

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 35 of 2016

Date: 11 May, 2017

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

In the matter of Petition filed by Abhijeet MADC Nagpur Energy Private Limited in the matter of a dispute between Generating Company and Distribution Licensee as a result of deliberate and willful failure of the Distribution Licensee to make payments, on account of the Change in Law, as per the terms of the Power Purchase Agreement dated 04.08.2010 (PPA).

Abhijeet MADC Nagpur Energy Private Limited (AMNEPL)Petitioner
Reliance Infrastructure Ltd. Respondent
Advocate for the Petitioner:	Adv. Hemant Singh
Advocate for the Respondent:	Adv. Anjali Chandurkar Shri. Ghanshyam Thakkar

Daily Order

1. Heard the Advocates of Petitioner and Respondent.
2. AMNEPL stated that:
 - a. Change in Law is contractual in nature and hence it is the duty of both the parties to fulfill their obligations under the contract.
 - b. In the last daily Order date 31 March, 2016, the Commission directed AMNEPL and RInfra-D to have meet with regard to computation of amounts and events of Change in Law agreeable to both Parties or otherwise, within a month. Accordingly, meetings were held regarding the events of Change in Law. During the meeting, against AMNEPL's claim of Rs 29.97 crore as impact of Change in Law, RInfra-D has

agreed on Change in Law events of Rs. 9.79 crore, subject to approval of the Commission.

- c. As regards to remaining Change in Law events, RInfra-D has mainly objected to the use of normative parameters as against actuals for arriving at usage of coal, tax paid to coal traders, percentage usage of domestic and imported coal, and on Change in Law with reference to transportation. AMNEPL has replied to all the objections and provided the information sought by RInfra-D. (Representative of RInfra-D pointed out that, in its Reply, RInfra-D has agreed to considering actual parameters for arriving at coal usage, hence there is no dispute on this issue now).
- d. As per Schedule 5 of the PPA, fuel is to be sourced under Fuel Supply Agreement (FSA) from domestic and imported sources in the ratio of 60% and 40% respectively. However, AMNEPL has actually used 95 % of domestic coal and 5% of imported coal. RInfra-D is contending that impact of Change in Law should be calculated only on the coal mix stipulated in the PPA. This contention of RInfra-D is wrong as declaration of FSA at the time of bid is limited only to confirming that the Bidder has arrangements for fuel. APTEL, in its Judgment dated 23 March, 2012 (RInfra Vs Wardha Power) and the Supreme Court in its Judgment dated 11 April, 2017 in Civil Appeal Nos. 5399-4000 of 2016, have held that the FSA appended to the PPA is only to indicate that the raw material for the working of the Plant is put in place. RInfra-D, cannot now refuse any claim on the basis of the change in quantum of domestic and imported coal.
- e. Even if it had taken the risk of transportation cost at the time of submission of the bid, course to the Change in Law provisions is always available to AMNEPL. It has only claimed the change in tax / duty post the bid and not any increase in transportation on account of other parameters. The taxes and duties in relation to the fuel transportation component have to be provided as per the Change in Law provisions.
- f. APTEL, in its Judgment dated 12 September, 2014 in Appeal No. 288 of 2013, held that the purpose of compensating the party affected by Change in Law is to restore the affected party to the same economic position as if such Change in Law had not occurred. APTEL ruled that, as per the provisions of the PPA, there is no co-relation between the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law.
According to that Judgment, the Change in Law on account of transportation has to be allowed.
- g. With reference to the taxes paid to Traders, Coal Traders have quoted all inclusive rates in their Purchase Orders (POs), i.e. inclusive of applicable taxes and duties. AMNEPL has paid all the bills to Traders, which are including taxes. AMNEPL, by

way of reverse calculation, has provided the split up of these taxes to RInfra-D. Further, all these Coal Traders are registered and active as per the website of Income Tax Department. These details and also all relevant Ledgers have already been provided to RInfra-D. However, RInfra-D is asking for documentary proof of actual payment of taxes.

- h. At the time of filing of this Petition, AMNEPL had not included a claim of Change in Law on account of secondary fuel, i.e. Light Diesel Oil (LDO). During the meeting on 12 May, 2016, RInfra-D has agreed to the claim regarding secondary fuel, subject to amendment to the Petition and approval by the Commission. Accordingly, on 23 February, 2016, AMNEPL has filed an amendment to its Petition for including Change in Law relating to secondary fuel amounting to Rs. 1,92,972.

3. RInfra-D stated that:

- a. In accordance with the last Daily Order dated 31 March, 2016, meeting with AMNEPL was held on 12 May 2016. Based on the details submitted by AMNEPL, out of Rs 29.97 crore, RInfra-D has agreed to Rs 9.79 crore as impact of Change in Law subject to approval of the Commission.
- b. For any claim under Article 10.3.1 and 10.3.2, the Seller shall provide the Procurer and the Commission documentary proof of any increase/decrease in cost, revenue and expenditure for establishing Change in Law. Thus, it is also essential for AMNEPL to provide the proofs of transactions to the Commission. RInfra-D will pay the amount against Change in Law only after the decision of the Commission as per Article 10.3.4 of the PPA.
- c. Subsequent to the 12 May, 2016 meeting, only three issues are outstanding on which parties have divergent views. These issues are: consideration of percentage of domestic and imported coal in fuel mix, Change in Law relating to transportation, and the taxes on domestic coal purchased from Traders.
- d. As per the last bullet point of Article 10.1.1, any change in tax or introduction of any tax made applicable for supply of power by the Seller is a Change in Law, but only as per the terms of PPA. AMNEPL in its Bid had submitted that the primary fuel source will be from domestic and imported sources in the ratio of 60% and 40% respectively. If AMNEPL during operations had changed the sources of coal, it was required to take the Commission's approval. If all the relevant Articles and schedules are read together, RInfra-D is not required to pay the claims against Change in Law for the coal used to the extent that it is different from that specified in the PPA.
- e. As per Schedule 8 (quoted Tariff) of the PPA, AMNEPL has quoted zero charges for the non-escalable and escalable inland transportation charges. APTEL in its Judgment dated 12 September, 2014 in Appeal No. 288 of 2013, has stated that the price bid

given by the seller for fixed and variable charges both escalable and non escalable, is based on its perception of risks and estimates of the expenditure at the time of submitting bid. Hence, AMNEPL's claim of Change in Law relating to transportation cannot be allowed.

- f. Invoices provided by AMNEPL for the coal purchased from the Traders do not have any head showing the actual taxes, whereas invoices of Western Coalfields Limited given the details of various taxes paid by AMNEPL for which it has claimed Change in Law. RInfra-D cannot rely on the reverse calculations provided by AMNEPL for arriving at the taxes paid to Coal Traders. APTEL, at para 30 of its Judgment dated 12 September, 2014 in Appeal No. 288 of 2013, has stated that the impact on account of change in expenditure due to Change in Law has to be allowed as per the actuals subject to verification of proof submitted by the Seller.
- g. Representative of RInfra-D further demonstrated some calculations provided by AMNEPL and gave comparisons and differences in the invoices provided. He stated that taxes in some invoices are calculated over and above the grand total of that invoice.

The Case is reserved for the Order.

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

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