

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 8/MP/2014**

Subject : Evolving a mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of change in law during Construction and Operating period.

Date of hearing : 19.5.2016

Coram : Shri Gireesh B. Pradhan, Chairperson  
Shri A.K. Singhal, Member  
Shri A.S. Bakshi, Member  
Dr. M.K. Iyer, Member

Petitioner : EMCO Energy Limited

Respondents : Maharashtra State Electricity Distribution Co. Limited and others

Parties present : Shri Amit Kapur, Advocate for the petitioner  
Shri V. Mukherjee, Advocate for the petitioner  
Shri Rohit Venkat, Advocate for the petitioner  
Shri Sai Kumar, Advocate, MSEDCL  
Shri Nitish Gupta, Advocate, MSEDCL  
Shri M.G. Ramachandran, Advocate, Prayas  
Shri Shubham Arya, Advocate, Prayas  
Ms. Poorva Saigal Advocate, Prayas  
Ms. Ranjitha Ramchandran, Advocate, Prayas  
Ms. Ashwini Chitnis, Prayas  
Ms. Anand Ganeshan, Advocate, DNH

**Record of Proceedings**

Learned counsel for the petitioner submitted as under:

(a) The petitioner has set up a 600 MW thermal power plant in the State of Maharashtra. It has a composite scheme for generation and sale of electricity with distribution companies in the States of Maharashtra, Dadra and Nagar Haveli and Tamil Nadu and the petitioner has a Power Purchase Agreement dated 17.3.2010 for supply of 200 MW power to MSEDCL, PPA dated 21.3.2013 for supply of 200 MW power to Power Department, DNH and PPA dated 27.11.2013 for supply of 150 MW to TANGEDCO.

(b) The petitioner has given notice to the respondents in terms of the PPA regarding 'change in law' which have impacted the capital cost during the construction period and revenue during the operating period.

(c) The claims on change in law regarding custom duty, excise duty, service tax, other taxes during the construction period and excise duty, royalty on coal, clean energy cess and CCEA directive on coal pass through for short fall in supply of coal during the operating period, have been accepted by MSEDCL in its reply dated 22.8.2014, subject to prudence check.

(d) Article 1.1 of the PPA defines the term 'law'. The definition of "law" is wide and inclusive definition and use of the terms 'all laws including' expands the scope of the definition clause and shall further include without limitation'.

(e) Article 10 of the PPA defines the term 'change in law'. a change in law events is any of the event enumerated, which have occurred after the cutoff date date (i.e. 01.08.2009 for the MSEDCL PPA and 02.06.2012 for the ED-DNH PPA); and which result in recurring/ non recurring expenditure or income to the petitioner.

(f) The definition of Indian Government Instrumentality includes any ministry department, board, authority, agency, corporation and commission under direct or indirect control of the Government of India. In the present case would include all ministries, the Indian Railways, the DGFT and Coal India and its subsidiaries.

(g) Further once change on law has occurred, the consequence for the same has to be ascertained in terms of Article 10.2 and 10.3 of the PPA.

(h) In the Supreme Court judgment in Sumitomo Heavy Industries Limited V Oil and Natural Gas Commission of India and Oil and Natural Gas Corporation V Atwood Oceanic International S.A., it was held that change in law provisions are not akin to indemnity clauses and have to be given wide and meaningful interpretation. Increase in taxes amounts to increase in cost which is covered under the change in law provision.

(i) Paragraph 4.7 of the Competitive Bidding Guidelines as amended on 18.8.2006 to 27.3.2008, provides that any change in law impacting cost or revenue from the business of selling electricity be adjusted separately.

(j) Article 10.1.1 of the PPA includes all taxes and is not limited to taxes to connection with the supply of power and all provisions of Article 10.1.1 have to be harmoniously construed to give effect to each provision.

(k) In terms of the revised Tariff Policy dated 28.1.2016 issued by the Ministry of Power, Government of India, increase in taxes and levies has been acknowledged as change in law events and allowed as pass-through.

