

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 15/MP/2019

Coram:

**Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri P.K. Singh, Member**

Date of Order: 25th January, 2022

In the matter of

Petition under Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 for declaration that any variation in the cost of fuel 'invoiced' to the Petitioner, owing to any increase in rate of taxes, levies, cess or duties which includes but is not limited to royalty, central excise duty, S.E.D. CST, energy cess, sizing charges, surface transportation and also enactment of new taxes/royalties on the coal cost which includes but is not limited to NMET, DMF, forest transit fee and PWD cess, imposed by the Central Government, State Government/Union Territory or any other Government, being a component of invoiced rate of coal, is a pass-through cost as per the terms of the PPA dated 7.8.2008.

And

In the matter of

Jhajjar Power Limited,
Village: Khanpur Khurd,
Tehsil: Matenhail, District: Jhajjar-124142,
Haryana.

.....Petitioner

Vs.

Haryana Power Purchase Centre (HPPC),
Shakti Bhawan, Sector-6,
Panchkula, Haryana

For

(a) Uttar Haryana Bijli Vitran Nigam Limited,
Vidyut Sadan, Plot No. C-16, Sector 6,
Panchkula, Haryana

And

(b) Dakshin Haryana Bijli Vitran Nigam Limited,
Having its registered office at Vidyut Nagar,
Hisar, Haryana

.....Respondents

Parties Present:

Ms. Shikha Ohri, Advocate, JPL
Ms. Surabhi Pandey, Advocate, JPL
Shri Shubham Arya, Advocate, HPPC
Ms. Poorva Saigal, Advocate, HPPC
Ms. Bitika Kaur, JPL
Ms. Sudipta Ghosh, JPL
Shri Vikas Kadian, HPPC

ORDER

The Petitioner, Jhajjar Power Limited (JPL) which has set up, owns and operates the Mahatma Gandhi Thermal Power Plant (MGTPP) with a capacity of 1320 MW (2x660 MW) (in short, 'the Project') in the State of Haryana has filed the present Petition for seeking declaration that any variation in the rate of taxes, levies, cess or duties, which includes but is not limited to Royalty, Central Excise Duty, S.E.D, Central Sales Tax (CST), Energy Cess, Sizing Charges, Surface Transportation and also enactment of new taxes on coal cost which includes but is not limited to National Mineral Exploration Trust (NMET), District Mineral Foundation (DMF), Forest Transit Fee and PWD cess, imposed by the Central Government, State Government/ Union Territory, or any other Government, being a component of invoiced rate of coal is a pass-through cost as per Article 11 read with Schedule 7 of the Power Purchase Agreement dated 7.8.2008.

Facts of the case

2. The facts leading to the filing of the Petition are capitulated in brief as under:
 - (a) Haryana Power Generation Company Limited (HPGCL) which was vested with the right related to procurement and bulk supply of electricity by the Government of Haryana was authorised by Uttar Haryana Vijli Vitran Nigam Limited (UHVNL) and Dakshin Haryana Vijli Vitran Nigam Limited (DHVNL) to procure power on their behalf. HPGCL conducted International Competitive Bidding (ICB) in accordance with the "Guidelines for Determination of Tariff by

Bidding Process for Procurement of Power by Distribution Licensees” (in short, “the Bidding Guidelines”) issued by the Government of India on 19.1.2005 under Section 63 of the Electricity Act, 2003 (in short, “the Act”).

(b) As per the Bidding Guidelines, Case 2 projects refer to “hydro power projects, load centre projects or other location specific projects with specific fuel allocation such as captive mines available, which the procurer intends to set up under tariff based bidding process.” In accordance with the Bidding Guidelines, HPGCL incorporated Jhajjar Power Limited as a Special Purpose Vehicle for setting up MGTPP which would be transferred to the successful bidder on conclusion of the bidding process.

(c) HPGCL conceived MGTPP under Case 2 bidding to be located at Matenheil, District Jhajjar, Haryana with fuel linkage to be procured from Government of India, Ministry of Coal. On 25.5.2006, HPGCL issued the Request for Qualification (RfQ) for development of MGTPP at the identified location for a capacity within the range of 1000-1200 MW. RfQ provided that a bidder could quote more than 1200 MW if it was possible to accommodate the same in the identified project site. Paragraph 2.3 of RfP provided that MGTPP would have a minimum capacity of 1000 MW and maximum capacity of 1320 MW at the generation bus bar in accordance with the PPA. RfP further provided that the procurers would contract 90% of the Available Project Capacity or Contracted Capacity from the date of commercial operation of MGTPP and the seller would have to sell the balance 10% of the Available Project Capacity outside the State of Haryana. RfP also stated that MGTPP would fall within the Mega Power Policy as notified by the Ministry of Power, Government of India. Paragraph 2.4.(iv) of RfP clarified that the coal linkage for MGTPP had been secured with the likely coal mines and specification of coal was indicated in Annexure 13 of RfP, though the exact location of mine/ subsidiary of Coal India Limited wherefrom coal would be supplied was yet to be notified.

