

RAJASTHAN ELECTRICITY REGULATORY COMMISSION

Petition No. RERC-1536/19

In the matter of petition filed under Section 86 (1) (f) of the Electricity Act, 2003 read with Article 41 and Article 48 of the Transmission Service Agreement dated 09.05.2016 claiming the enactment and levy of Krishi Kalyan Cess and Goods and Services Tax as Change in Law and subsequent relief for payment of compensation under such Change in Law.

Coram:

Shri Shreemat Pandey,	Chairman
Shri S. C. Dinkar,	Member
Shri Prithvi Raj,	Member

Petitioner : M/s Adani Transmission (Rajasthan) Limited.

Respondent : Rajasthan Vidyut Prasaran Nigam Ltd.

Date of hearings : 17.12.2019, 09.01.2020, 27.02.2020 & 23.07.2020

Presents :

1. Sh. Buddy A. Ranganadhan, Advocate for Petitioner
2. Sh. Raunak Jain, Advocate for Petitioner
3. Sh. Sandeep Phatak, Advocate for Respondent

Order Date :

14.09.2020

ORDER

1. M/s Adani Transmission (Rajasthan) Limited. (ATRL), a transmission licensee, has filed this petition on 29.07.2019 for declaring levy of Krishi Kalyan Cess and Goods and Services Tax as Change in Law and allowing subsequent relief for payment of compensation under such Change in Law as per Article

41 and Article 48 of the Transmission Agreement (Agreement) dated 09.05.2016.

2. Notice was issued to Respondent on 30.07.2019 to file reply on the petition.
3. Respondent Rajasthan Vidyut Prasaran Nigam Ltd. (RVPN) filed reply to the petition on 07.10.2019. Subsequently, Petitioner filed rejoinder to reply on 25.02.2020.
4. The matter was finally heard on 23.07.2020. Sh. Buddy A. Ranganadhan, Advocate appeared for Petitioner and Sh. Sandeep phatak, Advocate appeared for RVPN. Petitioner also filed its written submissions on 06.08.2020.
5. It is submitted on behalf of the Petitioner as follows:
 - (a) Petitioner has been granted transmission licence by the Commission vide its order dated 30.08.2016 to establish 400 kV Suratgarh-Bikaner Double Circuit transmission system from Suratgarh Thermal Power Station to Bikaner for evacuation of power from 2X660 MW Unit 7 and 8 of supercritical thermal power plant at Suratgarh with a design capacity to transmit electricity equivalent to 1066 MW.
 - (b) Earlier, RVPNL in its capacity of State Transmission Utility decided to develop the said Project through competitive bidding process under Public Private Partnership model on Design-Build-Finance-Operate-Transfer basis using Viability Gap Funding (VGF).
 - (c) M/s Adani Transmission Limited, parent company of the Petitioner, was selected as the successful bidder in competitive bidding process adopted by RVPN. Subsequently, a Letter of Award was issued to M/s Adani Transmission Limited on 16.03.2016 informing that its bid i.e. Premium equal to 20% of the Unitary Charge for each year commencing from CoD of the Project, has been accepted by RVPN. Thereafter, the

Petitioner was incorporated as an SPV to implement the Project as the successful bidder and a Transmission Agreement dated 09.05.2016 was entered into between the Petitioner and RVPN. The Project has achieved CoD on 28.07.2018.

- (d) Finance Act, 2016 (No. 28 of 2016) was passed to give effect to the financial proposals of the Central Government for the financial year 2016-2017. The Effective rate of Service Tax which was prevailing has increased by 0.5% with effect from 01.06.2016 through a new levy by the name of Krishi KalyaN Cess on taxable services.
- (e) Further, pursuant to the Constitution (One Hundred and First) Amendment Act, 2016, Government of India has enacted various legislations including Central Goods and Services Tax Act, 2017/Union Territory Goods and Services Tax Act 2017, for levy of tax on Intra-state supplies and Integrated Goods and Services Tax Act, 2017 for levy of tax on Inter-state Supplies including imports.
- (f) Majority of provisions of the said aforementioned enactments including the provision for levy and collection of the respective tax have become effective from 01.07.2017. Tax Division, Finance Department, Government of Rajasthan stipulating the effective date of majority of provisions including the provisions for levy and collection of SGST w.e.f 01.07.2017 under Rajasthan GST Act, 2017.
- (g) On account of the said introduction and levy of KKC & GST, there has been an increase in effective rate of taxation from the original bid date, which has affected the Project cost during construction period and the same will also affect the costs during the operation period. The same is squarely covered under Article 41 of the Agreement i.e. 'Change in Law'

and entitles the concessionaire to seek restitution to the original economic position that existed as on original bid date.

