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

Date: 3 January, 2017

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 and16.02.2013 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 (APML) .....Petitioner

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

Representative for APML: Shri. Vikram Nanakani (Sr. Adv.)
Shri. Ramanuj Kumar (Adv.)
Representative for MSEDCL: Ms. Deepa Chawan (Adv.)

Daily Order

Advocate of MSEDCL submitted that in Article 13 and Article 10 of the respective PPAs contemplates alteration of the economic position of the Party for claiming Change in Law. The nomenclature of such change is not relevant, and one should look into whether it is covered under the definition of 'Law' under the PPAs.

She stated that the impact on economic position has to be quantified at the time of filing the Petition, and the Petition is bereft of such details in case of certain claims such as the impact of the Environment (Protection) Amendment Rules, 2015. Advocate of APML responded that, in such cases, the Commission may first determine whether they constitute a Change in Law or not. As regards the impact of the amendment to the Environment Protection Rules, he stated that some Generators have approached CERC, which has asked CEA to quantify its impact on capital cost effect on capital cost. The Commission may keep this issue pending till the outcome of the matter before CERC. Advocate of MSEDCL agreed that the contentions of the Parties may be kept open on this issue.

Advocate of MSEDCL stated that express mention of a certain thing in a particular clause of the PPAs will exclude other things even of a similar nature. Thus, whereas Art. 12 specifically includes the Parties' contractors with regard to Force Majeure events, Art. 13 is silent on that point. The intention of the parties must be seen from the provisions of the PPAs as they stand, and not as might otherwise have been intended. In the Case of Hare Vs. Horton (circulated) a house with fixtures and foundry was to be sold. It was held that since only the word 'fixture' was used with regard to the house, fixtures with the foundry were not included. Similarly, the Commission has to see the intention of the parties as reflected in the PPAs and not otherwise.

Advocate of MSEDCL submitted that the definition of Government Instrumentality expressly covers only the Government of India and Government of Maharashtra, thereby excluding other State Govts. Therefore, the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 does not qualify under Change in Law. Moreover, APML has not demonstrated how its economic position is affected. Further, the Chhattisgarh Cess is levied on a 3rd party, i.e., SECL, and not on APML.

The Commission asked how an increase in costs arising from a Change in Law event would be distinguished from a change in economic position of the affected Party. Advocate of MSEDCL that compensation is due only if the Change has an impact exceeding 1 % of the Letter of Credit in aggregate for a Contract Year. Since the PPAs are under S. 63 and are not based on cost-plus, the risk has inherently to be borne by the Bidder.

To a query of the Commission, Advocate of MSEDCL responded that no precedent has been laid down by other SERCs or CERC in similar matters as the Chhattisgarh amendment has taken place only in 2015. She also stated that payments to the Mineral Foundation of the District in which the mining is carried out and to the National Mineral Exploration Trust are to be made by the mining lease holder, i.e. SECL, which is a third party and not covered under Arty. 13.

She also stated that MSEDCL is agreeable to the claims with regard to Swachh Bharat Cess and Krishi Kalyan Cess, subject to prudence check by the Commission.

As regards Port Congestion Surcharge, the MSEDCL Advocate submitted that it arises from a rate circular issued by the Railway Board, and hence does not amount to a Change in Law considering the definition of 'law'. To an observation of the Commission, she stated that the Commission had accepted the claim for Busy Season Surcharge in its earlier Order in Case No. 163 of 2014, and had also stated that it was not covered under the CERC escalation index. However, Advocate of MSEDCL reiterated that the Railways' letter did not quote any section of law under which the Surcharge was imposed. In its reply to APML's claim letter, MSEDCL had said that the matter would be decided by the Commission. APML also needs to submit in a tabular format the claim against each head.

As regards Krishi Kalyan Cess, she stated that MSEDCL accepts the claim subject to prudence check and confirmation of the dates.

Advocate of MSEDCL read out the Clause 2 (1) and 2 (3) of the Notification issued by Ministry of Environment and Forest dated 14 September, 1999 regarding utilisation of Fly Ash generated from Coal and Lignite based Thermal Power Plants. (TPPs) As on the date of the Bid, APML had to supply Fly Ash free of cost within a certain radius, which had been extended in 2003. In the subsequent Notification dated 27 August, 2013, Clause (3), the heading had been changed to 'Responsibilities of TPPs in place of 'Utilisation of Fly Ash'. Thus, the disposal of Fly Ash is now a responsibility cast on TPPs, and hence APML cannot claim any change in its economic position on this count since it is purely in the nature of its responsibility, under S. 63 read with Art. 13. APML may also have factored in the entire cost as per the 1999 Notification at the time of the Bid. Every increase in cost cannot be passed on as Change in Law under Art. 13. She referred to Clause 2 (b) (10) and 2 (b)(14) of the latest Notification dated 25 January, 2016, which showed that the onus had to be borne by the Generator, and could not be covered under Art. 13. To a query of the Commission, MSEDCL Advocate stated that she could not find any legal precedents with regard to this claim, or any Cases pending elsewhere.

Advocate of MSEDCL stated that the claim regarding terminal surcharge for loading/unloading of coal and coke was based only on Circulars of the Railways Ministry, and the incidence was on the agencies concerned/contractors. Hence, MSEDCL does not agree with it.

