

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 167/MP/2021

Coram:

Shri P.K. Pujari, Chairperson

Shri I.S. Jha, Member

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of order: 13th December, 2021

In the matter of

Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 inter alia seeking compensation on account of occurrence of 'Change in Law events' relating to Power Purchase Agreements dated 18.12.2013 and 19.12.2013 entered into between the Petitioner and the Respondents.

And

In the matter of

Adhunik Power and Natural Resources Limited,
9B, 9th Floor, Hansalaya Building,
15, Barakhamba Road, Connaught Place,
New Delhi – 110 001

... Petitioner

Vs.

1. Tamil Nadu Generation and Distribution Corporation Limited,
NPKRR Maligai, 6th Floor,
Eastern Wing, 144, Anna Salai,
Chennai – 600 002.

2. PTC India Limited,
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi – 110 066.

... Respondents

Parties Present:

Shri Deepak Khurana, Advocate, Adhunik Power
Ms. Nishtha Wadhwa, Advocate, Adhunik Power



ORDER

The Petitioner, Adhunik Power and Natural Resources Limited, has filed the present Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as “the Act”) *inter alia* seeking compensation on account of occurrence of Change in Law events under the back-to-back Power Purchase Agreement dated 19.12.2013 entered into between the Petitioner and the Respondent No.2 PTC India Limited, pursuant to Power Purchase Agreement dated 18.12.2013 entered into between the Respondent No. 1 and Respondent No.2. The Petitioner has made the following prayers:

- “a) Hold that the events enumerated in the Petition constitute Change in Law events as per the provisions of the PPAs and that the Petitioner is entitled to be restored to the same economic condition prior to occurrence of the said Changes in Law events;*
- b) Direct the Respondents to make payment of Rs.33,69,38,018/- (Rupees Thirty Three Crores Sixty Nine Lacs Thirty Eight Thousand and Eighteen Only) to the Petitioner towards the additional expenditure incurred by the Petitioner on account of Change in Law events enumerated in the Petition in supplying power to the Respondents under the PPAs up till March, 2021;*
- c) Grant carrying cost @ 1.25% per month from the date(s) on which the said amount(s) became due to the Petitioner till the actual realization of the same;*
- d) Direct the Respondents to continue to make payments accrued in favour of the Petitioner on account of Change in Law events enumerated in the Petition, up to the effect of the said Change in Law events as also the expenses incurred by the Petitioner towards the aforementioned Change in Law events, on a regular basis;*
- e) In the interim pending final adjudication of the present Petition, direct the Respondents to make payment of Rs.30,32,44,216 (Rupees Thirty Crores Thirty-Two Lacs Forty Four Thousand Two Hundred and Sixteen Only) i.e. 90% of the already incurred amount by the Petitioner up till March, 2021 towards supply of power to the Respondents.”*

2. The case was called out for admission through virtual hearing on 2.12.2021.
3. During the course of hearing, the learned counsel for the Petitioner submitted that the present Petition has been filed, *inter alia*, seeking compensation on account of occurrence of Change in Law events, namely, (i) levy of Jharkhand Covid-19 pandemic cess, (ii) levy of forest transit fee, (iii) coal terminal surcharge/ terminal

charge, and (iv) introduction of fly ash transportation cost in terms of Power Purchase Agreements dated 18.12.2013 and 19.12.2013 entered into between the Petitioner and the Respondents. The learned counsel further submitted that except for the levy of Jharkhand Covid-19 pandemic cess, all other Change in Law events have already been recognized and allowed by the Commission in its earlier orders.

4. In response to the observation of the Commission regarding the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (hereinafter referred to as “the Change in Law Rules”) notified by the Ministry of Power, Government of India, the learned counsel submitted that the present Petition has been filed prior to the issuance of notification of the Change in Law Rules i.e. on 22.10.2021 and, therefore, the rights have accrued in favour of the Petitioner when the present proceedings were initiated. The learned counsel further submitted that Change in Law Rules being a delegated legislation, their applicability has to be on prospective basis except for (i) where the parent Act, i.e. the Electricity Act, 2003 permits the retrospective application of the delegated legislation, and (ii) where the language of the Rules itself indicate that they are meant to be applied retrospectively. The learned counsel, referring to Rules 1(2), 3(1), 3(2) and 3(3) of the Change in Law Rules, argued that the language used therein indicates that the Change in Law Rules are to be applied prospectively with regard to the Change in Law events that occur after notification of the said Rules.

5. After hearing the submissions of the learned counsel of the Petitioner, the matter was reserved on “admissibility”.

6. We have considered the submissions made by the learned counsel for the Petitioner. Relevant portion of Change in Law Rules notified by the Ministry of Power, Government of India, are extracted as under:

“2(c) “change in law”, in relation to tariff, unless otherwise defined in the agreement, means any enactment or amendment or repeal of any law, made after the determination of tariff under section 62 or section 63 of the Act, leading to corresponding changes in the cost requiring change in tariff, and includes —

(i) -----

(ii) -----

(iii) -----

3. Adjustment in tariff on change in law— (1) On the occurrence of a change in law, the monthly tariff or charges shall be adjusted and be recovered in accordance with these rules to compensate the affected party so as to restore such affected party to the same economic position as if such change in law had not occurred.

(2) For the purposes of sub-rule (1), the generating company or transmission licensee, being the affected party, which intends to adjust and recover the costs due to change in law, shall give a three weeks prior notice to the other party about the proposed impact in the tariff or charges, positive or negative, to be recovered from such other party.

