

Rajasthan Electricity Regulatory Commission

Petition No. 1283/17

Petition filed under Section 86(1)(b)&(f) of the Electricity Act, 2003 for adjudication of disputes with Discoms regarding release of payment against bills raised to give effect Change in Law provisions of PPA with regard to Clean Energy Cess and VAT.

Coram:

Shri Vishvanath Hiremath, Chairman
Shri R. P. Barwar, Member
Shri S. C. Dinkar, Member

Petitioner : M/s Rajwest Power Ltd.

Respondent(s) :
1. Jaipur Vidyut Vitran Nigam Ltd., Jaipur
2. Ajmer Vidyut Vitran Nigam Ltd., Ajmer
3. Jodhpur Vidyut Vitran Nigam Ltd., Jodhpur

Date of hearings : 21.12.2017, 09.02.2018 and 12.04.2018

Present :
1. Sh. Aman Anand, Advocate for Petitioner
2. Sh. P. N. Bhandari, Advocate for Discoms

Order Date` : 29.05.2018

ORDER

1. Petitioner, M/s Rajwest Power Ltd. (hereinafter referred as 'RWPL') filed this petition on 24.11.2017 under Section 86(1)(b)&(f) of the Electricity Act, 2003 for

adjudication of the disputes between RWPL and Discoms regarding release of payment against Supplementary Bills raised to give effect to 'Change in Law' scenario under the PPA dated 26.10.2006 on account of increase in Clean Energy Cess on lignite w.e.f. 01.03.2016 to 31.03.2016 and increase in VAT from 02.02.2016 to 31.03.2016.

2. Petitioner in its petition submitted as under:

- (i) M/s Rajwest Power Ltd. is a generating company and operating Lignite based thermal generating station with a total capacity of 1080 MW, consisting of 8 units of 135 MW each at village Bhadresh in Barmer District of Rajasthan. Petitioner entered into PPA with Respondent Discoms on 26.10.2006 for sale of power from their station at the tariff as determined by this Commission from time to time.
- (ii) In terms of the PPA, any change inter-alia in the applicable taxes, duties or cess due to an amendment/modification of law, which results material increase or decrease in the cost/revenue of generation is to be adjusted in tariff through Supplementary Tariff Bills. The materiality threshold in case of energy charges is stated to be and increase (or decrease) of more than 0.1 paisa/kWh.
- (iii) Government of Rajasthan had increased the rate of VAT from 5% to 5.5% with effect from 02.02.2016 and the Central Government has revised/amend the Clean Energy Cess from Rs. 200/ton to Rs. 400 /ton with effect from 01.03.2016. The said increase in VAT and Clean Energy Cess impacted the energy charges to an extent of Rs. 0.0084kWh Rs. 0.2335 kWh respectively.
- (iv) Petitioner in terms of clause 13.3 of the PPA informed the Respondents with regard to aforesaid Change in Law events vide notice dated

05.02.2016.

- (v) After the aforesaid Change in Law event, Petitioner has issued a supplementary bill dated 04.03.2016 and 06.04.2016 respectively to the tune of Rs. 14.32 crore to the Respondents. However, the Respondents have failed to pay the aforesaid amount.
- (vi) The aforesaid events of Change in Law are no longer res-integra as the same have already been allowed by this Commission vide its adhoc interim tariff order dated 31.03.2016 for FY 2016-17, therefore, these events of Change in Law are admitted Change in Law events.
- (vii) Further, Respondents have also not been disputed the increase of VAT and upward revision of the Clean Energy Cess, however, payment of compensation as encapsulated in the PPA against such event of Change in Law has been denied by the Respondents.
- (viii) In the given circumstances, Petitioner is entitled to be get compensated from the date of adoption/promulgation/amendment, so that financial position of the Petitioner remains unaffected on account of such Change in Law events in true spirit of the PPA.
- (ix) Petitioner vide its letter dated 17.10.2017 has informed Respondents that these changes are admitted Change in Law events. It is further informed to the Respondents that even Central Electricity Regulatory Commission in its various orders held that to approach the Commission every year for computation and allowance of compensation for change in law is time consuming process which results in time lag between the amount paid by the generator and actual reimbursement by the procurers which may result in payment of carrying cost for the amount actually paid by the generator and accordingly provided a mechanism to reconcile the

impact of Change in Law wherein once the event declared as Change in Law then there is no need to approach commission for every year for computation of impact thereof and it should be reconciled between the parties themselves.

