

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 17/MP/2023

- Subject : Petition under Section 79(1)(b) and Section 79(1)(f) of the Electricity Act, 2003 read with Article 13 and Article 17 of the Power Purchase Agreement dated 7.8.2008 (as amended vide amendment agreements dated 17.9.2008 and 27.5.2022) executed between the Petitioner and Uttar Haryana Bijli Vitran Nigam Limited & Dakshin Haryana Bijli Vitran Nigam Limited; as well as Article 13 and Article 17 of the Power Purchase Agreement dated 20.1.2009 (as amended vide amendment agreement dated 21.10.2010) between the Petitioner and Tata Power Trading Company Limited inter alia seeking approval of Change in Law event, i.e., enactment of the Integrated Goods and Services Tax Act, 2017, the Central Goods and Services Tax Act, 2017, the State Goods And Services Tax Act, 2017, and the Union Territory Goods and Services Tax Act 2017; and compensation for additional expenses incurred by the Petitioner with respect to operation and maintenance of the Project on account of the same along with carrying cost.
- Date of Hearing : **13.8.2024**
- Coram : Shri Jishnu Barua, Chairperson
Shri Ramesh Babu V., Member
Shri Harish Dudani, Member
- Petitioner : Jhajjar Power Limited (JPL).
- Respondents : Uttar Haryana Bijli Vitran Nigam Limited and 3 Ors.
- Parties Present : Shri Aniket Prasoon, Advocate, JPL
Ms. Archita Kashyap, Advocate, JPL
Shri Md. Aman Sheikh, Advocate, JPL
Ms. Bitika Kaur, JPL
Shri Jogendra Behera, JPL
Shri Aditya Singh, Advocate, Haryana Discoms
Shri Venkatesh, Advocate, TPTCL
Shri Ashutosh Srivastava, Advocate, TPTCL
Shri Vineet Kumar, Advocate, TPTCL
Shri Nimesh Jha, Advocate, TPDDL

Record of Proceedings

The learned counsel for the Petitioner submitted that the present Petition has been filed *inter alia* seeking a declaration that the enactment and promulgation of the Integrated Goods and Services Tax Act, 2017, the Central Goods and Services Tax Act, 2017, and the State Goods and Services Act, 2017 ('GST Laws') is a Change in Law event and consequent direction to the Respondents to compensate the Petitioner towards the additional costs incurred by the Petitioner on account of the GST Law insofar as it relate to operation and maintenance expenses of its 2×660 MW Mahatma Gandhi Thermal

Power Project ('the Project') along with the carrying cost. The learned counsel mainly submitted as under:

a) The Petitioner has entered into a Power Purchase Agreement dated 7.8.2007 with the Respondent Nos. 1 & 2, Haryana Discoms ('Haryana PPA') for a supply of 90% of the power from the Project (i.e. 556.75 MW from each Unit) and for the remaining 10 % of the Project's net capacity, the Petitioner has entered into a Power Purchase Agreement with the Respondent No.3, Tata Power Trading Co. Ltd. (TPTCL) dated 20.1.2009 ('TPTCL PPA'). The Petitioner's Project achieved the Commercial Operation Date ('COD') on 19.07.2012

b) As per Article 13 of the Haryana PPA & TPTCL PPA, Change in Law is *inter alia* defined as enactment, bringing into effect, or promulgation of any law (which means all laws in force in India, including any statute or notification) after the date which is seven (7) days prior to the Bid Deadline (3.3.2008)/ Effective Date under TPTCL PPA (20.1.2009), which results in change in any cost of or revenue from the business of selling electricity by the Petitioner to Haryana Discoms/TPTCL under the terms thereof.

c) On 12.4.2017, the Government of India promulgated the GST Laws replacing multiple taxes levied by the Central and State Governments. Thereafter, on 1.7.2017, the GST Laws for levy and collection of tax on inter-State supply of goods or services or both by the Central Government were enacted. The said promulgation/ enactment of the GST Laws accrued an additional incremental cost on the Petitioner.

d) Although the Commission, in its various orders, recognized promulgation/ enactment of the GST Laws as a Change in Law event and their impact during the Construction Period, the Commission did not allow compensation for the additional costs incurred due to the enactment/promulgation of the GST Laws towards operation and maintenance expenses of the projects. However, subsequently, the Appellate Tribunal for Electricity, in its various decisions, including by the judgment dated 27.4.2021 in Appeal No. 172 of 2017 (*Coastal Gujarat Power Ltd. v. CERC and Ors.*) has allowed the compensation for the additional costs incurred due to the enactment/promulgation of the GST Laws towards operation and maintenance expenses of the project.

