

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**CASE No. 38 of 2016 and CASE No. 102 of 2016**

**Date: 27 December, 2016**

**CORAM:** Shri. Azeez M. Khan, Member  
Shri. Deepak Lad, Member

Petition of APML under Section 86 of the Electricity Act, 2003 read with Article 13 ("Change in Law") of PPA dated 08.09.2008 and Article 10 ("Change in Law") under the Power Purchase Agreements (PPAs") dated 31.10.2010, 09.08.2010 and 16.02.2013 executed between MSEDCL and APML for appropriate adjustment in tariff due to "Change in Law" which substantially affected cost and revenues of the project.[**Case No. 38 of 2016**]

Adani Power Maharashtra Limited (APML) .....Petitioner

Maharashtra State Electricity Distribution Company Limited (MSEDCL) ....Respondent

AND

Petition filed by APML under Section 86 (1) (f) of the Electricity Act, 2003 read with Article 13 "Change in Law" under the Power PPA dated 08.09.2008 for supply of 1320 MW of power executed between MSEDCL and APML for appropriate adjustment in tariff due to "Change in Law" for the 800 MW portion of contracted capacity linked to Lohara Coal Block which substantially affected cost and revenues of the project.[**Case No. 102 of 2016**]

Adani Power Maharashtra Limited .....Petitioner

Maharashtra State Electricity Distribution Co. Ltd. ....Respondent

**Appearance**

For APML: Shri. Ramanuj Kumar (Adv.)  
Shri. Kandarp Patel (Rep.)

For MSEDCL: Ms. Deepa Chawan (Adv.)

**Daily Order**

APML set out the chronology and stated the events of Change in Law and the relevant Notifications issued. Change in Law events had occurred on account of the following:

- a) Chhattisgarh Government has amended the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 on 16.6.2015, and notice of change of the Environment and Development Cess from Rs. 5/MT to Rs. 7.50/MT is applicable for all SECL coal despatches from 16 June, 2015.
- b) Mines and Minerals (Development and Regulation) Amendment Act, 2015 (MMDRA Act) dated 26.3. 2015 requires levies on Royalty to be paid to the District Mineral Foundation of the District in which mining operations are carried out, and also for payments by the holder of the mining lease to the National Mineral Exploration Trust. The Notifications were issued on 17.9.15 and 13.11.15, respectively.
- c) Swachh Bharat Cess on Service Tax on Rail Transportation, and on Service Tax on Operation Period.
- d) Port Congestion Surcharge on Railways base freight rates
- e) Capital investment required, if any, in compliance of Environment (Protection) Amendment Rules, 2015 dated 7 December, 2015 and consequent operation costs on account of increase in auxiliary consumption
- f) Krishi Kalyan Cess
- g) Coal and Coke Terminal Surcharge
- h) Amendment of Notification on Fly Ash utilisation

#### Chhattisgarh Govt. Environment and Development Cess

APML stated that it had submitted the challan billed by SECL for levy of Environment and Development Cess of Rs. 7.50/MT on coal by the Chhattisgarh Govt. arising from amendment of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 dated 16.6.2015 and passed on by SECL. The Cess was earlier Rs. 5/MT, which was factored in the bid by APML.

APML stated that, according to MSEDCL's Reply, the Chhattisgarh Govt. is not an Indian Govt. Instrumentality as defined in the PPAs. However, the definition of Change in Law, which refers to 'any law', has to be read with the definition of the term 'law' in the PPAs, which has not been qualified and is all-inclusive and across India, and not limited to an Indian Govt. Instrumentality as defined. SECL has to pay the Cess, and its incidence is passed on to APML. To the Commission's query as to the position if SECL were to bill an all-inclusive price, APML stated that it was a hypothetical question as CIL/SECL shows the price components in its bills. In E-Auction also, bidding is on the Base Price, and any tax and duties are levied separately on Rs./MT basis and not in percentage terms. The Commission

asked why, if that is the case, coal is at all sourced from SECL, and whether MSEDCL's interest was factored in. Had the coal been procured from WCL, for instance, instead of from SECL, there would not have been any Cess liability. The issue is whether this liability can be passed on to the Procurer and its consumers by the Generator. APML responded that it would demonstrate the basis.

