COURT-I

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

IA NO. 915 OF 2018 in
APPEAL NO. 202 OF 2018

Dated: 24th September, 2018

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

In the matter of:

Jaipur Vidyut Vitran Nigam Ltd. &Ors. .... Appellant(s)

Versus

Rajasthan Electricity Regulatory Commission &Anr. .... Respondent(s)

Counsel for the Appellant(s)	:	Ms. Susan Mathew Mr. Alok Pareek*(Rep.)*
Counsel for the Respondent(s)	:	Mr. Amit Kapur Ms. Poonam Verma Ms. Abiha Zaidi for R-2

ORDER

Per Hon'ble Mrs. Justice Manjula Chellur- Chairperson

1. This Application is filed under Rule 30 of Appellate Tribunal for Electricity (Procedure, Form, Fee and Record of Proceedings) Rules 2007, aggrieved by the Order dated 17.05.2018 (here-in-after called the impugned order) passed by the 1st Respondent/State Commission in Petition No. RERC/392/2013.

2. The impugned order pertains to claim of compensatory cost on account of change in law. It is not in dispute that there are provisions in the Power Purchase Agreement (for short "**PPA**") dated 28.01.2010 with regard to change in law. For the purpose of better understanding and brevity, the Appellant shall be referred to as the Appellant-Discoms and Respondent Energy Generation Company will be referred to as 2nd Respondent/APRL. The 1st Respondent is the State Commission. The Appellant-Discoms filed this application seeking relief on the grounds of *prima facie* case and balance of convenience being in their favour apart from contending that they shall suffer an irreparable loss, which cannot be compensated in terms of money if the stay is not granted. Against this, a detailed reply came to be filed on behalf of the 2nd Respondent totally denying the contentions raised by the Appellant-Discoms and further contended that balance of convenience is in their favour and they would suffer irreparable loss if an order of stay is granted.

3. In order to appreciate the stand of the parties, the relevant as well as admitted facts have to be referred to. Admittedly, APRL is a power generating company in terms of

Section 2 (28) of Electricity Act, 2003. It is also not in dispute that it is a subsidiary of Adani Enterprise Limited ("**AEL**"). APRL is a special purpose vehicle created to develop and implement a coal based thermal power plant with an installed capacity of 1320 (2 x 660) MW AT Kawai, Distt. Baran, Rajasthan (hereinafter referred to as "Kawai Project"). To set up the Kawai project, a Memorandum of Understanding ("**MoU"**) came to be entered into on 20.03.2008 between Government of Rajasthan and AEL. The estimated investment was Rs.5000 Crores.

4. In terms of MoU, especially Article 2.2 of MoU, the State will facilitate implementation of the project as may be required including its best efforts to secure/facilitate in getting coal linkage/coal block from Central Government or coal from any other source for the project. Accordingly, APRL on 29.08.2008 requested the Government of Rajasthan to advice Rajasthan Vidyut Vitran Nigam Limited to enter into MoU to provide for allocation of coal blocks to Kawai project under the then existing Government Dispensation Scheme, which was also in accordance with the terms of MoU. AEL also requested

Government of Rajasthan for applying to Ministry of Coal for allocation of coal block for Kawai project under the above said scheme and sought extension of the validity of the MoU for a period of one year. Several representations were given to Government of Rajasthan seeking supporting terms of MoU for meeting fuel requirement for the project, either allocation of surplus coal mine from the existing coal blocks to Government of Rajasthan or through future coal block to be allocated to Government of Rajasthan under Government Dispensation Scheme and as well as water linkage for the said project.

5. Apparently, Government of Rajasthan on 04.08.2009 conveyed to AEL that the validity of the MoU is extended by one year till March 20th 2010 and issued a communication to RVUN stating the following:

i. *Validity of the MoU dated 20.03.08 is extended for one year up to 20.03.2010.*

ii. *RVUN may apply for allocation of coal blocks for meeting coal requirement of both super critical extension projects of RVUN & Kawai project under Govt. dispensation scheme. Price is to be determined by the Board of RVUN and premium is to be charged on the mining cost of the coal.*

iii. RVUN may publicly invite tenders for mining & delivery of coal as was done in Parsa East & Kente Basan Coal Blocks taking into account the terms of the JV agreement/coal mining & delivery agreement signed with JV partner."

6. It is not in dispute that process was initiated on 25.02.2009 for procurement of power on long term basis through tariff based competitive bidding process under Case-1 bidding procedure for meeting the base load requirement of three Discoms of Appellant i.e., Jaipur Vidyut Vitran Nigam Limited, Ajmer Vidyut Vitran Nigam Limited, and Jodhpur Vidyut Vitran Nigam Limited. In response to the request for proposal, APRL offered total contracted capacity of 1200 MW from the above projects. The levelised tariff offered in the bid was Rs.3.2483/kWh. Later on, it was agreed for rate at Rs.3.238/kWh for 25 years. LOI came to be issued subsequently and consequently PPA came to be executed on 28.01.2010 between the APRL and the three Appellant-Discoms for supply of aggregate contracted capacity of 1200 MW. On 31.05.2010 a petition was filed by RVPN bearing petition No. 217 of 2010 seeking approval of the State Commission for

adoption of tariff at Rs. 3.238 per kWh. On considering that one paise less per unit was offered by APRL in view of the assurance and support from the Government of Rajasthan, the tariff came to be approved by the State Commission on 31.05.2010.