e) Insofar as the objection on the maintainability of the Petition on the ground of limitation is concerned, Article 113 of the Limitation Act, 1963 clearly provides that the period of limitation begins to run when the right to sue accrues. In the present case, the right to sue accrues only when the quantum of a claim for compensation for a Change in Law in the Contract Year gets crystallized. The Petitioner was required to prepare the financial statements for the Financial Year 2017-18, ending on 31.3.2018. The said statement was prepared by the Petitioner and approved by the Board of the Petitioner on 16.8.2018. Accordingly, it was only on 16.8.2018 that the impact of the Change in Law event (i.e., enactment of GST Laws) was crystallized when the Petitioner ascertained that the impact crosses the threshold of 1% of the Letter of Credit prescribed under the PPA. Therefore, in the present case, the right to sue accrued on 16.8.2018, and thus, the period of limitation prescribed under Article 113 of the Limitation Act, 1963, begins to run from 16.8.2018 and expires on 16.8.2021.

f) In view of the outbreak of the COVID-19 pandemic, the Hon'ble Supreme Court vide order dated 10.1.2022 in Suo Motu Writ Petition (Civil) No. 03 of 2020 has directed that the period starting from 15.3.2020 to 28.2.2022 will be excluded for the purposes

of computation of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings. Accordingly, the period of limitation for filing of the present Petition stands extended for a period of approximately 17 months, and thus, would expire only on 2.8.2023. Whereas, the present Petition was filed on 20.12.2022, i.e. within the prescribed period of limitation in terms of the extension granted by the Hon'ble Supreme Court vide the order dated 10.01.2022.

g) Without prejudice to the above, the claim(s) for Change in Law during the Operation Period is recurring in nature as the impact of the said Change in Law event is recurring. Accordingly, every Contract Year in the context of such impact gives rise to a separate cause of action for filing the present Petition, as each year's tax liability towards GST Laws is independent with respect to the previous year.

h) In terms of the previous orders passed by the Commission in similar matters, the Petitioner vide affidavit dated 14.9.2023 has placed on record various documents in support of its claims along with the Auditor's Certificate dated 1.9.2023 wherein it has been certified that - (i) various taxes subsumed/abolished with the introduction of GST Laws have been considered while ascertaining the total Change in Law claim in the statement prepared by the Petitioner in context of the incremental increased impact on the Operation and Maintenance cost due to the promulgation of the GST Laws; and (ii) clarification/ confirmation that the Petitioner has not received any Input Tax Credit vis-à-vis its claim.

2. The learned counsel for Respondent No.3, TPTCL, submitted that TPTCL has a back-to-back arrangement with the Petitioner and the ultimate beneficiary, i.e., Respondent No.4, TPDDL, through a Power Supply Agreement, and by virtue of this arrangement, it is merely an intermediary trader and as such not responsible for Change in Law claims raised by the Petitioner. Learned counsel also pointed out that the Change in Law Notice under Article 13.3 of the TPTCL PPA was sent to the Respondent, TPTCL, only on 25.8.2020, i.e., after the delay of about 3 years from the date of the enactment of GST Laws, whereas the said article requires giving notice for any Change in Law Event "as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law".

3. In rebuttal, the learned counsel for the Petitioner submitted that the Petitioner had given an advance notice under Article 13.3 of the Haryana PPA regarding the passage of GST Laws to the Respondent Nos.1 & 2, Haryana Discoms on 16.1.2017. However, the notice regarding the said Change in Law to the Respondent, TPTCL, under the TPTCL PPA was admittedly given only on 25.8.2020. The learned counsel, however, also pointed out the Commission has already held that the purpose of the notice is to inform the procurer about the details of the Change in Law and its impact on the affected party therein and in absence of any specific timelines for giving notice about the occurrence of Change in Law event in the PPA, delay in giving notice will not adversely affect or obliterate the claims of the affected party. In this regard, the reliance was placed on the order dated 23.6.2023 in Petition No.513/MP/2020 (*Adani Power (Mundra) Limited vs. Uttar Haryana Bijli Vitran Nigam Limited & Ors.*).

4. The learned counsel for Respondent Nos. 1 & 2, Haryana Discoms, citing the non-availability of the arguing counsel, sought another opportunity for making the oral submissions in the matter. The learned counsel for Respondent No.4, TPDDL, also sought liberty to make the oral arguments during the subsequent hearing.

5. The matter remained part-heard and will be listed for the hearing on **29.8.2024**.

By order of the Commission
Sd/-
(T.D. Pant)
Joint Chief (Law)