- (x) Discoms vide its letter dt. 15.11.2017 informed that claim of compensation on account of aforesaid Change in Law could not be processed because there is no specific order from the Commission to make payment of increase in VAT from 5% to 5.5% for the period 02.02.2016 to 31.03.2016 and increase in Clean Energy Cess from Rs. 200/ton to Rs. 400/ton for the period 01.03.2016 to 31.03.2016 and requested to seek clarification from this Commission.
- (xi) The aforesaid stand of the Respondents is completely against the provisions of the PPA. The act of denying the compensation towards the aforesaid Change in Law by the Respondents after a period of one and a half year approx. is nothing but to sheer delay tricks of Respondents of the due payment of compensation to the Petitioner on frivolous and vexatious reasons.
- (xii) In view of the aforesaid facts and circumstances, it is prayed to:-
 - (a) Adjudicate upon the dispute as detailed in the petition and issue necessary directions to the Respondents for making payment the amount due to the Petitioner on account of change in law along with interest; and
 - (b) Allow pendent-lite interest at the contractual rate on the claimed amount.

3. Notice was issued to Respondents on 22.12.2017 for filing their reply on the

petition.

4. Respondents have filed the preliminary objections on the petition on 05.02.2018 stating that the Petitioner cannot maintain the present petition for grant of Change in Law benefit on ground of Change in Law and it is M/s Barmer Lignite Mining Company Ltd. (BLMCL), which actually bears the Change in Law impact, shall have to file the petition.
5. The matter was heard on 09.02.2018. Sh. Aman Anand, Advocate appeared for Petitioner. Sh. P.N. Bhandari, Advocate appeared for Discoms.
6. Commission after considering the submissions made by the Petitioner and preliminary objections raised by Respondents and all others documents placed before the Commission, directed Petitioner to implead the BLMCL as party to proceedings and serve the copy of the petition to BLMCL.
7. Accordingly, Petitioner impleaded BLMCL as necessary party to the present proceedings and served copy of the petition on 26.03.2018.
8. BLMCL has filed its reply to the petition on 09.04.2018 and has submitted as under:
 - (a) It is not privy to the subject dispute between RWPL and Discoms and not subject to the jurisdiction of this Commission.
 - (b) BLMCL had issued the letters dt. 02.02.2016 and 29.02.2016 to RWPL claiming Change in Law impact on the ad-hoc transfer price of lignite prevalent at the relevant stage. RWPL had made payment to BLMCL taking into account Change in Law impact on account of increased VAT w.e.f. 02.02.2016 and increased in Clean Energy Cess w.e.f. 01.03.2016.

- (c) BLMCL had actually deposited a sum of Rs. 11.07 Crore and Rs. 24.18 Crore on account of increase in VAT and Clean Energy Cess for the period 02.02.2016 to 31.03.2016. In this regard, copy of challans along with other details has been placed with reply.
- (d) BLMCL had claimed and already recovered the difference of Rs. 13.70 Crore from RWPL on account of Change in Law as per provisions of Fuel Supply Agreement.
- (e) The above submissions may be taken on record and the claim made by RWPL in the present petition, if considered appropriate be decided in light of the above facts.

9. The matter was finally heard on 12.04.2018. Sh. Aman Anand, Advocate appeared for Petitioner. Sh. P.N. Bhandari, Advocate appeared for Discoms and reiterated his submission made earlier also.

Commission's view

10. It is submitted on behalf of Petitioner generator that on account of Change in Law, i.e., increase in the rate of VAT and Clean Energy Cess has increased lignite cost of BLMCL and as per FSA the same has to be allowed to it and in-turn be claimed from Discoms as per clause 13 of the PPA.

11. Sh. P.N. Bhandari, Advocate on behalf of Respondent Discoms opposed the claim stating that it is M/s BLMCL which has to meet increased VAT and Clean Energy Cess therefore, it has to file petition to claim the same and not the Petitioner, i.e., M/s RWPL.