(d) China Light and Power Limited (CLP) was issued RfQ on 19.2.2007 and after being shortlisted, was issued RfP documents on 24.12.2007. CLP submitted its bid on 10.3.2008. On conclusion of the bidding process, CLP emerged as the successful bidder and Letter of Intent (LOI) was issued on

23.7.2008. Thereafter, CLP acquired 100% equity shares in Jhajjar Power Limited and entered into PPA dated 7.8.2008 with DHBVNL and UHBVNL (Haryana PPA) for supply of power from 90% net capacity of the power project. The Petitioner, Jhajjar Power Limited negotiated sale of 10% of the net capacity to New Delhi Power Company Ltd (presently known as Tata Power Delhi Distribution Ltd or TPDDL) in order to meet the qualification requirement of a Mega Power Project. The sale was executed through an inter-State trader namely, Tata Power Trading Company Limited (TPTCL) through a Power Purchase Agreement dated 20.1.2009 (Tata PPA) for sale of 10% power at the same tariff as under Haryana PPA. TPTCL entered into a back to back Power Sale Agreement dated 20.1.2009 with TPDDL at the same tariff for sale of the entire contracted capacity.

(e) Based on the PPAs dated 7.8.2008 (Haryana PPA) and 20.1.2009 (Tata PPA) and confirmation of compliance by the Government of Haryana and Government of NCT of Delhi with the terms and conditions of the Mega Power Policy of Government of India, Ministry of Power vide its letter dated 13.5.2009 accorded Mega Power status to the 1320 MW MGTPP of Jhajjar Power Ltd.

(f) The Petitioner procures coal under the Fuel Supply Agreements ("FSAs") executed with subsidiaries of Coal India Limited ("Coal Companies"). Since the Project falls under Case-2 bid, in terms of the Bidding Guidelines, RfP and Haryana PPA, the coal linkage was arranged by the Respondents (Procurers under Haryana PPA) and the terms of FSAs were also approved by them. Costs in relation to procurement and transportation of coal required for the Project, including all applicable taxes and duties, are invoiced to the Petitioner by the Coal Companies and Indian Railways.

Submissions of the Petitioner

3. The Petitioner has mainly submitted as under:

(a) Unit 1 of the Project achieved commercial operation ("COD") on 29.3.2013. Since COD of the Project, the Petitioner has been supplying power and raising invoices for energy charges to the Procurers in accordance with the terms of Haryana PPA.

(b) The invoices raised by the Coal Companies on the Petitioner consists of several chargeable heads some of which are royalty, DMFT, Road/RE Cess, AMBH Cess, Evacuation Charges, Weighment Charges, Evacuation Facilitation Charges, Management Charges, Breaking Charges, Silo Charges, Beneficiation Charges, Selective Loading Charges, MMDR Royalty (Central Fund and State Fund), Stowing Excise Duty, Pithead Price, Clean Environment Cess, C.S.T. and Central Excise Duty, etc. since the Project falls under the category of a Case-2 project, the fuel cost is a complete pass through and the same is also evident in Article 11 read with Schedule 7 of Haryana PPA. Therefore, the Petitioner is required to be compensated by the Procurers/ Discoms at actuals, in terms of monthly energy charges as part of monthly tariff payments.

(c) The Petitioner had received debit notes pertaining to the months of November 2016, December 2016, January 2017 and February 2017 from the Procurer, in relation to additional NMET and Royalty on coal. Therefore, the weighted average coal cost used for invoicing of the aforesaid months was reworked after considering the debit notes. The differential energy charges for the aforesaid months were billed through the supplementary invoices vide letter dated 28.4.2017, for the months of December 2016, January 2017, February 2017 and March 2017 to the Respondent, Haryana Power Purchase Centre (in short, "the Procurer") who is representing Haryana Discoms in present case. However, the Procurer temporarily withheld payment of the above-mentioned supplementary invoices dated 28.4.2017. On 8.6.2017 and 22.6.2017, the Petitioner sent reminders to the Procurer to release the payment due.