(l) In the judgment dated 7.4.2016 in Appeal No. 100 of 2013 and Batch of Appellate Tribunal for Electricity in UHBVNL and Anr. Vs CERC & Ors. ("Full bench Judgment") it was held that for grant of relief under such clauses (FM and CIL), the PPA is the guiding document and if a case for change in law is made out, the affected party is entitled to be compensated for the same. Further the Hon'ble Tribunal has noted that provisions such as Change in Law and Force Majeure are incorporated to provide for unforeseen eventualities.

(m) With regard to the claim for pass-through of cost of imported coal, it was submitted that Paragraph 5 of the NCDP which has been relied on by Prayas is not applicable in the present case since that only applies to new consumers. EMCO, being an existing LOA holder was covered under Paragraph 2.2 of the NCDP. Further the pass through of cost of imported coal on account of short supply of domestic coal has been permitted as change in law.

2. Learned counsel for the Prayas Energy Group submitted as under:

(a) The change in law events occurring before the cutoff date of the bid submission i.e. 1.8.2009 shall not be considered by the Commission. It is only the changes which have occurred after the cutoff date would be considered.

(b) The change in law is contractual provision incorporated in the PPA. Article 10.1.1 of the PPA which provides for 'any change in tax or the introduction of any tax' is circumscribed by the qualification contained in the provision, i.e. 'made applicable for supply of power by the seller as per the terms of the Agreement'. This would indicate that every change in tax or introduction of new tax would not be covered under the Change in Law provision and the additional condition that it should be related to the supply of power by the seller to the procurers needs to be satisfied.

(c) The term 'Supply' has been defined to mean the sale of electricity to a licensee. Therefore, any change in tax or introduction of new tax made applicable for sale of power to a licensee by the seller as per the terms of the agreement and not all taxes but only those taxes which are for sale of power.

(d) The PPA's proposed in the Standard Bidding Documents from time to time are different and the parties have bid on the basis of a particular draft PPA proposed to them. In the present case, the parties have to bid on the basis of PPA dated 17.3.2010. Therefore, the effect of change in law to be given should be restricted to the specific stipulation and conditions contained in Article 10.1.1.

(e) The claim made by the petitioner includes various items which are not in pursuance to any statutory levy or tax applicable for the supply of power, as envisaged in Article 10.1.1 (change in law). The claims include the price or consideration payable by the petitioner to coal companies or railways and are pursuant to a contractual or commercial arrangement and certainty not as a result of change in law as envisaged in the PPA. The increase or decrease in such prices from time to time by such entities supplying coal or goods or providing services of transportation are part of the business aspects and are not a result of any change in law. These include royalty rate of coal, excise duty as well as reimbursement on domestic coal and busy season surcharge, development surcharge, reimbursement of service tax on freight etc related to railways.

(f) With regard to change in other tax rates i.e. works contract tax, VAT and CST, clause 2.4.1.1 (B)-xi of the RfP issued by MSEDCL specifically provided that the quoted tariff shall be an all inclusive tariff and the bidder shall have to take into account all costs including capital and operating costs, statutory taxes, levies, duties while quoting such tariff. Therefore, it is not open for the petitioner to claim such increase. Moreover, the incidence of tax is not on sale/supply of power.

(g) The issue regarding VAT has already been decided and disallowed by the Commission in its order dated 30.3.2015 in Petition No. 6/MP/2013 (Sasan Power limited V Madhya Pradesh Power Management Company Limited) and others and in order dated 3.2.2016 in Petition no. 79/MP/2013 (GMR Kamalanga Energy Limited V Dakshin Haryana Bijli Vitran Nigam Limited).

(h) With regard to the withdrawal of deemed export benefits it is submitted that the circular dated 28.12.2011 amending the foreign trade policy did not make any difference to the present case as even earlier the benefit was not available to the non mega power projects. The clarification issued by the Directorate General of Foreign Trade (DGFT) cannot be said to have the effect of change on interpretation and therefore cannot be covered under change in law. Accordingly, there is no change in law within the meaning of Article 10 of the PPA.

(j) The tax on income including MAT or income tax has nothing to do with the supply of power. The Income Tax is post revenue of the business and it is on the operating profit or net profit. Accordingly, the imposition of MAT or tax on income

or any increase or decrease in the tax on income cannot be construed as change in law.