She also emphasized that prudence check is necessary for each claim, and the Commission may ensure that no inefficiency of the Generator is passed on.

Referring to Article 13 (Art. 10 in the other PPA), Advocate of APML stated that definitions have always to be read in the context of the other substantive provision of the PPAs. Article 13.1.1 (i) refers to 'any law', neutral of who or where, or what kinds of laws. The definition of 'law' cannot be at variance with the substantive provisions of Art. 13.1.1. This is followed by 'or' sub-clause (ii) which refers to Indian Government Instrumentality. As in Article 13.4.1 (i) and (ii), this distinction between 'law' and Indian Government Instrumentality is throughout maintained in the PPA. Art. 13.4 read with Art. 13.1.1. entirely covers the

Chhattisgarh Cess as a Change in Law, since it has been imposed by the Legislature by statute.

Advocate of APML stated that MSEDCL's contention that the Force Majeure provision covers contractors but missing in the Change in Law provision, and hence that the intention of the Parties was to exclude contractors from Change in Law is not correct. Force Majeure and Change in Law are mentioned in different section of the PPA. The concepts of Force Majeure and Change in Law are totally different. In any case, SECL is not a contractor but a fuel supplier or vendor in terms of Change in Law. The intention of the Parties is to be gauged from what is in the contract and no adverse inference can be drawn from what is omitted. If there is no express provision in Art. 13, it cannot be said that the claim is not due. Paras 185 and 186 of ATE Judgment dated 7 April, 2016 may be seen in this context.

Advocate of APML stated further that Art 13.2 provides that the affected party be restored to the same economic position as if such Change in Law had not occurred. APML will demonstrate the extent of consequential change in its economic position. Art. 13.2 (b) of the PPA provides that, in such cases, increases in costs to the Seller would require compensation to be decided by the Commission.

Advocate of APML submitted that, to its notices under Art 13.2, MSEDCL only replied that it would be decided by the Appropriate Commission. None of the issues now raised by MSEDCL were cited in its replies to the notices. Art. 13.3 (notification of Change in Law) has some purpose; the response cannot be merely to say that the Commission may decide, and hence MSEDCL is estopped from raising new objections at this stage. In the context of there having been no substantive reply or objection to the notices, and considering the provisions of Art. 13.2 (b), Art. 13.3 and Art. 17.3.1 (ii), the Commission may only decide the extent of compensation due to APML. The Commission observed that, even if both parties agreed on a certain matter, the Commission's role may not be limited to merely determining the compensation.

Advocate of APML referred to Art. 19 (which is only in one of the PPAs). It has three sentences, setting out what is allowed, what is not allowed, and the exception to what is allowed. In Case1 bidding, it is APML's responsibility to arrange fuel, so change in fuel source is allowed. Tariff adjustment or change in quoted transmission charge is not allowed. The third sentence is an exception to the first sentence that it is applicable to the Unit identified under the RFP. This means that, for Change in Law, change in fuel source is not a restriction, but change in Unit is not allowed because it is an exception as provided in the last sentence of Art. 19.

Advocate of APML stated that, at para 2.1 of MSEDCL's submission dated 14 October, 2016, it has accepted the levy of District Mineral Foundation and National Mineral Exploration Trust, subject to prudence check.

He stated that, with regard to Port Congestion Surcharge, at para. 37 of its Order in Case No. 163 of 2014, the Commission had approved a similar Surcharge. While doing so, it had discussed the provisions of the Railways Act. The Railways Act gives a mandate to levy such charges, whether through notification or circular. The Railways letter refers to Central Govt. sanction: such sanction is under S. 30 of the Act. He cited the Judgment of Calcutta High Court AIR 2015, 288 (2), para 21 of Rashmi Metalliks Ltd. V/s Union of India in which it was held that the rate circulars of the Railway Board are Orders, though termed as Circulars. Thus, the rate circular issued by Railways Board has the force of law under section 30 of the Railways Act. The same reasoning is applicable to Coke and Coal Terminal Surcharge.

As regards the amendment relating to Fly Ash, Advocate of APML submitted that, by MSEDCL's logic, since everything is a responsibility of the Generator, nothing can be passed on. From 1999 to 2016, the TPP was required to dispose of Fly Ash in ash bunds, and then an obligation was cast only to make available the Fly Ash. In 2016, Clause 2(8) was added to the Notification. APML now has to transport the material to the Fly Ash user, and incur additional costs whose impacts have been submitted.

As regards the issue of its replies to APML's notices, Advocate of MSEDCL stated that these notices were not issued under Art. 17.2, which requires a response from MSEDCL, but under Art. 13.2 which does not call for specific response.

Advocate of APML stated that the issue of carrying cost had also been raised in the previous occasion. In case the final Order in Case No. 102 of 2016 would take time, some interim relief may be given along the lines of the Change in Law events which were allowed by the Commission in Case No. 163 of 2014. Advocate of MSEDCL stated, however, that the claim for carrying cost had already been rejected by the Commission in Case No. 163 of 2014. Interim relief is also not warranted.

The Cases are reserved for Orders.

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