



Petition No. 1655 of 2020

**BEFORE
THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW**

Date of Order: 02.08.2022

PRESENT:

Hon'ble Shri Raj Pratap Singh, Chairman
Hon'ble Shri Kaushal Kishore Sharma, Member
Hon'ble Shri Vinod Kumar Srivastava, Member (Law)

IN THE MATTER OF

Petition on account of occurrence of 'Change in Law' events as per Article 13.1.1 of the Power Purchase Agreement (PPA) dated 26.09.2014 between Noida Power Company Limited and Dhariwal Infrastructure Limited for claiming additional recurring/non-recurring expenditure incurred by Dhariwal Infrastructure Limited for the supply of 187 MW of Power (Net Capacity - 170 MW after excluding Normative Auxilliary Power Consumption) from Unit 2 of the Generating Station located at Taladi, Chandrapur, Maharashtra to Noida Power Company Limited.

Dhariwal Infrastructure Limited (DIL),
Registered Office: CESC House,
Chowringhee Square, Kolkata - 700 001

..... Petitioner

AND

Noida Power Company Limited (NPCL),
Electric Sub-Station,
Knowledge Park - IV,
Gautam Buddha Nagar, Greater Noida - 201 310

..... Respondent

The following were present:

1. Ms. Mandakini Ghosh, Advocate, DIL
2. Ms. Srishti Rai, Advocate, NPCL
3. Shri. Sanket Srivastava, NPCL
4. Shri. Rama Shankar Awasthi, Consumer Representative
5. Shri. Divyanshu Bhatt, Counsel Shri. Rama Shankar Awasthi

Order

(Date of Hearing: 30.11.2021)

1. The Petitioner DIL has filed the instant Petition for claiming compensation on account of occurrence of 'Change in Law' events as



per Article 13.1.1 of the Power Purchase Agreement (PPA) dated 26.09.2014 for supply of 187 MW of power from Unit 2 of the Generating Station to NPCL.

2. The Petitioner has prayed as follows:

- i. Admit the instant Petition;
- ii. Declare and adopt the Notification No. SECL/BSP/M&S/19-20/1673 dated 11.10.2019 and Notification No. SECL/BSP/M&S/19-20/1704 dated 17.10.2019 as issued by SECL; thereby increasing the CG Environment Cess and CG Development Cess applicable of Coal charges 'as 'Change in Law' events within the meaning of Article 13 of the NPCL PPA and allow compensation on account of 'Change in Law' thereof;
- iii. Direct the Respondent to make a payment of additional Rs. 0.30 Crore (including carrying cost till 30.09.2020) to the Petitioner for FY 2019-20 from the date of occurrence on the event, i.e., 04.09.2019 due to increase/variation in cost of FSA Grade Coal, subject to adjustment till the date of actual payment and;
- iv. Allow the Petitioner to include such claim/compensation on account of 'Change in Law' events in monthly supplementary energy bills for the period beyond 31.03.2020;

Brief facts

3. The Commission has vide its Order dated 29.05.2020 in Petition No. 1440 of 2019 considered 26.10.2015 as the Cut-off Date for the purpose of adjudicating the claim of the Petitioner pertaining to the 'Change in Law' events. The relevant excerpts from the Order dated 29.05.2020 in Petition No. 1440 of 2019 are reproduced hereunder:

"33. The variable cost in Tariff is impacted by various "Change in Law" event over the period of PPA and assumptions/principles as on cut-off date may not hold good. In view of the Petitioner's submissions dated 26.10.2015, vide which the details of tariff with all assumptions based on the then prevalent price of coal were submitted, it would be reasonable and proper to glue the Petitioner to the proposal made on the basis of assumptions valid as on such date i.e. 26.10.2015. Therefore, we are inclined to accept 26.10.2015 as the cut-off date for the purposes of determining Change in Law events in the instant case."

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The Petitioner has for the purpose of the instant Petition considered the same date, i.e. 26.10.2015, as the Cut-off Date for such Change in Law events.

4. The relevant provisions from the PPA regarding 'Change in Law' events are reproduced below for ease of reference:

"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 events after the date, which is seven (7) days prior to the Effective Date:

- i. The enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law; or
- ii. a change in interpretation of any Law by a Competent Court of Law, tribunal or Indian Government Instrumentality provided such Court of Law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation, or
- iii. change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement, or
- iv. any change in the cost of implementing Environmental Management Plan for the Power Station,

But shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency Intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

13.1.2 "Competent Court" means:

The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

13.2 Application and Principles for computing impact of Change in Law

While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the party affected by such Change in Law, is to restore through Monthly Tariff payments, to the extent contemplated in this Article 13, the Affected Party to the same economic position as if such Change in Law has not occurred.



...

b) Operation period

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by Appropriate Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

Provided that the above-mentioned compensation shall be payable only if and for increase/ decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a Contract Year.