(d) The Procurer vide its letter dated 12.9.2017 informed the Petitioner that since the Procurer was not clear about applicability of 'Change in Law' (Article 13), payment was withheld and there is a need of clarity with respect to the payment of additional amount raised on account of NMET. Accordingly, the Respondent requested the Petitioner to approach the Commission for confirmation of reimbursement of amount claimed.

(e) In the formula for calculation of the monthly energy charge, the variable " F^{COAL}_m " representing the fuel cost for the month 'm', has been explained as the "weighted average invoiced rate of coal" incurred by the Seller in purchasing and transporting the coal for the Project during the month immediately preceding the month "m" (in Rs/Kg). The explanation of the term F^{COAL}_m takes into account 'all' costs incurred by the Petitioner in purchasing and transporting of coal, which are duly invoiced by Coal Companies and transporter.

(f) Therefore, any increase in rate of taxes, levies, cess or duties which includes but is not limited to Royalty, Central Excise Duty, S.E.D. CST, Energy Cess, Sizing Charges, Surface Transportation, and also enactment of new taxes on the coal cost which includes but is not limited to NMET, DMF, Forest Transit Fee and PWD cess, imposed by the Central Government, State Government/Union Territory, or any other Government, which are 'invoiced' by the Coal Companies, local transporters (if any) and the Indian Railways, etc., have to be considered as 'invoiced' and shall be included in the element F^{COAL}_m for the purpose of calculation of monthly energy charge. This essentially means that any variation in cost of fuel ought to be a complete pass through as per Article 11 read with Schedule 7 of the Haryana PPA.

(g) The Hon`ble Supreme Court in the case of Nabha Power Limited v. Punjab State Power Corporation Ltd & Anr. in Civil Appeal No. 179 of 2017 has held that the contract did not provide for a fixed energy charge, or a periodic revision of that charge, as the formula for energy charge was designed in such a manner that it would be influenced by the actual cost of coal. Thus, the basis is the actual cost incurred with regards to the coal. Therefore, in terms of said order, it is clear that if the terms of the contract (Haryana PPA) provide that the energy charge be influenced by the 'actual' cost of coal, and not be a fixed energy charge, then the payment made by the Procurer must be on the actual cost incurred by the seller. This variation in cost of coal may be due to any factor but what is essential is that the actual cost of coal incurred by the seller, be wholly reimbursed.

(h) Ministry of Power, Government of India, under Section 107 of Act, vide letter dated 27.8.2018, has issued directions to the Commission to allow pass through of any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/ Union Territories or by any Government instrumentality leading to corresponding changes in the cost, after the award of bids, under 'Change in Law', unless otherwise provided in PPA.

4. Against the above background, the Petitioner has made the following prayers:

“(a) Declare that any variation in the cost of fuel supplied to the Petitioner, on account of any increase in rate of taxes, levies, cess or duties which includes but is not limited to royalty, central excise duty, S.E.D. CST, energy cess, sizing charges, surface transportation, and also enactment of new taxes on the coal cost which includes but is not limited to NMET, DMF, forest transit fee and PWD cess, imposed by the Central Government, State Government/Union Territory, or any other Government, being a component of invoiced rate of coal is a pass-through cost as per Article 11 read with Schedule 7 of the PPA dated 07.08.2008 and direct the Respondents to make payments of invoices accordingly within a period as deemed appropriate by this Hon’ble Commission;

(b) Alternatively, it is prayed that the Petitioner be allowed pass through of all the above mentioned taxes, duties, duties& charges under “Change in Law” provision of PPA dated 07.08.2008 and direct the Respondent to make payment of invoices accordingly.

(c) Condone any shortcomings/deficiencies in the Petition; and

(d) Grant an expeditious hearing of the Petition.”

5. Reply to the Petition has been filed by the Respondent and the Petitioner has filed rejoinder thereof. The reply and rejoinder filed by the Petitioner and the Respondent have been dealt with in succeeding paragraph.

Hearing dated 11.1.2022

6. During the course of hearing, the learned counsels for the Petitioner and the Respondents reiterated the submissions made in the Petition and reply and requested to dispose of the Petition.