(3) The affected party shall furnish to the other party, the computation of impact in tariff or charges to be adjusted and recovered, within thirty days of the occurrence of the change in law or on the expiry of three weeks from the date of the notice referred to in sub-rule (2), whichever is later, and the recovery of the proposed impact in tariff or charges shall start from the next billing cycle of the tariff.

(4) The impact of change in law to be adjusted and recovered may be computed as one time or monthly charges or per unit basis or a combination thereof and shall be recovered in the monthly bill as the part of tariff.

(5) The amount of the impact of change in law to be adjusted and recovered, shall be calculated -

(a) where the agreement lays down any formula, in accordance with such formula; or

(b) where the agreement does not lay down any formula, in accordance with the formula given in the Schedule to these rules;

(6) The recovery of the impacted amount, in case of the fixed amount shall be —

(a) in case of generation project, within a period of one-hundred eighty months; or

(b) in case of recurring impact, until the impact persists.

(7) The generating company or transmission licensee shall, within thirty days of the coming into effect of the recovery of impact of change in law, furnish all relevant documents along with the details of calculation to the Appropriate Commission for adjustment of the amount of the impact in the monthly tariff or charges.

(8) The Appropriate Commission shall verify the calculation and adjust the amount of the impact in the monthly tariff or charges within sixty days from the date of receipt of the relevant documents under sub-rule (7).

(9) After the adjustment of the amount of the impact in the monthly tariff or charges under sub-rule (8), the generating company or transmission licensee, as the case may be, shall adjust the monthly tariff or charges annually based on actual amount recovered, to ensure that the payment to the affected party is not more than the yearly annuity amount.”

7. As per the above-quoted provisions, on occurrence of a Change in Law, the affected party, in the present case the Petitioner, and other parties, in the present case the Respondents/ Procurers, are to settle the Change in Law claims among themselves and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.

8. The learned counsel has contended that present Petition has been filed before the Commission prior to the notification of the Change in Law Rules. Therefore, these rules are not applicable in the present case. The issue of retrospective application of the rules has been dealt with by the Commission in order dated 6.12.2021 in Petition No. 228/MP/2021 as under:

“13. It is a settled law that as a general rule, no law operates retrospectively unless it has been provided differently in the law itself, or with exceptions as have been delineated by Hon`ble Supreme Court. Hon`ble Supreme Court in the case of T. Kaliamurthi and Anr. V. Five Gori Thaikal Wakf and Ors. [2008 (9) SCC 306], dealing with law of limitation has succinctly laid down the principle as under (emphasis by us):

“22. It is well settled that no statute shall be construed to have a retrospective operation until its language is such that would require such conclusion. The exception to this rule is enactments dealing with procedure. This would mean that the law of limitation, being a procedural law, is retrospective in operation in the sense that it will also apply to proceedings pending at the time of the enactment as also to proceedings commenced thereafter, notwithstanding that the cause of action may have arisen before the new provisions came into force. However, it must be noted that there is an important exception to this rule also. Where the right of suit is barred under the law of limitation in force before the new provision

came into operation and a vested right has accrued to another, the new provision cannot revive the barred right or take away the accrued vested right.”

14. It is also a settled principle of law that where a particular provision operates in a future, it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included. In this regard, it would be relevant extract the decision of the Hon'ble Supreme Court in the case of Trimbak Damodhar Raipurkar v. Assaram Hiranman Patil, [(162) Supp. (1) SCR 700]:

“9. In this connection it is relevant to distinguish between an existing right and a vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included.”

9. In light of the above observation, the contention of the leaned counsel that the present Change in Rules do not apply to the present case, is not sustainable.

10. The learned counsel has also referred to Rules 1(2), 3(1), 3(2) and 3(3) of Change in Law Rules to contend that the language used therein, particularly in Rule 3(3), which requires the affected party to furnish the other party the computation of impact in tariff or charges to be adjusted and recovered within thirty days of occurrence of Change in Law, clearly indicates that the Change in Law Rules are to be applied in respect of the Change in Law events that occur after the notification of the said rules. However, we do not find merit in the contention of the Petitioner for the reason that under Rule 3(3) of the Change in Law Rules as quoted above, the affected party is required to furnish to the other party, computation of impact in tariff or charges to be adjusted and recovered, within thirty days of occurrence of Change in Law or on the expiry of three weeks from the date of the notice as referred to Rule 3(2), whichever is later. Therefore, it is not mandatory that the affected party furnishes the computation of impact in tariff or charges to be adjusted and recovered to the other party within thirty days of occurrence of Change in Law as the Change in Rules itself provides that such computation can also be furnished on the expiry of three weeks from the notice issued under Rule 3(2). Under Rule 3(2) of the Change

in Law Rules, the affected party which intends to adjust and recover the costs due to Change in Law is required to give a three week prior notice to the other party about the proposed impact in the tariff or charges to be recovered from such other party. Thus, this rule simply provides for issuing a three weeks prior notice to the other party about the proposed impact in tariff or charges to be recovered due to occurrence of Change in Law event and does not link the requirement of issuing such notice with the date of occurrence of Change in Law event. Therefore, in our view, the contention of the Petitioner that the language of the Change in Law Rules indicates that they will only apply to Change in Law events those have occurred after the notification of the Change in Law Rules is misplaced.

11. In view of the foregoing discussion, the Petitioner may approach the procurer(s) for settlement of Change in Law claims amongst themselves in terms of the Change in Law Rules and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.

12. Accordingly, the Petition No. 167/MP/2021 is disposed of in terms of the above at the admission stage.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(P.K. Pujari)
Chairperson