not in accordance with the Commission's order. In this regard, reliance has been placed on the Commission's order dated 8.7.2019 in Petition No. 269/MP/2018 (Adani Power (Mundra) Limited v. Uttar Haryana Bijli Vitran Nigam Limited and Anr.)

(c) Pursuant to the order dated 30.4.2019, the Petitioner had raised the supplementary invoice on 21.5.2019. However, on account of failure to provide proof of payment and computation of impact of such Change in Law, WBSEDCL vide its letter dated 3.6.2019 sought such details and proposed a meeting with the Petitioner on 7.6.2019 to expedite the process. Subsequently, vide letter dated 8.6.2019, WBSEDCL had once again sought the relevant documents from the Petitioner.

(d) On 4.7.2019, the Petitioner itself significantly reduced its original claim amount of Rs. 135.63 crore to Rs. 119.25 crore excluding those claims that had been erroneously included. Thereafter, on 8.7.2019 and 13.8.2019, WBSEDCL requested the Petitioner through PTC to furnish the details to justify its claims.

(e) There were errors in the information and computations submitted by the Petitioner in support of its claims. Despite the Commission's direction dated 30.4.2019 that the Change in Law claims shall be computed based on the normative operational parameters as per the Commission's Tariff Regulations or actual, whichever is lower, the Petitioner has computed its



claims by taking the values of SHR and auxiliary consumption on normative basis.

(f) The operational parameters considered by the Petitioner for computing its claims are as per the Jharkhand State Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2010 instead of this Commission's Tariff Regulations.

(g) The computation furnished by the Petitioner also indicates that the average energy charges corresponding to supply to WBSEDCL has been estimated using the energy charge as approved by Jharkhand Electricity Regulatory Commission in respect of Jharkhand Bijli Vitran Nigam Limited. It is also not clear as to how the tapering linkage available to the Petitioner has been apportioned between various beneficiaries.

(h) Chartered Accountant Certificate furnished by the Petitioner along with its claims does not verify the application of correct SHR or auxiliary consumption.

(i) WBSEDCL has appointed an independent advisor, namely, Deloitte on 19.5.2020 to verify the Change in Law claims of the Petitioner and the said assignment is expected to be completed within 90 days.

4. After hearing the learned senior counsel for the Petitioner and learned counsel for the Respondent, WBSEDCL, the Commission observed that while WBSEDCL may undertake assessment/verification of the Petitioner's total claims of Rs. 138.56 crore (upto April, 2020), the entire claim amount ought not to be held up pending such assessment/verification. In response, learned counsel for WBSEDCL sought time up to 29.5.2020 to seek necessary instruction regarding release of part payment against the Petitioner's claims.

5. Accordingly, the Commission directed WBSEDCL to file its submission specifying the amount it is willing to pay to the Petitioner, by 29.5.2020. The Commission further directed WBSEDCL to involve the Petitioner in the assessment/verification exercise undertaken by it in order to expedite the process and avoid subsequent delays.

6. The Petition shall be listed for hearing in due course for which separate notice will be issued.

By order of the Commission

**Sd/-
(T.D. Pant)
Deputy Chief (Law)**

