CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 269/MP/2018

Subject	: Petition under Section 142 of the Electricity Act, 2003 for noncompliance of direction dated 28.9.2017 in Petition No. 97/MP/2017.
Petitioner	: Adani Power (Mundra) Limited (APMUL)
Respondents	: Uttar Haryana Bijli Vitran Nigam Limited and Others
Date of Hearing	: 11.4.2019
Coram	: Shri P.K. Pujari, Chairperson Dr. M.K. Iyer, Member Shri I.S. Jha, Member
Parties present	: Shri Amit Kapur, Advocate, APMUL Ms. Ponam Verma, Advocate, APMUL Ms. Abiha Zaidi, Advocate, APMUL Ms. Tanesha Sultan Singh, Advocate, APMUL Shri Jignesh Langalia, APMUL Shri Shashank Kumar, APMUL Shri M.G. Ramachandran, Senior Advocate, Haryana Utilities Ms. Poorva Saigal, Advocate, Haryana Utilities Shri Shubham Arya, Advocate, Haryana Utilities Shri Vikrant Saini, Haryana Utilities

Record of Proceedings

At the outset, learned counsel for the Petitioner submitted that the Commission vide ROP dated 19.3.2019 directed the respondents to obtain the desired certificate from the coal companies, on or before 27.3.2019 and process the case of the Petitioner to make payment of outstanding dues. The respondents have filed the information received from MCL on 27.3.2019. However, no payment has been made by the Haryana Utilities so far. Learned counsel for the Petitioner further submitted as under:

(a) In terms of the judgment of the Hon`ble Supreme Court in the case of Energy Watchdog, direction of Ministry of Power dated 31.7.2013, amended Tariff Policy dated 28.1.2016 and the Commission's order dated 31.5.2018 in Petition No. 97/MP/2017, the entitlement of the Petitioner for compensation for shortfall of coal supply is no longer *res-integra*.

(b) It is only the payment of compensation by Haryana Utilities, which is being adjudicated by the Commission in the present proceeding. Nothing more than that can be the subject matter of the present proceedings. Any grievance arising out of the Commission`s order dated 31.5.2018 cannot be taken up in the present proceedings, since it is neither a review nor an appeal.

(c) To compute compensation for shortfall of coal, only two quantities need to be assessed, namely (i) Annual Contracted Quantum (ACQ) of 6.405 MTPA, and (ii) Actual supply by CIL. Shortfall ought to be computed as 'ACQ minus Actual Supply'.

(d) The shortfall claimed by the Petitioner in Petition No. 97/MP/2017 has been found to be correct and revalidated by MCL/SECL certificates.

(e) The entitlement for shortfall of coal supply must not be confused with the Petitioners' entitlement for compensation from MCL/SECL for short supply under the FSA. The Commission in its order dated 31.5.2018 has observed that the compensation payable under the FSA for supply of coal for capacity lower than trigger level is too meagre to meet the expenditure for procurement of coal from alternate sources or through import. Therefore, the compensation under the FSA for the shortfall below 80% of ACQ is not sufficient to put the Petitioner in the same economic position as if the Change in Law event has not occurred.

(f) The 'Program' and 'Offer' referred by the Haryana Utilities relates to supply of domestic linkage coal by rail and the certificate issued by MCL dated 25.3.2019 also clearly refers to linkage coal by rail only. 'Program' is submitted by the Petitioner to the Railways and CIL and then 'Offer' is made by Coal Company to the Petitioner. Thereafter, the supply of coal is controlled and managed between the Railways and the coal company. Thus, 'program' and 'offer' have no relevance for the purposes of computation of compensation for shortfall of coal supply as it involves only a part of ACQ to be supplied by way of rail.

(g) If the contention of Haryana Utilities is upheld, then the CCEA decision read with MOP directions as upheld by the Supreme Court (stating that the *higher cost of imported coal procured to meet the shortfall*) will have to be given a go-by.

2. Learned senior counsel for Haryana Utilities argued at length and mainly submitted as under:

(a) As per the Para 47 of the Commission`s order dated 31.5.2018, coal availability from the coal companies is to be considered for computation of shortfall. The Commission had directed the Petitioner in Para 47 to obtain and provide to the Haryana Utilities certificate from MCL about the actual availability and actual supply of domestic coal against the FSA dated 9.6.2012 during each of the contract years i.e. 2013-14, 2014-15, 2015-16 and 2016-17.

(b) The Petitioner has wrongly claimed the shortfall in the domestic coal supply. MCL`s letter dated 25.3.2019 specifically confirms that MCL had made available the coal of quantum not less than the trigger level and therefore, there was no occasion for MCL to consider any penalty or compensation to the Petitioner in terms of the Fuel Supply Agreement.

(c) The availability by MCL was higher than the supply claimed by the Petitioner. The consideration in Petition No. 97/MP/2017 is only shortfall in coal due to NCDP 2013 i.e. shortfall by MCL/SECL. Any shortfall due to any other reason cannot be a reason for monetary compensation under change in law;

(d) Haryana Utilities had specifically sought from the coal company the program given by the Petitioner and the consequent offer by MCL. Perusal of table given by MCL reveals that substantially the program sought by the Petitioner for the rakes was offered by MCL. Therefore, there was no shortfall in the offer by MCL to the Petitioner`s request/program. If the Petitioner did not seek the program, MCL could not have offered the same.

(e) SECL certificate dated 27.3.2019 also states that as the level of lifting in terms of the Fuel Supply Agreement during the concerned periods was not less than the trigger level, no compensation was paid to the Petitioner.