Analysis and Decision

7. We have considered the submissions of the Petitioner and Respondent. The Respondent has not raised any objection on the jurisdiction of this Commission to decide the matter. Besides, since the generating station of the Petitioner is located in the State of Haryana and is supplying power to Haryana and National Capital Territory of Delhi, it has a composite scheme for generation and supply of electricity to the States of Haryana and National Capital Territory of Delhi and the Appropriate Commission for adjudication of the dispute between the Petitioner and the procurers under Haryana PPA and Tata PSA is the Central Commission in terms of Section 79(1)(b) of the Act. Accordingly, we proceed to deal with the issues involved in the present case.

8. The Petitioner has sought declaration that any variation in the cost of fuel supplied to the Petitioner, on account of any increase in rate of taxes, levies, cess or duties which includes but is not limited to Royalty, Central Excise Duty, S.E.D. CST, Energy Cess, Sizing Charges, Surface Transportation, and also enactment of new taxes on the coal cost which includes but is not limited to NMET, DMF, Forest Transit Fee and PWD cess, imposed by the Central Government, State Government/ Union Territory, or any other Government, being a component of invoiced rate of coal is a pass-through cost as per Article 11 read with Schedule 7 of the Haryana PPA dated 7.8.2008.

9. Article 11 of the Haryana PPA provides as under:

“11. ARTICLE 11 BILLING AND PAYMENT

11.1 GENERAL

From the COD of the first Unit, Procurers shall pay the Seller the Monthly Tariff Payment, on or before the Due Date, comprising of Tariff for every Contract Year, determined in

accordance with this Article 11 and Schedule 7. All Tariff payments by Procurers shall be in Indian Rupees."

Schedule 7 of the Haryana PPA provides as under:

"Schedule 7: Tariff

1.1 General

- i. The method of determination of Tariff Payments for any Contract Year during the Term of Agreement shall be in accordance with this Schedule.*
- ii. The Tariff shall be paid in two parts comprising of Capacity and Energy Charge,*
- iii. For the purpose of payments, the Tariff will be Quoted Tariff, escalated as provided in this Schedule 7 for the applicable Contract Year as per Schedule 11.*
- iv. The full Capacity Charges shall be payable based on the Contracted Capacity at Normative Availability and Incentive shall be provided for Availability beyond 85% as provided in this Schedule shall be given. In case of Availability being lower than the Normative Availability, the Capacity Charge shall be payable on proportionate basis in addition to the penalty to be paid by Seller as provided in this Schedule.*

1.2 Monthly Tariff Payment

1.2.1 Components of Monthly Tariff Payment

The Monthly Bill for any Month in a Contract Year shall consist of the following:

- i.. Monthly Capacity Charge Payment in accordance with Article 1.2.2 below;*
- ii. Monthly Energy Charge for Scheduled Energy in accordance with Article 1.2.3 below;*
- iii. Incentive payment determined in accordance with Article 1.2.4 below (applicable on annual basis and included only in the Monthly Tariff Payment for the first Month of the next Contract year);*
- iv. Penalty Payment determined in accordance with Article 1.2.8 below (applicable on annual basis and included only in the Monthly Tariff Payment for the first Month of the next Contract Year).*

.....

1.2.3 Monthly Energy Charge

The Monthly Energy Charge for Month m will be calculated as under:

$$MEP_m = \frac{QNHR \times F^{COAL}_m \times AEOM}{PCV_m}$$

PCV_m

Where,

MEP_m is the Energy Charge payment for Month "m" (in Rs.);

QNHR is the Quoted Net Heat Rate, as provided in Schedule 11 (in kCal/kwh); and

AEO_m is the Scheduled Energy during the month (in kWh)

F^{COAL}_m is the weighted average invoiced rate of coal incurred by the Seller in purchasing, and transporting the coal for the Project during the Month immediately preceding the Month "m" (in Rs/Kg),

Provided that in the event washing of coal is required under the environmental protection laws, regulations or clearance, the cost of washing the coal shall be considered as part of the coal purchasing cost subject to the following:

(i) in the event the coal washing is carried out by CIL/CIL's subsidiary, the cost shall be considered at actuals; and (ii) in the event the coal washing is carried out by any other entity the considered cost shall be lower of the: (a) actual cost of washing the coal; and (b) minimum cost of washing the coal as charged by CIL/CIL's subsidiary supplying coal to the Project; and

PCV_m is the weighted average Gross Calorific Value of the coal for the Month immediately preceding the Month "m" determined in a manner specified in Schedule 17 (in kCal/kg)."

