

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 450/MP/2019

- Subject : Petition invoking Section 79 of the Electricity Act, 2003 read with (i) Article 10 of the Power Purchase Agreement dated 18.01.2014, (ii) Article 10 of Schedule 1 of the PPA dated 20.01.2014, (iii) Clause 4.7 of the Competitive Bidding Guidelines, and (iv) this Commission's Order dated 03.06.2019 passed in Petition No. 156/MP/2018 seeking approval of the additional capital and operational expenditure on account of installation of various Emission Control Systems in compliance with Ministry of Environment, Forest and Climate Change Notification dated 07.12.2015.
- Date of Hearing : 9.2.2022
- Coram : Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member
- Petitioner : M B Power (Madhya Pradesh) Limited (MBPMPL)
- Respondents : Uttar Pradesh Power Corporation Limited (UPPCL) and 6 Ors.
- Parties Present : Shri Amit Kapur, Advocate, MBPMPL
Shri Akshat Jain, Advocate, MBPMPL
Shri Pratyush Singh, Advocate, MBPMPL
Shri Abhishek Gupta, MBPMPL
Shri Sitesh Mukherjee, Advocate, UPPCL
Shri Abhishek Kumar, Advocate, UPPCL
Shri Nived Veerapaneni, Advocate, UPPCL
Shri Karan Arora, Advocate, UPPCL
Shri Chandrika Prasad Yadav, UPPCL
Shri Ravi Kishore, Advocate, PTC

Record of Proceedings

Case was called for virtual hearing.

2. During the course of hearing, learned counsel for the Respondent, UPPCL made detailed submissions in the matter. Learned counsel, *inter alia*, submitted the following:

(a) The Petitioner through its affidavit dated 6.9.2021 has submitted that pursuant to re-tendering, the base cost discovered for implementation of FGD system is Rs. 648.20 crore, which amounts to Rs.0.54 crore/MW. The said cost is significantly higher than the cost recommended by CEA (i.e. Rs.0.37 crore/MW) and the cost discovered by the other generators. Reliance was placed on a comparative statement exhibiting the base cost discovered and considered by the Commission in various orders.

(b) The Petitioner has not filed the copy of Notice Inviting Tender (NIT) and other relevant documents to indicate whether such documents provided any benchmark price or floor price.

(c) The basis and justifications for seeking in-principle approval of total capital expenditure towards installation of emission control system such as the regulatory certainty qua treatment of costs/charges, methodology for arriving at compensation to mitigate the impact of Change in Law, etc., have now been rendered infructuous in view of the suo-motu order dated 13.8.2021 read with corrigendum dated 11.11.2021 in Petition No. 6/SM/2021.

(d) In the aforesaid suo-motu order, the Commission has already provided the mechanism/ methodology to determine compensation on account of installation of emission control system keeping in mind the principle of economic restitution, which gets triggered only once the capital cost of emission control system is determined. Accordingly, in-principle approval or provisional approval of the cost is no longer required.

(e) The Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 ('the Change in Law Rules') notified by the Ministry of Power, Government of India on 22.10.2021 prescribe a mechanism for treatment of cost of Change in Law and do not permit or contemplate an in-principle or provisional approval. The Change in Law Rules clearly provide that the actual impact of the Change in Law event is required to be placed before the Commission.

(f) Apart from the Respondents, the Petitioner is supplying power to M. P. Power Management Company Limited, distribution companies of Madhya Pradesh and Government of Madhya Pradesh under long-term PPAs and these are necessary parties in the present petition. Non-joinder of the same is fatal to the present proceedings.

(g) Order I Rule 9 of the Code of Civil Procedure, 1908 ('CPC') provides that no suit shall be defeated by the reason of misjoinder or non-joinder of parties. However, proviso clarifies that nothing in Order I Rule 9 of CPC shall apply to a 'necessary party'. Therefore, it should be ensured that necessary party is before the Court otherwise the proceedings will have to fail. Reliance was placed on the decision of Hon'ble Supreme Court in the case of Chief Conservator of Forest v. Collector, [(2003) 3 SCC 472].

(h) Prayer for grant of an in-principle or provisional approval has been sought against the total estimated capital expenditure which corresponds to the entire 1200 MW of the project and not for only 32.715% (i.e. capacity allocated to Respondents) of total costs. Hence, MPPMCL, MP Discoms and Government of Madhya Pradesh are necessary party to the present proceedings and the prayers sought by the Petitioner cannot be adjudicated in their absence.

(i) Submissions of the Petitioner that the Respondent having not raised similar objections in the earlier proceedings in Petition No. 156/MP/2018 is untenable as prayers sought therein and in the present case are very distinct in nature. Also, the various decisions relied upon by the Petitioner in this regard are distinguishable.