(f) In the order dated 31.5.2018, there has been no determination of the amount payable by Haryana Utilities to the Petitioner. Therefore, the computation made by the Petitioner which is not acceptable to the Haryana Utilities need to be first adjudicated upon by the Commission before any claim for recovery is made.

(g) The present petition is outside the scope of Section 142 of the Electricity Act, 2003 which deals with the punishment for non-compliance of the directions of the Appropriate Commission. The prayers made in the petition cannot be a subject matter of a proceeding under Section 142 of the Electricity Act, 2003 but has to be preferred as a substantive petition seeking declaration on merits and consequential directions for payment of the amount based on the decision that may be reached by the Commission on the aspect of such declaration. The present Petition should be converted to adjudication proceedings. In support of its contention, learned senior counsel relied on the judgment of the Hon`ble Supreme Court in the case of R.N. Dey and Ors. vs Bhagyabati Pramanik and Ors. [(2000) 4 SCC 400] and Appellate Tribunal`s judgments in the cases of B.M. Verma vs Uttarakhand Electricity Regulatory Commission and BSES Rajdhani Power Limited vs Secretary, Delhi Electricity Regulatory Commission.

(h) With regards to taxes and duties, as per the Commission`s order dated 6.2.2017 in Petition No. 156/MP/2014, the compensation for change in law was allowed on the basis of actual coal consumed subject to ceiling. If the Petitioner does not actually consume coal or does not make the actual payment towards change in law, it cannot claim such compensation from the Procurers. Since the IPT is a facility taken by the Petitioner for its commercial convenience, the obligation of the Haryana Utilities will be only to pay such taxes as per the taxes applicable to imported coal or taxes applicable for domestic coal, whichever, is lower.

(i) Change in law compensation can only be for the difference between landed cost of domestic linkage coal and landed cost of alternate coal and not energy charge. However, the Commission has rejected this contention in the Review Petition filed against the order dated 31.5.2018 in Petition No. 97/MP/2017.

3. Learned counsel for the Petitioner in its rebuttal submitted as under:

(a) In Para 61 of the order dated 31.5.2018, the Commission has held that inter plant transfer of coal is permissible under the CIL policy and therefore, the coal supplied to other plants has to be accounted for against the generation and supply of power to Haryana Utilities from Units 7, 8 and 9 of Mundra and all claims for change in law with respect to the PPA dated 7.8.2008 with respect to Haryana Utilities shall be considered after taking into account the coal diverted under inter plant transfer.

(b) The Respondents cannot seek to reopen the judgment of the Hon`ble Supreme in the case of Energy Watchdog Judgment, amended Tariff Policy and the decisions of MOP and CCEA in the present proceedings.

(c) MCL, in its certificate dated 13.2.2019 has categorically stated that the coal supplied to be considered as actual quantity supplied by MCL as per the actual

availability of coal. The Petitioner cannot be held accountable for the lower throughput of the coal companies.

(d) It can be observed from the MCL certificate dated 31.5.2016 that the quantity indicated in the certificates is related to supply of domestic coal under rail mode only which is 80% of the ACQ. The coal companies supply 15% of ACQ through import of coal under the terms of the FSA. The decision of MoP and CCEA, which has been upheld by the Hon`ble Supreme Court, allowed pass through of cost of imported/market-based e-auction to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal on case to case basis. Therefore, the compensation is to be based on difference between ACQ and actual supply of domestic coal and not on 'Programme' vs 'Offer' of coal rakes.

(e) The quantity of actual coal supply to the Petitioner for the years 2013-14, 2014-15, 2015-16, 2016-17 as claimed by the Petitioner in its Petition No. 97/MP/2017 filed on 1.5.2017, as recorded in the Commission's order dated 31.5.2018 at paragraph 60 had been found to be correct and had been revalidated by the certificates of MCL and SECL. Moreover, MCL and SECL certificates obtained by Haryana Utilities and those obtained by Adani reflected identical quantities. Therefore, repeated and unsubstantiated objections of Haryana Utilities' against the certificates provided by the Petitioner are prejudicial.

(f) During the hearings of Petition No.97/MP/2017 on 10.8.2017 and 28.9.2017, Haryana Utilities had accepted the methodology used for Change in Law relief and calculations for the same. Having raised no objections at the said time, the Haryana Utilities were now attempting to mislead the Commission by re-arguing decided issues.

(g) The present proceedings cannot be used to re-argue the issues raised in Petition No. 97/MP/2017 and Review Petition. Haryana Utilities' have also suppressed the fact that they have already filed an Appeal before the Appellate Tribunal for Electricity against the Commission`s order dated 31.5.2017 in Petition No. 97/MP/2017.

(h) As regards the objections of Haryana Utilities regarding Section 142 of the Electricity Act, 2003, learned counsel submitted that Haryana Utilities cannot escape their obligation to pay legitimate dues to the Petitioner by raising procedural grounds, seeking to erroneously limit the mandate and the powers of this Commission. Despite the clear directions of this Commission in order dated 31.5.2017, Haryana Utilities have unilaterally withheld the payment due to the Petitioner. Therefore, the Petitioner has approached the Commission praying for appropriate relief. The statutory and regulatory powers of the Commission under Section 61 read with Sections 63 and 79(1)(b) of the Act enable it to pass directions as it deems necessary and fit to adjudicate the present dispute.

4. After hearing the learned senior counsel and learned counsel for the parties, the Commission directed the Petitioner and the Respondents to file their respective written submissions by 26.4.2019 with copy to each other.

5. Subject to the above, the Commission reserved the order in the Petition.

By order of the Commission
Sd/-
(T. Rout)
Chief (Law)