- (h) Petitioner sent Change in Law notices under Article 41 of Agreement to Respondent vide letter dated 30.06.2016 and 01.08.2017.
- (i) Respondent RVPN vide its letters dated 28.08.2017 and 18.10.2017 asked Petitioner to furnish details in support of effect of GST on Unitary Charges in any accounting year and taxes and duties considered and furnished at the time of RFP stage so as to ascertain aggregate financial effect due to change in law under Article 41 of the Agreement.
- (j) Petitioner vide its letter dated 14.11.2017 submitted that the Project is under implementation stage, hence, it is unable to ascertain the final Project cost inclusive of Change in Law impact at this stage and would revert with complete details once the Project has achieved CoD.
- (k) Thereafter, Project achieved CoD on 28.07.2018. Petitioner vide letter dated 05.02.2019 again sent a notice to RVPN for payment of compensation under Change in Law as per Article 41 of the Agreement.
- (l) In response, RVPN vide its letter dated 27.02.2019 requested to furnish claim duly verified/certified from independent engineer and statutory auditor of the Project as per the Agreement.
- (m) Petitioner vide its letter dated 28.05.2019 furnished its claim of Change in Law duly verified/certified by the Independent Statutory Auditor of the Project, M/s Karm & Co. on the basis of books of accounts and other relevant records at Rs. 3,39,21,104 /- as the extra financial cost incurred by the Petitioner for extra tax burden due to Change in Law and introduction of GST laws.

- (n) RVPN vide its letter dated 04.06.2019 submitted that claim of the Petitioner for KKC and GST is not supported by documents; and the certification of claim by Statutory Auditor of the project is incomplete in reference to Clause 41.1 of the Agreement and not supported with details of criteria they followed to certify the claim.
- (o) RVPN while referring common Rupee Loan Agreement between Petitioner and PTC India Financial Services Ltd. executed on 4.11.2016, submitted that as per Schedule-II, the estimated project cost was Rs. 160 crores whereas as per certificate dated 19.12.2018 of Statutory Auditor, total capital cost of the project is Rs. 134.48 crore as on 30.11.2018. Therefore, upto the expenditure of capital cost of Rs. 160 crore for development of the Project there shall be no extra financial burden. Therefore, claim of extra financial burden is insubstantial.
- (p) It is submitted that the claim for additional costs has been submitted in accordance with Article 33.3 of the Agreement which provides for certification of claim by Statutory Auditor appointed under the Agreement. Further, as per Article 33.1.1, RVPN has authority to inspect any of the books of accounts of the Petitioner. Hence, the certificate issued by the Statutory Auditor under the Agreement has legal significance.
- (q) Central Electricity Regulatory Commission vide its order dated 14.03.2018 passed in Petition No. 13/SM/2017 in the matter of "The Commission on its own Motion vs. GMR-Kamalanga Energy Limited & Others" while considering the relevance of Statutory Auditor's certificate, has held that the GST compensation on account of 'Change-in-Law' is to be allowed on the basis of the Statutory Auditor Certificate. The beneficiaries may refund or recover the amount after providing increase and decrease in taxes, duties, cess etc. supported by the Statutory Auditor's Certificate.

- (r) Unless RVPN could point out any anomaly with the Statutory Auditor Certificate and/ or the detailed element-wise break-up and after exhausting its rights available under the Agreement, it cannot be allowed to protract the payment on compensation and go on endlessly which is legally due to the Petitioner on account of 'Change-in-Law'.
- (s) Further, regarding contention of the RVPN that the completed Project cost (Rs. 134.48 Cr.) is lesser than estimated Project cost (Rs. 160 Cr.) and Petitioner has not incurred any additional costs therefore, Petitioner is not entitled to compensation on account of 'Change-in-Law' events under the Agreement, it is submitted that Article 41.3 of the Agreement only contemplates the comparison of the Net Project Value (NPV) of the Project by including the impact of 'Change-in-Law' vis-a-vis NPV of the Project using the Financial Model which has been adopted by the lender but with the adjustment of actual costs and revenue etc.
- (t) Hence, in terms of Article 41.3 of the Agreement, it has to be ascertained as to whether the NPV of the Project on the actual completed cost has gone up or down by comparing the NPV of the actual Project cost with the NPV of the actual project cost plus the impact of 'Change-in-Law'.
- (u) Using the same Financial Model as adopted by the lender in terms of Article 41.3 and making adjustment for the completed project cost of Rs.131.09 Cr. (excluding 'Change-in-Law' impact) in lieu of the estimated cost of Rs. 160 Cr, the NPV of the Project should be 21.01. If one re-computes the NPV of the Project including the 'Change- in-Law' impact, the NPV of the Project would be 18.60 which is much lesser than 21.01.
- (v) Therefore, even in terms of Article 41.3, the Petitioner is not in the same financial position as he would have been had there been no 'Change-in-Law'.