#### MMDRA Act levies

As regards the levies on royalty now payable by the mining lease holders to the District Mineral Foundation and the National Mineral Exploration Trust, APML stated that, in the earlier Change in Law Case No. 163 of 2014, the Commission had concluded that the PPA provides the full framework for allowing tariff adjustments for Change in Law so as to restore the Seller to its original economic position. In other words, the levy does not have to be only one which is directly on the party itself. MSEDCL has not contested APML's claim against these levies but stated that it should be subject to prudence check, and APML has computed the per-unit impact.

#### Swachh Bharat Cess on Service Tax for rail transportation, and on Service Tax on Operation Period

APML stated that the Notification had been provided, and that the Commission had approved this as a Change in Law in an earlier Case. MSEDCL has not contested the claim, subject to prudence check.

#### Port Congestion Surcharge by Railways

According to MSEDCL, Art. 19 does not cover this. However, Art. 19 is only in one of the PPAs (dated 8.9.08 for 1320 MW). It provides that there would be no tariff adjustment in respect of power supplied from alternate sources, and the Change in Law provision would apply only to Units identified in the RfP. The definition of 'Contracted Capacity' identifies the Units. Art. 19 was a modified version of the Case 2 Standard Bid Document and included in the PPA because, at that time, the required Case 1 Document had not been issued by the Central Govt. APML stated further that, according to MSEDCL, Art. 19 disentitles the Seller even if the Unit is the same but the coal source has changed, which is not a correct interpretation. The Commission observed that Art. 19 refers to 'alternate sources of fuel or Unit'. APML responded that, as long as the Change in Law meets the stipulated tests, including to restore the party to the same economic position, it would apply. The primacy of the Change in Law provisions in Art. 13 is confirmed in Art. 19 which provides that the Change in Law and Force Majeure provisions shall apply 'notwithstanding anything in this document'. Art. 19 of the PPA is for the Units identified in the RFP and not for the fuel source.

APML stated further that Busy Season Surcharge was approved by the Commission in its last Order (para (k), page 39-40), having been imposed by GoI under the Railways Act. The same

analogy applies to the present claim regarding Port Congestion Surcharge. Para. 12.40 of the last Change in Law Order also discusses Art. 19. To the Commission's observation that the document of the Ministry of Railways does not indicate any notification having been issued or the legal provision, APML stated that it would file its submission.

#### Amendment to Environment Protection Rules

APML stated that the Environment (Protection) Amendment Rules, 2015 dated 7 December, 2015 notified by GoI set new requirements to be met Generating Stations such as Cooling Towers, etc. and set more stringent emission norms. APML will have to make additional capital investment and Auxiliary Consumption may also increase. The assessment of its impact has not yet been done by APML. However, once the Commission approves it in principle as a Change in Law, the financial impact would be worked out and submitted.

To the Commission's query as to the treatment given by other Commissions, etc., APML stated that it would ascertain and submit the position. CERC has been approached by CGPL, a Generator, and has referred the issue to CEA with a view to deciding the way forward considering the impact on all such Generators.

#### Krishi Kalyan Cess (on Service Tax for rail transportation, etc.)

APML stated that MSEDCL had objected because the financial impact had not been assessed. APML had now given the impact in its Rejoinder.

#### Coal and Coke Terminal Surcharge

APML stated that, according to MSEDCL, the Change in Law earlier allowed by the Commission was concerning the power based on the Lohara Block (which was cancelled by the Central Govt.). Since coal was now being obtained from a different source, relief should only be to the extent of the difference in distance between the original (Lohara) source and the new. As per the notification, the distance has to exceed 100 kms. However, both Lohara and the new source are more than 100 kms. away from the generation site.

