

# Rajasthan Electricity Regulatory Commission

**Petition No. 1220/17**

Petition filed under Section 86(1)(b)&(f) of the Electricity Act, 2003 read with Article 13 of the PPA for adjudication of disputes with Discoms regarding Change in Law provisions of PPA with regard to NMET and DMFT.

## **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 : 02.11.2017, 30.11.2017, 13.12.2017 and 16.01.2018

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 29.06.2017 under Section 86(1)(b)&(f) of the Electricity Act, 2003 read with Article 13 of the PPA dt. 26.10.2006, executed between Petitioner

and Respondent Discoms, 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 impositions of new levies towards District Mineral Foundation Trust (DMFT) & National Mineral Exploration Trust (NMET); and consequential increase in allied taxes w.e.f. 12.01.2015 to 31.03.2015 & 01.04.2015 to 31.03.2016.

2. Notice was issued to Respondents on 03.07.2017 for filing their reply on the petition. Accordingly, Respondents have filed the preliminary objections on the petition on 30.11.2017. Petitioner has also filed rejoinder on the preliminary objections on 12.12.2017.
3. The matter was heard on 16.01.2018 on the preliminary points raised by Sh. P.N. Bhandari, Advocate appearing for Discoms and reply given by Sh. Aman Anand, Advocate appearing for Petitioner.
4. On behalf of Petitioner, it is submitted as follows:
  - (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) After the issuance of the ad-hoc interim tariff order dated 30.05.2014 for FY 2014-15 and order dated 31.03.2015 read with order dated 25.01.2016 for FY 2015-16, two new levies have been imposed on lignite w.e.f. 12.01.2015 i.e. a levy equivalent to 30% of the Royalty to be paid to the District Mineral Foundation Trust ("DMFT") in terms of Section 9B of the Mines and Minerals (Development and Regulation) Act, 1957 as amended by the Mines and Minerals (Development and Regulation) Amendment Act, 2015 (collectively "MMDR Act") read with Rule 2 of the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 dated 20.10.2015 and a levy equivalent to 2 % of the Royalty to be paid to the National Mineral Exploration Trust ("NMET") in terms of Section 9C of the MMDR Act read with Rule 7(3) of The National Mineral Exploration Trust Rules, 2015.
- (iv) These statutory increases also led to an increase in allied taxes like service tax on Royalty, DMFT, NMET and VAT payable. The introduction of these new levies and the consequent increase in allied taxes has led to an increase in the lignite transfer price by Rs. 28.34/ MT for the period 12.01.2015 to 31.03.2015 and consequently impacted the energy charges payable by the Petitioner to the tune of Rs. 0.0314 per kWh for the period 12.01.2015 to 31.03.2015 and Rs. 0.0303 per kWh for the period of 01.04.2015 to 31.03.2016.
- (v) Aforesaid levies have been introduced subsequent to the cut-off date i.e. 19.10.2006 and amounts to Change in Law in terms of Article 13 of the PPA.
- (vi) In order to claim the effect of this Change in Law, M/s Barmer Lignite

Mining Company Ltd. (BLMCL), the mining entity, as per Article 8 of Fuel Supply Agreement, had issued a notice to the Petitioner on 19.09.2016. Thereafter, Petitioner in terms of Clause 13.3 of the PPA had issued a notice dated 07.10.2016 to the Respondents, claiming an additional amount of Rs. 0.0314 per kWh for the period 12.01.2015 to 31.03.2015 and Rs. 0.0303 per kWh for the period of 01.04.2015 to 31.03.2016 in variable cost as a result of Change in Law.

- (vii) After issuance of above notice, Petitioner, in terms of the PPA, submitted Supplementary Bill dated 10.10.2016 to the Respondent Discoms, claiming the effect of the Change in Law on account of impositions of new levies towards DMFT & NMET and consequential increase in allied taxes.
- (viii) Even after our various communications and reminders for compliance with the terms of the similar earlier orders passed by this Commission and provisions of PPA, no payment has been made against the said bills by the Discoms.
- (ix) It is submitted that Commission vide its order dated 29.06.2016 has allowed the Petitioner's claim for recovery of increased Clean Energy Cess, considering the same to be covered under a Change in Law event under the PPA dated 29.10.2006.
- (x) Further, the Hon'ble APTEL vide its judgment dated 10.12.2015, passed in Appeal No. 177/2015, has already been adjudicated that BLMCL has to be compensated for any increase in statutory levies. Accordingly, Commission has passed a consequential order dated 25.01.2016, considering applicable statutory levies and revised the transfer price of lignite from Rs. 1397/ton to Rs. 1516.15/ton and variable charges of tariff from Rs. 1.68/kWh to Rs. 1.8166/kWh. Thus, any increase in the statutory

levies impacting the transfer price of lignite has, as per the judgment of the Hon'ble APTEL dated 10.12.2015, necessarily to be compensated in form of correspondingly increasing the energy charges.

- (xi) Further, the Commission vide its orders dated 31.03.2016 & 27.04.2017 while considering interim transfer price of lignite from Kapurdi mines to Petitioner for FY 2016-17 & 2017-18 has also allowed contribution made towards DMFT and NMET by BLMCL under the Change in Law event. Therefore, the Petitioner is entitled to receive payment against the aforementioned Supplementary Bills.
- (xii) In view of the creation of the DMFT and NMET in terms of the MMDR Act, Petitioner has to reimburse the payment made towards the following by the M/s BLMCL as per the terms of the FSA and in turn Discoms has to reimburse the said payment to Petitioner as per the terms of the PPA.
- (xiii) Article 13 of the PPA clearly covers any Change in Law affecting energy charges and provides a detailed procedure for claiming the same. In the past, BLMCL has notified the Petitioner the Changes in Law affecting the transfer price of lignite as per the provisions of the FSA dated 19.01.2011, and the Petitioner in-turn after calculating the impact of such Change in Law on the energy charges has claimed the same from the Respondent Discoms, without any objections being raised by the Discoms in this respect.
- (xiv) BLMCL has no direct privity with the Respondent Discoms and it is only the Petitioner, which being the seller under the PPA, can claim the impact of Change in Law affecting energy charges, from the Discoms. Anything suggested to the contrary by the Discoms is incorrect and thus denied. FSA dated 19.01.2011 does not have any materiality threshold for claiming

Change in Law, as is being portrayed by the Discoms.