- (w) At the time of bidding, the grant/premium amount quoted by the bidders was the sole criteria constituting for evaluation of Bids. The Project has been awarded to the Petitioner who has quoted the highest Premium equal to 20% of the Unitary Charge. However, at the time of bidding, there was no question of funding the Project or taking loan against a Project which has not even been successfully bid for. Hence, Unitary Charge is not computed on the 'Financial Model'. Rather, the Financial Model was the revenue projected to be earned from the 'Unitary Charge' to assess the cash flow and debt-servicing capabilities of the Project.
- (x) As on the Bid date i.e. 18.02.2016, the 'Financial Model' did not even come into existence. The obligation to prepare and provide the 'Financial Model' to RVPN has arisen only as a condition precedent specified under Article 4.1.3 (h) of the Agreement which had to be done within 180 days of the Agreement and has been executed on 09.05.2016 i.e. much after the Bid date. Hence, how could the Petitioner be placed in the same financial position existing prior to the Bid date on the basis of a Financial Model prepared much after the Bid date and submitted to RRVNPL as per terms of the Agreement on 24.10.2016.
- (y) Therefore, there can be no question of computation of the NPV on estimated cost of Rs. 160 Cr. to ascertain as to what the financial position of the Petitioner would have been had the 'Change-in-Law' not occurred.
- (z) Hence, the 'Change-in-Law' as well as the payment of compensation under such 'Change-in-Law' claimed in the petition squarely meet the criteria laid down under Article 41 and Article 48 of the Agreement.

(aa) Article 44.4 of the TSA provides that the parties may approach the Commission if a dispute is required to be adjudicated upon by the Commission instead of reference to arbitration under Article 44.3 of the TSA. Further, Hon'ble Supreme Court in the case of "Gujarat Urja Vikas Nigam Ltd Vs. Essar Power Ltd." (2008) 4 SCC 755 has categorically held that in case of dispute between licensees and generating companies, Section 86(1)(f) of Electricity Act, 2003 being special law would prevail over Section 11 of the Arbitration and Conciliation Act, 1996, whereas other disputes would be decided in accordance with Section 11 of the Act, 1996. Hence, Petitioner approached the Commission for adjudication of disputes.

(bb) In light of above submissions, it is prayed to-

- (i) Declare that the event of introduction and levy of Krishi Kalyan Cess & Goods and Services Tax under the GST Laws is a Change in Law event under the Transmission Agreement dated 09.05.2016;
- (ii) Award subsequent relief for payment of compensation under such Change in Law event amounting to Rs. 3,39,21,104/- as also certified by the Independent Statutory Auditor for the Project;
- (iii) Grant interest/carrying cost from the date of impact till reimbursement by the Respondent;
- (iv) Petitioner should be at liberty to approach change in Law affecting the operating period as notified to the Respondent

6. Per contra, the Counsel for the Respondent submitted that:

- (a) Petitioner has filed this petition under Section 86(1)(f) of Electricity Act, 2003 read with Article 41 & 48 of the Transmission Agreement dated 09.05.2016. However, a perusal of the aforesaid provisions would indicate

that the petition seeking adjudication of the dispute on account of Change in Law is not maintainable as a separate dispute resolution mechanism has been provided under the Agreement itself.

