

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.156/MP/2014

- Subject : Petition under Section 79 of the Electricity Act, 2003 read with Article 13 of the Power Purchase Agreements dated 7.8.2008 executed between Uttar Haryana Bijli Vitran Nigam Limited/ Dakshin Haryana Bijli Vitran Nigam Limited and Adani Power Limited.
- Date of Hearing : 27.9.2021
- Coram : Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member
- Petitioner : Adani Power (Mundra) Limited (APMuL)
- Respondents : Uttar Haryana Bijli Vitran Nigam Limited and Anr.
- Parties Present : Shri Amit Kapur, Advocate, APMuL
Shri Akshat Jain, Advocate, APMuL
Shri Raghav Malhotra, Advocate, APMuL
Ms. Poorva Saigal, Advocate, Haryana Utilities
Shri Shubham Arya, Advocate, Haryana Utilities
Shri Vikas Kadian, Haryana Utilities

Record of Proceedings

Case was called out for virtual hearing.

2. The learned counsel for the Petitioner circulated the note of arguments and made detailed submission in the matter. The learned counsel mainly submitted the following:

(a) Pursuant to the direction of the Commission vide Record of Proceeding for the hearing dated 30.7.2021, the Petitioner issued supplementary bills to the Respondents ('Haryana Utilities') for compensation towards Change in Law allowed by the Appellate Tribunal for Electricity ('the APTEL'), namely, Busy Season Surcharge ('BSS') & Development Surcharge ('DS') and carrying cost for Rs. 390.13 crore along with detailed calculation and supporting documents on 2.8.2021. Various meetings were held between the parties for reconciliation of its claims.

(b) While the computation have been verified and found to be in order by both parties, there is divergence of views between the parties on certain principles, namely, (i) treatment of BSS and DS w.e.f. 15.1.2018 along with carrying cost, and (ii) methodology for computation of carrying cost.

(c) The Petitioner has agreed to the proposal of Haryana Utilities to the effect that Paradeep sea-port (which is at a shorter distance) is to be considered in place of Dharma sea-port (for quantity corresponding to IPT coal) for computation of BSS and DS. Accordingly, the consensus has been



arrived at between the parties in respect of BSS and DS on railway freight for the period upto 14.1.2018 and thus, the revised/ reconciled amount works out to Rs. 358.94 crore instead of Rs. 390.13 crore as earlier claimed by the Petitioner.

(d) BSS and DS were being levied by Railways over and above basic freight till 14.1.2018 separately. Subsequently, Railways by its Notification dated 9.1.2018 has included the said amount (equivalent to BSS and DS) in the basic freight w.e.f. 15.1.2018. Hence, BSS and DS which were being levied separately have now been subsumed in basic freight rate w.e.f. 15.1.2018. This has also been recognized by the Commission in its order dated 15.11.2018 in Petition No. 88/MP/2018 (GWEL v. MSEDCL and Anr.).

(e) Therefore, question of refund of these charges w.e.f. 15.1.2018 does not arise at all and the Petitioner has not claimed the impact of BSS and DS w.e.f. 15.1.2018. Also, having never raised such contention either before the Commission or APTEL, the same ought not to be considered in the remand proceedings.

(f) Without prejudice to above, even if it is assumed that Haryana Utilities are entitled to a refund, such refund has to be corresponding to linkage coal supplied by Coal India/ its subsidiaries instead of coal requirement based on 100% scheduled energy as contended by Haryana Utilities.

(g) The Petitioner has claimed the carrying cost based on the monthly compounding methodology, which is in line with the methodology adopted by Haryana Utilities for making payments towards carrying cost on Change in Law compensation on account of taxes and duties levied on imported coal. However, the Haryana Utilities are now proposing to compute carrying cost based on simple interest, contrary to their own earlier approach.

(h) The very same issue between the same parties have been conclusively settled by the APTEL in its judgment dated 12.8.2021 in Appeal No. 421 of 2019. The Petitioner is entitled to claim carrying cost on the basis of compound interest in terms of the provisions of the PPA and decisions of the Hon'ble Supreme Court in the case of Energy Watchdog v. CERC [(2017) 14 SCC 80] and in UHBVNL and Anr. v. Adani Power Ltd. and Ors. [(2019) 5 SCC 325].

(i) Contentions of Haryana Utilities that compounding of interest or interest on interest is not permissible in absence of any agreement or statutory provisions providing for the same and further issue of Section 3 of the Interest Act, 1978 has already been dealt with by APTEL in its recent judgment dated 20.9.2021 in Appeal No. 386 of 2019 (MSEDCL v. MERC and Anr.)

(j) Accordingly, the Haryana Utilities may be directed to pay Rs. 358.94 crore on or before 30.9.2021 since these amounts have been pending for payment since last 8 years. Even if the Haryana Utilities' calculation of simple interest and other negative impact of BSS and DS on the claims of the Petitioner are considered, it works out to Rs. 188 crore, which must be paid forthwith.

