



Petition No. 1340 of 2018
BEFORE
THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW

(Date of Order: 02.09.2022)

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 under Section 81(1) and (b) of the Electricity Act, 2003 and Article 12 read with Article 16.3.1 of the PPA executed between the Petitioner and UPPCL dated 27.12.2013 seeking relief on account of a "Change in Law" viz. the introduction of GST laws at the central level and change in rate of Service Tax, resulting in additional recurring expenditure in the form of an additional tax burden to be borne by the Petitioner after the Effective Date of PPA.

Azure Surya Private Limited (ASPL)

Southern Park, 5th Floor, D-II, Saket Place,
Saket, New Delhi - 110017

.....Petitioner

Versus

Uttar Pradesh Power Corporation Limited (UPPCL)

7th Floor, Shakti Bhawan Extn, 14 Ashok Marg,
Lucknow - 226001

.....Respondent

The following were present:

1. Shri Vishal Binod, Advocate, Azure Power
2. Shri C.P. Maurya, AE, UPPCL
3. Shri Divyanshu Bhatt, Counsel, UPPCL
4. Shri Sashwat Singh, Advocate, UPPCL

ORDER

(Date of Hearing - 28.07.2022)

1. Pursuant to last hearing dated 07.07.2022, the Commission vide Order dated 20.07.2022 on the UPPCL's request allowed to respond to ASPL's rejoinder.



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The matter came up for hearing today.

2. Shri Vishal Binod, Counsel of ASPL submitted that as per Section 17 & 18 of the Registration Act, Agreements pertaining to Immovable Property are required to be registered and since the present O&M Agreement in the matter is related to services and therefore, need not to be registered. He further referred to two case laws from Hon'ble Supreme Court and Hon'ble Allahabad High Court wherein it has been held that a document which has not been necessarily registered has to be taken admissible as evidence even if it is not registered.
3. The Commission observed that the referred judgment is related to property, however, the instant case is related to service. Sh. Binod stated that Service Contracts are never ordinarily registered and the same is enforced by way of Contract Act as the Agreement has been signed between the parties and whether it is registered or not; does not make it authentic under Section 49 of the Registration Act. Further, Sh. Binod submitted that outsourcing O&M activities under section 62 and Section 63 projects is distinct and therefore, tax which was paid needs to be reimbursed to them under Change in Law.
4. Shri Divyanshu Bhatt, Counsel of UPPCL submitted that ASPL's case is based on two parts: first, there's no provision under the PPA which prohibits them to outsource O&M activities and second, relied on various judgements of Hon'ble APTEL to establish the case. He further referred Hon'ble APTEL Judgements dated 13.01.2022 and stated that whether O&M should have been outsourced or not is still open before SERC's and CERC to adjudicate. He further submitted that since there is no clause under the PPA for allowing outsourcing of O&M, hence the associated cost must be disallowed and emphasized recital (d) at page 6 of the PPA.
5. Further, Sh. Bhatt submitted that Article 7 of the Model PPA, Generator alone shall be liable to operate and maintain the power plant at its own cost and such Clause to its effect was removed in the final PPA executed between the parties. He further submitted that ASPL had executed two O&M Agreements (i.e., in 2014 & 2019) wherein a substantial variation has been observed in Contract Price between the two O&M Agreements at Rs. 1.16 Crore per year for the First Agreement and around Rs. 0.14 Crore per year for the Second Agreement.
6. Sh. Vishal Binod in his rebuttal submitted that their claim is only based on Change in Law event as per Article 12.1 of the PPA. Regarding observation of the Commission about Supply of Power under Article 12.1.1 of the PPA, the Counsel

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