- (b) Article 48.1 of Agreement dated 09.05.2016 provides that in case of any dispute raised by the Authority, such dispute shall be settled in accordance with the dispute resolution procedure provided under Article 44 of the Agreement, which provides for conciliation followed by Arbitration/adjudication by the Commission. Hence, the Agreement provides for specific remedy to be undertaken by the parties in case of any dispute, however, by avoiding the said remedy, the present petition has been filed, which is not maintainable.
- (c) It is a settled preposition of law that whenever, there is an Arbitration Agreement agreed between the parties for alternate dispute resolution mechanism then jurisdiction of any other Forum or Court of law is barred.
- (d) Petitioner vide its letters dated 30.06.2016 and 01.08.2017 claim Change in Law under Article 41 of the Transmission Agreement on account of increase in effective rate of service tax from 14.5% to 15% due to levy of Krishi Kalyan Cess @ 0.5% as per Finance Act, 2016 and increase in effective rate of taxation due to introduction of GST pursuant to GST Act, 2017, which became effective from 01.06.2016 and 01.07.2017 respectively.
- (e) RVPN in response replied that notice was not supported with the relevant documents for ascertaining the alleged aggregate financial effect/burden on the concessionaire due to Change in Law.
- (f) As per Clause 4.1.1 of the Transmission Agreement conditions precedent are to be satisfied in totality and appointed date is to be declared prior to claiming any other right under the Transmission Agreement. Conditions

precedent required concessionaire to deliver true copies of Financing Agreements, Financial Package and Financial Model of the Project.

- (g) These documents were provided by the Petitioner wherein it was recorded that the estimated Project cost as per financial documents was Rs.160.00 Crores and to achieve the said amount Rs.120.00 Crores was the loan amount and remaining Rs.40.00 Crores was equity contribution. As per the Financing Agreement 'Estimated Project Cost' was defined as 'the cost incurred or to be incurred by the borrower to develop, finance and construct the Project to achieve COD.....'
- (h) Petitioner again vide its letter dated 05.02.2019 (after achieving the CoD on 28.07.2018) approached RVPN along with a sheet indicating total financial impact on account of Change in Law. The amount so indicated was Rs. 2.11 Crores. The said calculation sheet was totally unsubstantiated and without any supporting document and therefore, vide letter dated 27.02.2019, Petitioner was directed to submit a verified claim from the Independent Engineer and Statutory Auditor.
- (i) Petitioner vide Letter dated 28.05.2019 submitted a certificate issued by the Statutory Auditor M/s KARM & Company, which purportedly certified Rs.3,39,21,104/- as additional financial cost incurred by the Petitioner due to Change in Law, which also included carrying cost of Rs.49,57,955/- upto 30.04.2019 due to additional tax burden on account of imposition of Krishi Kalyan Cess and GST. The said certificate clarified that it only indicated the extra financial cost incurred by the Petitioner, but does not certify the eligibility or sustainability of any kind of claim raised by the Petitioner from any Government or Non-Government Authority. The said certificate is not determinative of the eligibility of the claim to the Petitioner and further the Statutory Auditor has not even certified the

claim of the Petitioner, which was otherwise required to be done as per clause 33.3 of the Transmission Agreement.

- (j) Petitioner was informed vide letter dated 04.06.2019 that the alleged claim was incomplete, unsubstantiated and in the absence of supporting details mentioned in Article 41 of the Agreement, the same could not be considered. Petitioner has executed a Financial Agreement with PTC India Financial Services Ltd., according to which the estimated Project Cost was considered as Rs.160.00 Crores and as per the certificate dated 19.12.2018 of Statutory Auditor, the actual capital expenditure incurred on the Project is Rs.134.48 Crores as on 30.11.2018. Hence, there is no extra financial burden on the Petitioner on account of the Change in Law.
- (k) Provisions of Article 41 of the Transmission Agreement clearly provide that only upon satisfaction of the conditions mentioned in Article 41 of the Agreement, any claim would be admissible. Also, as per clause 41.3 of the Transmission Agreement, for the purpose of placing the Concessionaire in the same financial position as it would have enjoyed had there been no Change in Law affecting the costs, returns or other financial burden or gains, the parties shall rely on Financial Model.
- (l) As per the Transmission Agreement 'Total Project Cost' for development of the Project shall be Rs.134.48 Crores which has been certified by the Statutory Auditor of the Petitioner.
- (m) Further, Financial Model indicated the estimated project cost of Rs.160.00 Crores, which was reduced to Rs.134.48 Crores. Therefore, in view of Article 41.3 of the Transmission Agreement, it is clear that relying upon Financial Model for the purposes of placing concessionaire in the same financial position as it would have enjoyed in the absence of any

Change in Law, there shall be no increase in the cost of the project and no extra financial burden on the Concessionaire until the capital cost incurred on the project is more than Rs. 160 Crores.