3. The learned senior counsel for the Respondents, Haryana Utilities circulated the note of arguments and made detailed submission. Learned senior counsel mainly submitted the following:

(a) As on cut-off date, the applicable rate of BSS and DS were 5% and 2% respectively. Therefore, apart from considering the increase in BSS from 5% to 10%, to 12% and 15% and similarly, increase in DS from 2% to 5%, the total remission to nil w.e.f. 15.1.2018 have to be considered in a cumulative manner till date of order to be passed by the Commission and thereafter, there has to be reduction in quoted tariff equivalent to 5% BSS and 2% DS which was prevalent on the cut-off date.

(b) As per Article 13 of the PPA, any change in BSS and DS, whether increase or decrease has to be treated equally i.e. if an increase is Change in Law, then any decrease is also Change in Law. The decision to not levy BSS and DS and this having resulted into such charge being reduced to zero, is also equally a Change in Law in favour of Haryana Utilities.

(c) The Petitioner has not factored the remission of BSS and DS to nil-effective 15.1.2018 on the ground that BSS and DS have been subsumed in the basic freight charges of Railways. However, it is now settled that the increase or the decrease in basic freight charges are commercial decision of Railways and does not constitute Change in Law. Thus, any increase or decrease of basic freight cannot be considered directly or indirectly a Change in Law for the Petitioner to give effect to impact of remission of these charges w.e.f. 15.1.2018.

(d) Reliance placed by the Petitioner on the decision of the Commission dated 15.11.2018 in Petition No. 88/MP/2018 is misconceived as in the said order, the Commission was considering the impact of Service Tax/GST being applicable to quantum of basic freight charge as Change in Law event and in that background, the Commission has held that w.e.f. 15.1.2018, GST applicable on freight charges as BS and DS have been subsumed.

(e) For the purpose of computation of the above charges to be remitted to Haryana Utilities, post abolishment of the above two charges w.e.f. 15.1.2018, the coal actually required corresponding to scheduled generation based on the actual parameters achieved by the Petitioner subject to the ceiling of applicable Tariff Regulations has to be considered.

(f) Contention of the Petitioner that Haryana Utilities did not raise any such objection either before the Commission or before the APTEL is also misconceived. BSS and DS were not considered as Change in Law events by the Commission in its order dated 6.2.2017. In such circumstances, there was no occasion for Haryana Utilities to raise any issue on the decrease in the cost on account of withdrawal of these charges. The occasion for raising the issue of decrease in these charges as Change in Law arose only with judgment of APTEL dated 7.6.2021 and thus, while undertaking the computation as per Article 13 of the PPA, any change in BSS and DS, whether increase or decrease has to be treated equally.

(g) The Petitioner's computation of carrying cost is on compounding basis with monthly interest. However, there is no provision for compounding carrying cost, either in order dated 17.9.2018 in Petition No. 235/MP/2015 or in the judgment passed by the APTEL. The Petitioner is also claiming interest on carrying cost (interest on interest) which was neither argued nor provided by the APTEL.

(h) In terms of Article 13.2 of the PPA, providing for computation of impact of Change in Law, there is no provision for restitution on compound interest

basis. The principle of compensation is limited to the extent contemplated in Article 13 of the PPA and there cannot be any claim of compound interest and/or penal interest and/or interest on interest.

(i) Section 3(3)(c) of the Interest Act, 1978 also restricts the Court to award interest on interest. Thus, as per the well settled principle and in the absence of any provision for interest on interest in the contract, it is not permissible for the Court to award interest on interest or compound interest. The reliance was also placed on the decision of APTEL dated 11.5.2017 in Appeal No. 250 of 2015 in the case of Jaigad Power Transco Ltd. v. MERC.

(j) Reliance placed by the Petitioner on the judgment of APTEL dated 12.8.2021 in Appeal No. 421 of 2019 is erroneous. Firstly, there is no such direction passed by the APTEL in Appeal No. 158 of 2018 in regard to payment of interest on compounding basis or interest on carrying cost and it is not open to refer to certain other decision as applicable to the present case. Secondly, the action of Haryana Utilities of paying invoices with carrying cost claimed by the Petitioner after an earlier order dated 17.9.2019 cannot be considered as binding precedent for other subsequent cases.

(k) Similarly, reliance on the decision of APTEL dated 20.9.2021 in Appeal No. 386 of 2019 is misplaced as it was a case where the amount has been directed to be paid by the Commission and there was delay/ default in the payment. However, in the present case, the liability to pay has not accrued so far and there is no default or failure.

(l) Interest has been claimed by the Petitioner at the rate of 9.87% to 13.10% for the period from 2012 to till date whereas, Coastal Gujarat Power Limited in its Petition No. 157/MP/2015 has claimed interest for the period from March, 2012 to January, 2021 at the rate ranging from 8.76% of 10.94% on simple interest basis and not on compounding basis. There is no justification for the Petitioner to claim such excessive rate for carrying cost when both plants are of same size, located at same place and both are multilateral industrial groups.

(m) Even assuming that the claim of the Petitioner for compounding interest is to be considered, it is appropriate to consider the rate of interest at 9% allowed by the Hon'ble Supreme Court even with compounding interest in in the case of Jaipur Vidyut Vitran Nigam Ltd. & Ors. v. Adani Power Rajasthan Ltd. and Ors. [2020 SCC Online SC 69] be followed.

4. After hearing the learned senior counsel and learned counsel for the parties, the Commission reserved the matter for order.

By order of the Commission

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