12. Commission after considering the above submissions made by way of preliminary objections raised by Respondents vide its order dt. 21.03.2018 did not accede to the same. Instead it only directed Petitioner to implead the

BLMCL as party to proceedings. Accordingly, Petitioner has made BLMCL as necessary party to the proceedings. BLMCL filed reply to the petition on 09.04.2018.

13. Commission observes that BLMCL in its reply has submitted that it had deposited increased VAT and Clean Energy Cess for the period 02.02.2016 to 31.03.2016. BLMCL has also submitted copies of challans through which it has deposited VAT and Clean Energy Cess for the said period. BLMCL further submitted that it had claimed RWPL Change in Law impact on the ad-hoc transfer price of lignite vide letter dt. 02.02.2016 and 29.02.2016.
14. It has been observed that M/s RWPL and BLMCL both had filed an Interlocutory Applications in petition no. 486/14 and 487/14, one for enforcement of clause 13 of PPA to claim the benefit of 'Change in Law' provided in PPA and due adjustment in interim tariff and other for increase in transfer price. This Commission though took note of same but did not allow the relief as the impact can be adjusted in the interim tariff already granted to the RWPL.
15. Against this order, the Petitioner filed an appeal before the Hon'ble APTEL in appeal no. 177 of 2014. The APTEL vide its order dated 10.12.2015 directed as follows:

"12.23 In view of the above discussions, we hold that the State Commission has committed gross illegality in passing the interim order, dated 31.3.2015 (impugned order), whereby it simply extended the ad-hoc transfer price (inclusive of all statutory levies) applicable for FY 2014- 15, to the ad-hoc transfer price of lignite for next FY 2015-16 even without considering the increases in the statutory levies introduced by the Union Budget for FY 2015-16 because the State Commission was bound to consider the increase in statutory levies and allow the impact thereof to the Appellant while extending the ad-hoc transfer price of lignite to the next financial year.

12.24 We also hold that the State Commission, vide its subsequent order, dated 19.6.2015, has wrongly rejected the joint application filed by the Appellant and Respondent No.4 seeking modification of the order, dated 31.3.2015, to the limited extent of permitting the Appellant and the Respondent No.4 to reapportion the interim tariff between fixed and variable charges in the manner as provided in the said joint application because the whole adjustment were to be made between the mining entity (Appellant) and the Respondent No.4/power generation company without there being any increase in the tariff at the said moment.

12.25 In view of the above discussions, both the issues at Sl. No.12.23 and Sl. No. 12.24 above, are decided in favour of the appellant and the impugned order dated 31.03.2015 and the following order dated 19.06.2015 are liable to be set aside. This appeal is liable to be partly allowed.

Order

The present Appeal, being Appeal No.177 of 2015, is hereby partly allowed to the extent indicated above. Both the orders, dated 31.3.2015 (impugned order) with respect to ad-hoc transfer price of lignite for FY 2015-16 and, the subsequent order, dated 19.6.2015, are hereby set-aside. The State Commission is directed to allow basic transfer price of lignite on ad-hoc basis passed by the State Commission in the Impugned Order dated 31.03.2015 and 19.06.2015 plus applicable taxes viz. the current rates of statutory levies applicable for FY 2015-16 and, pass a consequential order within three months from today based on our decision given at paragraph 12.23 & 12.24 above. No order as to costs." (emphasis supplied)

16. In compliance to above order Commission passed the consequential order on 25.01.2016 duly giving the benefit of 'Change in Law' to the Petitioner M/s RWPL.

17. Further, Commission observes that M/s RWPL had filed one more petition no. 523/15 and had claimed the impact of 'Change in Law' on account of increase in Clean Energy Cess from Rs. 100/ton to Rs. 200/ton after adjusting reduction in diesel surcharge. This Commission did not consider the same and

passed an order on 07.10.2015 rejecting the same for the reason that Commission is in the process of finalising the tariff. Petitioner aggrieved filed an appeal before Hon'ble APTEL in appeal no. 289/2015. The Hon'ble APTEL vide its order dt. 29.04.2016 allowed the appeal and directed to allow claim of Change in Law as follows:

"Heard the rival parties, namely, Mr. M.G.Ramachandran, for the Appellant and Mr. P. N. Bhandari, appearing for Respondent Nos.1, 2 & 3/DISCOMs in this appeal. The Appellant submits that, it is a case fully covered by Change of Law. The benefit of Change in Law, with regard to clean energy cess should be allowed to the Appellant/Petitioner.