#### Amendment of Notification on Fly Ash utilization

By an amendment dated 25.1.16, it is now mandatory for the Generator to bear the transport cost for supply of fly ash to user units within 100 kms. of the Plant. Beyond 100 kms., the cost is to be shared between the Generator and the units. According to MSEDCL, this is a part of the Generator's CSR. However, in fact, it is the Generator's legal obligation.

APML stated further that MSEDCL had raised the issue of the date of effect of Change in Law. Even the Change in Law approved earlier had not been implemented for the period in FY 2013-14 because, with regard to 1200 MW, MSEDCL contends that, although there was

an agreement to prepone the supply as per the PPA provisions, the Change in Law provision is not applicable to the preponed period. In fact, the Change in Law is to apply from the date it affects the Seller, as also held by the Commission in its last Order. APML referred to the PPA provisions and the correspondence. The preponed supply of firm power had been agreed to at the same tariff, and all else is to be as per the PPA. The Commission may give specific directions not to withhold the due Change in Law payment. Moreover, according to MSEDCL, under Art. 10.3.2 of the PPA for 1200 MW and the corresponding provision in the PPA for 1320 MW, the compensation is due only if the cost exceeds 1%. However, Art. 10.3 does not deal at all with when the Change in Law is applicable. Besides, the floor of 1% is in aggregate and not event-wise.

As regards 800 MW, APML stated that MSEDCL has taken the plea that APML's appeal is pending in APTEL for invoking Force Majeure. However, these matters are independent of each other: the Lohara appeal is not concerned with Change in Law but other issues of compensatory tariff (set aside by APTEL) and Force Majeure (claimed by APML). The only concern may be double-counting, which can be addressed.

APML also stated that, in its Reply, MSEDCL refers to the joint application of both parties for a certain tariff for an earlier SDD in which it was stated that APML would not ask for any interim tariff increase before the Revised SDD and that, therefore, Change in Law will not apply. However, Change in Law applies as and when supply commences.

APML submitted that, following the Orders in Case No. 163 of 2014 and other matters, some of the awarded claims had not been paid by MSEDCL. While carrying cost had not been given in those Orders, APML is now claiming carrying cost. To the Commission's observation that APML had not sought review of that Order which has attained finality, APML stated that para. 12.4.5 of the Order does not negate the principle of carrying cost. However, the interest incurred has to be shown and cannot be notional. Therefore, now APML is coming with supporting documents and proof regarding the actual interest incurred by it.

MSEDCL stated that Change in Law is an event which alters the economic position of a party, which needs to be restored. Thus, every Change in Law is not covered under Art. 13. In the case of the amendment to the EPA Rules, for instance, the precise impact on APML's economic position has to be shown. Paras. 171 to 185 of the APTEL compensatory tariff Judgment dated 7 April, 2016 enumerates the principles of Change in Law. Art. 13.1.1 (of the PPA dated 8.9.08) is an exhaustive definition of Change in Law, which 'means' and not 'means and includes'. In other PPAs, Article 10 sets out the applicability of tariff adjustment on account of Change in Law.

MSEDCL also referred to other Sections of the Change in Law Article, and also to the definition of 'law' and 'Indian Governmental Instrumentality'. The latter includes MERC, CERC, GoI and GoM (and agencies controlled by them) or the Govt. of the State where the

Project is located. Hence, the intent was not to cover the Chhattisgarh mine. Para. 185 of the APTEL Judgment may be referred to in this context.

Citing the PPA definitions, including the last bullet point of Art. 10.1.1 which refers to ‘as per the terms of the Agreement’, MSEDCL stated that, for instance, if an intervening State sets a transit tax on transport of coal, it will not be covered under Change in Law because it is not on generation per se.

The Commission scheduled the next hearing on 3 January, 2017, when MSEDCL would resume its arguments.

**Sd/-**  
**(Deepak Lad)**  
**Member**

**Sd/-**  
**(Azeez M. Khan)**  
**Member**