13.3 Notification of change in law

13.3.1 If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obligated to serve a notice to the Procurer under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

- (a) The Change in Law, and
- (b) The effects on Seller of matters referred to in Article 13.2

13.4 Tariff adjustment Payment on account of change in Law

13.4.1 Subject to Article 13.2, the adjustment in monthly tariff payment shall be effective from:

(i) The date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

(ii) The date of order/judgment of the competent Court or Tribunal or Indian Governmental Instrumentality, if the change in Law is on account of a change in interpretation of Law.

13.4.2 The payment for changes in Law shall be through Supplementary Bill as mentioned in article 11.8. However, in case of any change in Tariff by reason of change in law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff Shall appropriately reflect the changed Tariff."



5. This Commission has, vide its Order dated 29.05.2020 in the above Petition no. 1440 of 2019, approved majority of the events which have occurred from the period after the Cut-off Date till 31.03.2019. Further, post 31.03.2019, additional events qualifying under 'Change in Law' provisions of the PPA for FY 2019-20 have occurred which have resulted in increase in Landed Price of the FSA Grade Coal.
6. The occurrence of the following events constitute the 'Change in Law' events affecting the seller/Petitioner and on account of which there would be an additional impact on the financials of the Petitioner for the period of FY 2019-20 and onwards:

TABLE 1: 'CHANGE IN LAW' EVENTS LEADING TO INCREASE IN COMPONENTS OF COAL CHARGES DURING FY 2019-20

Particulars	As on 26.10.2015 (/Ton)	Revised Value (Rs/Ton)/(%)	Applicable Period	Reference
Components of Coal Charges				
CG Environment Cess	7.50	11.25	04.09.2019 to 31.03.2020	SECL Notification No. SECL/BSP/M&S/19-20/1673 dated 11.10.2019.
CG Development Cess	7.50	11.25	04.09.2019 to 31.03.2020	

7. The above Notifications have resulted in change/increase in the cess levied by the State of Chhattisgarh. This amount is collected by the coal company. The present change qualifies as a 'Change in Law' event, and as such, the Petitioner is entitled for compensation as per the provisions of Article 13 of the NPCL PPA. It is further submitted that the objective of Article 13 of the NPCL PPA is to restore the seller, i.e., the Petitioner to the same economic position as it existed on 26.10.2015.
8. The Petitioner submits that claims pursuant to change in CG Environment Cess and CG Development Cess have been recognised as change in law events and allowed by the Hon'ble Central Electricity Regulatory Commission ("**Hon'ble CERC**") vide its Order dated 29.03.2020 in Petition No. 327/MP/2018: Dhariwal Infrastructure Limited vs. Tamil Nadu Generation and Distribution Corporation Limited & Ors. The relevant extracts of the aforesaid Order are reproduced below for ease of reference:



"(e) Increase in Chhattisgarh Environment Cess (Paryavaran Upkar) and Infrastructure Development Cess (Vikas Upkar)

65. We have considered the submission of the Petitioner. The Commission has already allowed increase in Chhattisgarh Environment Cess/ Paryavaran Upkar and Infrastructure Development Cess/ Vikas Upkar as Change in Law events in order dated 19.12.2017 in Petition No. 229/MP/2016, in order dated 19.12.2017 in Petition No. 101/MP/2017, in order dated 18.4.2018 in Petition No. 18/MP/2017 and other orders. The relevant extract of the Commission's observation in these orders is reproduced as under:

"....Since the Infrastructure development cess and Environment Cess has been imposed by Act of Chhattisgarh State, i.e. Chhattisgarh legislature, it fulfils the conditions of Change in Law event under Article 10 of the PPA. Accordingly, the Petitioner is entitled for the expenditure incurred on this account...."

66. In light of the above decision of the Commission, the Petitioner is entitled to reimbursement of the expenditure incurred on this account. The Petitioner shall be entitled to recover on account of Chhattisgarh Infrastructure Development Cess (Vikas Upkar) and Chhattisgarh Environment Cess (Paryavaran Upkar) in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Infrastructure Development Cess and Environment Cess. The Petitioner shall furnish to TANGEDCO, the details of payments made, supported by Auditor's Certificate, while claiming the expenditure and TANGEDCO shall reimburse on the basis of actual payments made. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims on annual basis."

9. The Petitioner has vide its Letter No. DIL/GM-Coord/NPCL/1107 dated 20.12.2019 served the notice to the Respondent regarding such increase in rates of CG Environment Cess and CG Development Cess from ₹ 7.50/Ton to ₹ 11.25/Ton in terms of the provisions of Article 13.3 of the NPCL PPA. -
10. The total amount of claim, i.e., compensation on account of increase in CG Environment Cess and CG Development Cess for the period from 04.09.2019 to 31.03.2020 works out to ₹ 0.27 Crores (excluding