Mr. P.N.Bhandari, learned counsel for the DISCOMs, also admits that, this is a case where Change in Law with regard to seeking energy cess, should be allowed. Mr. P.N. Bhandari, for the DISCOMs, submits that, though, there was no counter claim or any petition before the State Commission, but facts regarding counter claim are mentioned by the State Commission in the Impugned Order. Mr. Bhandari, wants the matter to be remanded to the State Commission, with direction that, if, there was any counter claim on behalf of the DISCOMs, Respondents, herein, pending on date of passing of Impugned Order filed by the State Commission in Petition No.523 of 2015, the Commission should decide the same.

We allow the instant Appeal; being Appeal No.289 of 2015, and set aside the Impugned Order dated 07.10.2015 passed by the State Commission in Petition No.523 of 2015. We further direct the State Commission to allow the benefit of Change in Law with regard to clean energy cess to the Appellant. The State Commission is further directed to decide the counter claim of the DISCOMs, Respondent Nos.1, 2 & 3, if any, was pending before the State Commission on the date of passing the Impugned Order. (emphasis supplied)

We further, make it clear today that, if, there was no counter claim or counter demand of DISCOMs, pending at the time of passing the Impugned Order, the Commission cannot decide the same.

Mr. R.K.Mehta, learned counsel appearing for the State Commission, sincerely, states that, if there was any counter claim pending at the time of passing of the Impugned Order, the State Commission, shall consider it. Thus, instant Appeal, being Appeal No. 289 of 2015, is allowed to the extent, as indicated above. No costs."

18. The above order of Hon'ble APTEL has become final and binding on Petitioner, Respondents and also this Commission.

19. Commission observes that PPA dt. 26.10.2006 has been executed between the Petitioner (M/s RWPL) and Respondent Discoms. The said PPA clause which deals with Change in Law reads as under:

".....

13 Article 13 CHANGE IN LAW

13.1 Definitions

In this Article 13, the following terms shall have the following meanings:

13.1.1 "Change in Law" means the occurrence of any of the following as a result of, or in connection with, any action or inaction by any Legal authority after the date, which is seven (7) days prior to the date of this Agreement:

the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulation, notice, circular, code, rule or direction by any Governmental instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties charges, levies, etc. that in either of the above cases results in any change with respect to any tax or surcharge or case levied or similar charges by the Competent Government, which materially increases or decreases cost of generation or revenue (including in relation to construction, financing, return on equity, operation or maintenance of the Project) from sale of electricity;

20. As per the above Article change in taxes, duties charges, levies etc. which materially increases or decreases cost of generation or revenue from sale of electricity is covered under Change in Law.

21. Commission observes that increase in rate of Clean Energy Cess and VAT applicable on Lignite resulted in increase in the transfer price of Lignite and consequently, increased the Energy Charges which results in a material change in the cost of generation of RWPL.

22. Petitioner has stated that it has paid the increased transfer price on account of Change in Law to BLMCL under the Change in Law clause of Fuel Supply Agreement and accordingly has claimed the same from the Discoms under provisions of Change in Law in PPA
23. Commission is of the view that change in rate of Clean Energy Cess and VAT which consequently increased the cost of generation of RWPL is covered under the definition of Change in Law as provided in the said PPA.
24. Further, issue relating payment of Clean Energy Cess under Change in Law Clause of the PPA, the same is no longer res-integra. The Hon'ble APTEL in the case referred to above has directed this Commission to allow the benefit of Change in Law with regard to Clean Energy Cess to the Petitioner.
25. Sh. Bhandari in the present case has also expressed the same view as he expressed before Hon'ble APTEL by him. However, he also submitted that before allowing actual benefit, the claim should be verified with respect to the terms of PPA including the threshold limit required.
26. Therefore, Commission allows the impact of Change in Law with regard to Clean Energy Cess and VAT to the Petitioner subject to Petitioner furnishing to the Respondents all relevant material details as required under Clause 13 in support of its claim and Respondents after due verification allow the claim and pay the amount payable to the Petitioner within a period of (3) three months.
27. Petition stands disposed of in the above terms.

(S.C. Dinkar)
Member

(R.P. Barwar)
Member

(Vishvanath Hiremath)
Chairman