(j) Where the PPA is entered into in pursuance of a competitive bidding process as per Section 63 of the Electricity Act, 2003, the tariff is a per unit tariff allowed on the electricity generated and supplied. There is no separate element of return of equity or reasonable return. These all are factored in the bid price itself. In case of tariff determined based on capital cost under section 62 of the Electricity Act, 2003, one of the components allowed as tariff is tax on income. The pass through on MAT or income under the tariff regulations is by virtue of the specific provision and not by virtue of affecting the supply of power by the generating company.

(k) With regard to increase in the rate of royalty on coal, increase in excise duty on coal and levy of clean energy cess are not be a tax on supply of power and therefore does not fall within the definition under Article 10.1.1.

(l) With regard to change in railway development surcharge and other taxes by Ministry of railways, the tax imposed from time to time by way of increase or decrease are not in pursuance of any statutory declaration or levy.

(m) The increase in the price of coal due to the domestic shortage should have been anticipated and therefore cannot be considered as unprecedented. The New Coal Distribution Policy (NCDP) did not guarantee 100 % coal supply based on domestic production. The petitioner submitted its bid based on the LoA and NCDP,2007 which gives absolutely no assurance in terms of the quantity, quality or price of coal that would be supplied to the petitioner and in face envisages meeting of shortfall through imports. Therefore, the petitioner on its own with due knowledge has taken the commercial risk.

3. Leaned counsel for ED-DNH adopted the submissions of Prayas and nothing is to be added.

4. Leaned counsel for MSEDCL submitted as under:

(a) In light of the Full Bench Judgment of the Tribunal, the Commission does not have jurisdiction in the present case, since the full bench has held that in a Section 63 bid, Section 79(1)(b) shall not be applicable and only the State Commission shall have jurisdiction since it was the state commission that adopted the tariff and is the Appropriate Commission in terms of the PPA.

(b) The PPA between MSEDCL and the petitioner dated 17.3.2010 was approved by and the tariff was determined under section 63 of the Electricity Act by the State Electricity Regulatory Commission. Therefore, the appropriate Commission in the present case is MERC and not the Central Commission.

(c) Learned counsel adopted the submission of Prayas regarding taxes on the sale of power. It was reiterated that various claims of the petitioner are not in pursuance of a statutory levy or tax applicable for supply of power and hence should be dis-allowed by the Commission.

(d) MSEDCL sought time to file a fresh affidavit would be filed within a week.

5. Learned counsel for the petitioner in its rejoinder submission stated as under:

(a) The interpretation of the findings of the Full Bench Judgment by the counsel for MSEDCL is mis-conceived. After going through various portions of the Full Bench Judgment, it is clear that this Commission has jurisdiction in the present case. In light of the findings of the Tribunal regarding composite scheme.

(b) With regard to the submissions on the interpretation of the Change in Law clause, it was reiterated that Article 10.1.1 includes all taxes and is not limited to taxes in connection with the supply of power and all provisions of Article 10.1.1 have to be harmoniously constructed to give effect to each provision. It was further submitted that the definition of "law" is wide and inclusive definition and use of the terms 'all laws including' expands the scope of the definition clause which is further expanded by the use of the term 'and shall further include without limitation'.

(c) The definition of Indian Government Instrumentality includes any Ministry Department, Board, Authority, Agency, Corporation and Commission under direct or indirect control of the Government of India. In the present case Indian Government Instrumentality would include all Ministries, the Indian Railways, and the DGFT and Coal India and its subsidiaries.

(d) The definition of Law would include 'Clarifications' since the same has been issued by an Indian Government Instrumentality and such clarification has the force of law.

(e) MSEDCL is taking contrary stand to that taken in its reply, wherein MSEDCL has accepted certain claims subject to prudence check by the Commission. The same was taken note of by the Commission.

6. After hearing the parties, the Commission, permitted MSEDCL to file a fresh affidavit latest by 20.6.2016.

7. Subject to above, order was reserved in the petition.

**By order of the Commission**

**Sd/-  
(T. Rout)  
Chief (Law)**