- (xv) Whenever Change in Law affects the transfer price of lignite and consequently the energy charges, to take effect from the beginning of a financial year, BLMCL has amended its transfer price to claim impact of these changes and the Petitioner has accordingly filed its amended tariff petition to ensure that such increase in the energy charges is captured in the interim tariff order itself.
- (xvi) However, when the Change in Law has come into effect, during the currency of a financial year, the Petitioner has been following the procedure described under Article 13 of the PPA. In case of denial/inaction by the Respondents, Petitioner has filed similar petition claiming the relief under the Change in Law clause of the PPA without any objections from any quarters.
- (xvii) The levies of contributions towards NMET and DMFT have been introduced with retrospective effect with the rules having been notified even later in the FY 2015-16, post passing of the interim tariff orders for FY 2014-15 and FY 2015-16. Consequently BLMCL and the Petitioner were unable to claim the impact of the same for the period 12.01.2015 to 31.03.2015 and 01.04.2015 to 31.03.2016, therefore, following the procedure to amend transfer price petition and consequently the Petitioner having to amend its tariff petition to subsume this impact.
- (xviii) In view of the aforesaid facts and circumstances, it is prayed to:-
  - (a) Declare that the events set out in Paragraphs 15 to 22 above as Change in Law events impacting revenues and costs during the Operating Period starting from 12.01.2015 to 31.03.2015 & 01.04.2015 to 31.03.2016 for which the Petitioner may be compensated in terms of

Article 13 of the PPA; and

(b) Adjudicate upon the dispute as detailed in the petition and issue necessary directions to the Respondents Discoms for making payment of all the amount due to the Petitioner on account of change in law scenario under the PPA dated 26.10.2006, due to impositions of new levies towards District Mineral Foundation Trust (DMFT) & National Mineral Exploration Trust (NMET); and consequential increase in allied taxes w.e.f. 12.01.2015 to 31.03.2015 & 01.04.2015 to 31.03.2016 along with interest; and

5. Sh. P.N. Bhandari, Advocate who appeared for Discoms submitted the following preliminary objections on the petition:

(i) Petitioner has filed the petition claiming payment on account of Change in Law arising out of two levies imposed on lignite w.e.f. 12.1.2015 - a levy equivalent to 30% of the royalty to be paid to DMFT under MMDR Act and a levy equivalent to 2% of the project to be paid to NMET. These levies, are payable by the mining entity i.e. BLMCL. Hence the claim can be made by BLMCL alone, whose operations are connected with these levies. M/s RWPL has no locus standi to file the petition on behalf of BLMCL.

(ii) Clause 8 of Fuel Supply Agreement executed between RWPL & BLMCL provides that the claim can be raised if the cost of supply of lignite from the mine increases by more than 10%. Since the increase is much less, hence no claim can be made by BLMCL. If BLMCL cannot claim anything from RWPL under the Fuel Supply Agreement, there is no question of any claim by RWPL.

(iii) Earlier, the claim of 30% contribution to DMFT and 2% towards NMET was

made by BLMCL through petition no. 593/16 before the Commission. Whereas for similar levies, the present petition has been filed by RWPL not by BLMCL. This change of claimants, for similar levies is startling.

(iv) Earlier also, BLMCL had filed also filed a petition no. 487/14 before the Commission claiming additional amount arising out of royalty, taxes and duties. Against the above background, the change of Petitioners is inexplicable.

(v) In the light of the above preliminary submissions, the petition deserves to be summarily dismissed. The petition, if any, should be filed by BLMCL and not by RWPL as the levies have been imposed upon the mining entity and not upon RWPL.

(vi) Since the above preliminary submissions go to the very root of the petition, it is requested that the Commission may kindly decide the matter on these preliminary submissions.

### **Commission's view and decision**

6. It is submitted on behalf of Petitioner that on account of Change in Law, i.e., imposed of new levies DMFT and NMET on lignite 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.
7. 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 rate of DMFT and NMET therefore, it has to file petition to claim the same and not the Petitioner, i.e., M/s RWPL.
8. 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 11.04.2018.

9. Commission observes that BLMCL in its reply has submitted that it had deposited the contribution towards NMET and DMFT including increased allied taxes and duties for the period 12.01.2015 to 31.03.2016. BLMCL has also submitted copies of challans through which it has deposited contribution towards NMET and DMFT 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. 19.09.2016.
10. 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.
11. 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)

12. 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.

13. 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."*

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

15. 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;*

16. 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.

17. Commission observes that imposition of two new levies on lignite have been 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.
18. 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
19. Commission is of the view that imposition of two new levies on lignite i.e. contribution towards NMET and DMFT, which consequently increased the cost of generation of RWPL is covered under the definition of Change in Law as provided in the said PPA.
20. Sh. Bhandari in the present case has also expressed that before allowing actual benefit, the claim should be verified with respect to the terms of PPA including the threshold limit required.
21. Therefore, Commission allows the impact of Change in Law with regard to NMET and DMFT 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.
22. Petition stands disposed of in the above terms.

(S.C. Dinkar)  
Member

(R.P. Barwar)  
Member

(Vishvanath Hiremath)  
Chairman