10. The Respondent has submitted that the claim of the Petitioner is premised on the basis that the Project is a Case-2 project wherein the fuel cost is a pass through to the procurers as envisaged in Article 11 read with Schedule 7 of the Haryana PPA dated 7.8.2008. Therefore, any variation in invoiced rate of coal supplied to the Petitioner on account of increase in taxes, levies and cess, etc. is in accordance with the terms of the Haryana PPA, namely Schedule 7 read with Article 11, the same may be allowed as a pass through in tariff subject to prudence check. The Respondent has further submitted that the Petitioner may be directed to submit all the requisite invoices, data and documents to substantiate its claim for pass through cost of increased invoiced coal rate.

11. In response, the Petitioner has submitted that it has placed on record 109 monthly invoices raised by it on the Respondent from COD of the Project to October 2019. The Petitioner has submitted that these bills have been raised in accordance with the provision of the Haryana PPA along with all the coal bills, Railway receipts and other data and documents, etc. in support of the calculation of the invoices.

12. We have considered the submissions of the Petitioner and the Respondent. During the course of hearing, the learned counsel for the Petitioner submitted that the present Petition has been filed seeking declaration in accordance with Article 11 read with Schedule 7 of the Haryana PPA and there is no need to invoke Change in Law provisions in the present case. The learned counsel further submitted that it is only in the alternative that the Petitioner has sought to invoke the Change in Law provision of the PPA in praying that it may be allowed pass through of the above-mentioned taxes, duties and charges under the Change in Law provisions of the PPA. The learned counsel submitted that the Project falls under the category of Case-2 project, wherein the entire fuel cost is pass through under the Haryana PPA as evident from bare reading of Article 11 read with Schedule 7 of the Haryana PPA. However, the Respondent had temporarily withheld payment of its supplementary invoices in relation to the additional NMET royalty on coal citing lack of clarity as to the applicability of Change in Law clause of the Haryana PPA and had further asked the Petitioner to approach the Commission for seeking confirmation on the reimbursement of the amount claimed on account of change in the rates of taxes and duties and introduction of any new taxes, duties and levies. The learned counsel also added that the Respondents are, in fact, already making the payments of the invoices raised by the Petitioner to this effect.

13. The learned counsel for the Respondent, HPPC submitted that to the extent the variation in the invoiced rate of coal supplied to the Petitioner on account of increase in taxes, levies and cess, etc. is in accordance with provisions of the Haryana PPA, namely, Schedule 7 read with Article 11, the same may be allowed as a pass through in tariff by the Commission subject to the prudence check.

14. It is noted that the factor ' $F^{COAL}m$ ' has been defined in Schedule 7 as *'the weighted average invoiced rate of coal incurred by the Seller in purchasing, and transporting the coal for the Project'*. Therefore, the energy charges are required to be computed based on the actual cost incurred by the Petitioner. Further, Schedule 7 has to be read with Schedule 11 where the seller was required to quote the 'Net Heat rate'. Therefore, the combined reading of Schedule 7 and Schedule 11 of the Haryana PPA reveals that the bid was quoted on net heat rate and thereafter, the Procurer is required to make payments as per actual fuel cost incurred by the seller. Evidently, the actual fuel cost shall include the changes in taxes/ duties/ levies on coal so also any new levy on the coal procured by the Seller. Accordingly, we are of view that the Petitioner is entitled to actual cost incurred in procurement of coal in terms of Article 11 and Schedule-7 read with Schedule-11 of the Haryana PPA. Actual cost would include components such as any increase in rate of taxes, levies, cess or duties which includes but is not limited to Royalty, Central Excise Duty, S.E.D. CST, Energy Cess, Sizing Charges, Surface Transportation, and also enactment of new taxes on the coal cost which includes but is not limited to NMET, DMF, Forest Transit Fee and PWD cess, imposed by the Central Government, State Government/ Union Territory, or any other Government, being a component of invoiced rate of coal. Apparently, as is clear from the submissions of the Respondent, the procurers have been making payments on the same principle to the Petitioner from COD of the Project based on actual cost of coal which incorporates changes in taxes, duties.

15. Therefore, the Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the Auditor to the Respondents and the Petitioner and the Respondents are directed to carry out reconciliation on

account of these claims and make payments in accordance with the provisions of the PPA.

16. The Petition No. 15/MP/2019 is disposed of in terms of above.

**Sd/-
(P.K. Singh)
Member**

**sd/-
(Arun Goyal)
Member**

**sd/-
(I.S. Jha)
Member**

**sd/-
(P.K. Pujari)
Chairperson**