3. *In rebuttal*, learned counsel for the Petitioner made detailed submissions refuting the contentions made by the learned counsel for the Respondent, UPPCL. Learned counsel for the Petitioner, *inter alia*, submitted the following:

(a) The Petitioner's prayer for in-principle approval has not been rendered infructuous. The in-principle approval of the cost to be incurred by the Petitioner on account of procurement and installation of FGD system is critical and necessary to provide required comfort to the bankers/ lenders for debt funding towards installation of capital-intensive FGD system. This position has already been noted and upheld by the APTEL, this Commission and the Ministry of Power. Reliance was placed on the decision of APTEL dated 28.8.2020 in Appeal No. 21 of 2019 (TSPL v. PSERC and Anr.) and the order of the Commission dated 23.4.2020 in Petition No. 446/MP/2019 (Sasan Power Ltd. v. MPPMCL and Ors.).

(b) Funds required for procurement and installation of FGD system is substantially high, which cannot be arranged by the Petitioner from its internal resources and, hence, debt-funding by the banks/ lenders is essential. If debt funds are not sanctioned at the earliest, the entire work pertaining to procurement and installation of FGD system will be halted resulting in violation of the phase-wise accelerated timeline of December 2024 given to the Petitioner for installation of FGD system. Thus, prayer of the Petitioner for grant of in-principle approval of FGD system cost has not been rendered infructuous.

(c) The contentions of UPPCL are self-contradictory. At one hand, UPPCL vide its reply dated 16.7.2020 stated that the prayer for in-principle approval of FGD cost is premature since the Petitioner has approached the Commission without completing the competitive bid process for discovering the actual cost and now that the Petitioner has discovered the actual base cost for installation of FGD system, UPPCL is contending that such prayer has been rendered infructuous. The Hon'ble Supreme Court in Suzuki Parasrampuria Suitings (P) Ltd v. Official Liquidator, [(2018) 10 SCC 707] has held that taking inconsistent stand by a party makes its conduct far from satisfactory.

(d) CEA in its letter dated 5.3.2020 has stated that actual cost of retrofitting FGD system for the Petitioner is required to be discovered through competitive bidding process. Pursuant to CEA's directions, the Petitioner has conducted the competitive bidding process and discovered the actual base cost of Rs. 648.20 crore for procurement and installation of FGD system.

(e) Suo-motu order dated 13.8.2021 in Petition No 6/SM/2021 is a generic order prescribing generic norms for determination of Change in Law compensation. The said order comes into play only when the Petitioner has actually incurred FGD cost and not at the present when it has to arrange the requisite debt funds which requires a prior in-principle approval of FGD cost from the Commission.

(f) The Change in Law Rules are not applicable to the present case as they do not deal with the grant of in-principle approval of the cost of FGD system as sought in the present Petition. Further, the Petitioner in its Note for Arguments dated 19.1.20220 has already made detailed legal submissions

and reasons justifying that the Change in Law Rules are not applicable. The present Petition is limited to in-principle approval of the cost.

(g) The Commission in various orders has declared MoEF&CC Notification dated 7.12.2015 as Change in Law and has granted in-principle approval of the associated cost to various generating companies therein. In many of such cases, UPPCL was also party to the proceedings and has not challenged such orders. Thus, it is barred from raising pleas which have been rejected by this Commission. APTEL vide its judgment dated 12.8.2021 in Appeal No. 421 of 2018 (APMuL v. Haryana Utilities) has clearly held that the distribution licensees being a public utility cannot adopt a different approach/ yardstick but should have same approach towards all the parties.

(h) MPPMCL/ MP Discoms are not the necessary party to the present proceedings.

(i) The present Petition has been filed in terms of directions and liberty granted by the Commission vide order dated 3.6.2019 in Petition No. 156/MP/2018, wherein MPPMCL was not a party to the Petition. Also, the purpose of the present Petition is limited only to claim relief from UPPCL corresponding to its contracted capacity of 361 MW (net) (i.e. 32.175% of Project Capacity) in accordance with the applicable Change in Law provisions under Article 10 of UP-PPA. Even in the other proceedings initiated by the Petitioner before this Commission vide Petition No. 224/MP/2018 and Petition No. 289/MP/2018 also, UPPCL did not raise such issues qua impleadment of MPPMCL as party to the Petition.

(j) UP-PPA dated 18.1.2014 has been executed pursuant to competitive bidding process under provisions of Section 63 of the Electricity Act, 2003 ('the Act') whereas, PPAs with MPPMCL/MP Discoms have been executed under Section 62 of the Act where the tariff determination is essentially done on cost plus basis in accordance with prevailing Tariff Regulations. The provisions of such PPAs are significantly different with regard to aspects like tariff determination, computation of compensation/ supplementary tariff on account of Change in Law, etc. and as such proceedings under PPAs in terms of Section 62 and Section 63 of the Act cannot be at the same footing. In this regard, reliance was placed on the decision of APTEL dated 20.12.2019 in Appeal No. 54 of 2019 (GRIDCO Ltd. v. GMR Kamalanga Energy Ltd. and Ors.) wherein APTEL has categorically held that since proceedings under Section 62 and Section 63 of the Act are entirely different, distribution companies under Section 62 PPAs would not qualify as a necessary party in Change in Law Petitions filed by the generating company under Section 63 PPAs entered with other distribution companies.

4. After hearing the learned counsels for the parties, the Commission reserved the order in the matter.

By order of the Commission

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