- (n) As per Article 41 of the Agreement, Petitioner is not entitled for raising any claim on account of Change in Law until Petitioner suffers an increase in the total cost as a result of Change in Law. In the present case the actual capital cost incurred by the Petitioner for the Project is less than the estimated Project cost mentioned in the Financing Agreement/Financial Model. The cost relevant for consideration is the cost mentioned in the Financial Agreement/Financial Model. Therefore, there is no extra financial burden upon the Petitioner in view of the cost indicated in the Financing Agreement /Financial Model i.e. Rs.160.00 Crores. Hence, the Petitioner does not have any cause of action to file the present petition.

Commission's Views & Decisions

7. Commission has heard Ld. Counsels appearing for both the parties and considered the pleadings made by the parties along with documents placed on record.
8. It is the case of the Petitioner that in pursuance to Government of India notification on account of introduction and levy of Krishi Kalyan Cess & Goods and Services Tax, there has been an increase in effective rate of taxation from the original bid date, which has affected the Project cost during construction period. According to the Petitioner, the same is squarely covered under Article 41 of the Transmission Agreement i.e. 'Change in Law', therefore, it prayed to declare that the levy of KKC & GST is a Change in Law event under the Transmission Agreement dated 09.05.2016 and allow subsequent relief of payment of compensation.
9. Per contra, Respondent submitted that as per Article 41 of the Transmission

Agreement, Petitioner is not entitled for raising any claim on account of Change in Law until Petitioner suffers an increase in the total cost as a result of Change in Law. In the present case the actual capital cost incurred by the Petitioner for the Project is less than the Project cost mentioned in the Financing Agreement/Financial Model. As there is no extra financial burden upon the Petitioner hence, the Petitioner does not have any cause of action to file the present petition.

10. It is observed that the dispute which has arisen between the parties is on account of the claim made by the Petitioner for compensation under change in law which is provided in Article 41.3 of the Transmission Agreement. Therefore, it is necessary to look in to the wording of Article 41.3 of the Agreement before proceeding further.

"41.3 Protection of NPV

Pursuant to the provisions of Clauses 41.1 and 41.2 and for the purposes of placing the Concessionaire in the same financial position as it would have enjoyed had there been no Change in Law affecting the costs, returns or other financial burden or gains, the Parties shall rely on the Financial Model to establish a net present value (the "NPV") of the net cash flow and make necessary adjustments in costs, revenues, compensation or other relevant parameters, as the case may be, to procure that the NPV of the net cash flow is the same as it would have been if no Change in Law had occurred. For the avoidance of doubt, the Parties expressly agree that for determination of NPV, the discount rate to be used shall be equal to the weighted average rate of interest at which the Concessionaire has raised the Debt Due under its Financing Agreements."

11. The above Article provides that the Parties shall rely on the Financial Model to establish a net present value of the net cash flow to procure that the NPV of the net cash flow is the same as it would have been if no Change in Law had occurred.

12. Article 48 provides the definition of Financial Model which reads as under:

"Financial Model" means the financial model adopted by Senior Lenders, setting forth the capital and operating costs of the Project and revenues

therefrom on the basis of which financial viability of the Project has been determined by the Senior Lenders, and includes a description of the assumptions and parameters used for making calculations and projections therein;

13. As per definition of Financial Model, the Financial Model submitted by Petitioner shall set forth the capital and operating cost along with revenue to settle the financial viability of the Project. It includes all assumptions and parameters thereby freezing the financial viability or net cash flow.
14. Further, as per Clause 41.3, in case of Change in Law for placing the Petitioner in the same financial position the Financial Model shall be relied upon which is the basis for financial viability.
15. In the present case, Petitioner submitted the Financial Model having estimated project cost as Rs. 160 Crore and the same unitary charges as furnished in the bid.
16. Commission observed that the financial viability of the project of the Petitioner was based on the project cost of Rs. 160 Crore and admittedly Petitioner has made expenditure of Rs. 134 Crore only, therefore, in Commission's considered view Petitioner does not suffer any adverse financial implication on its project, hence not entitled for payment of compensation under Change-in-Law.
17. Petition is disposed of accordingly.

(Prithvi Raj)
Member

(S.C. Dinkar)
Member

(Shreemat Pandey)
Chairman