7. Apparently, there were communications addressed to Ministry of Power, Ministry of Coal for allocation of coal linkage at par with 11th Five Year Plan Projects and Government of Rajasthan also by letter dated 17.02.2012 requested Ministry of Power, Ministry of Coal to regard Kawai Project at par with 11th Five Year Plan Project so far as grant of coal linkage. Apparently, the Ministry of Coal communicated to Government of Rajasthan vide letter dated 26.04.2012 that Kawai project has been recommended for coal linkage as 12th Plan Project and in the meanwhile Government of Rajasthan may consider revising the mining plan capacity of the captive coal blocks allocated to them, namely, Paras East and Kente Basan upward so as to mitigate the demand of coal for power projects in Rajasthan. The problem seems to have occurred from this stage onwards. Apparently, the Government of Rajasthan on 05.11.2012 in response to AEL's letter communicated that there

is surplus coal in Paras East and Kente Basan coal blocks which could be allocated to Kawai project.

8. It was the contention of APRL that in spite of APRL and Government of Rajasthan continued to follow up the matter with Ministry of Power, Ministry of Coal and Planning Commission to address the problem, no positive development happened and Kawai project was still deprived of coal linkage. APRL contended before the State Commission that due to non-availability of domestic coal and change in Indonesian law, the process of coal imported from Indonesia has resulted in increase of the price. According to APRL, they had to import coal and purchase coal at high price for the entire capacity, which ultimately adds to the financial burden to the tune of Rs.1221 Crores per annum approximately as compared to levelised energy charge in terms of PPA. If the said situation were to continue, the Kawai project would become commercially unviable, therefore, they approached the State Commission to establish a mechanism to offset in tariff, the adverse impact of the unforeseen events, which were not in the control of the APRL.

9. After admitting the petition, detailed replies came to be filed by the Respondents. During the pendency of the petition before the State Commission, Judgment in ***Energy Watch Dog Vs. CERC, Prayas Energy Group and others*** reported in (2017 (14) SCC 80) came to be pronounced. Paragraphs 56 and 57 of the said Judgment are relevant since the controversy pertain to the compensation payable on account of change in law, which reads as under:

> "**56.** However, insofar as the applicability of Clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under Clause 13.1.1. if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under Clause 13.1.1. It is clear from a reading of the Resolution dated 21-6-2013, which resulted in the letter of 31-7-2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18-3-2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeking the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable.
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> .....

57. Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, 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, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would."

10. APRL filed additional affidavit placing reliance on the above paragraphs of the Judgment and Article 10 of the PPA dated 28.01.2010 contending that it is identical to Article 13 of the PPA, referred to in the Energy Watch Dog's case. In terms of PPA in question, the essential ingredients with regard to change in law are enumerated hereunder:

"(a) Change in Law events inter alia include the enactment, modification of any Law occurring after the cut-off date i.e. 7 days before the bid deadline;

(b) The definition of Law includes a notification by an Indian Governmental instrumentality;

(c) The definition of Indian Governmental instrumentality includes any ministry, department, board, agency or other authority of Government of India.

(d) Any recurring / non-recurring expenditure arising due to Change in Law is to be compensated in terms of Article 10."

11. At this stage, we have to see whether there is a *prima facie* case in favour of Appellant-Discoms. It is not in dispute that in terms of the Judgment of Hon'ble Apex Court any change in arrangement for supply of coal due to modification of National Coal Distribution Policy (for short "NCDP") is a change in law.

12. The issue involved in the present appeal is whether the letter of Government of India dated 31.07.2013 and revised Tariff Policy amount to change in law. In other words, whether in terms of Judgment of the Apex Court, any change in arrangement for supply of coal in modification of the NCDP 2007 is a change in law? It is not in dispute that the assurance held out in the NCDP of 2007 to supply 100% of normative requirement of coal for all IPPs including for future capacity additions came to be changed by Government of India by its decision on 14.02.2012, whereby they decided that no fresh linkage will be granted in view of shortage of coal.

13. Apparently, Kawai project finds place in the 12th plan projects. If there is a modification to the coal supply arrangement contemplated under NCDP 2007, it would affect the project of the 2nd Respondent i.e., Kawai project. If any project is affected by such change in law, they are entitled to be restored to the same economic position by allowing the higher cost of any alternate coal that is being procured as against the assurance of coal supply assured from Coal India Limited (for short "**CIL**").

14. In their reply before the State Commission, Appellant-Discoms have categorically acknowledged that there is change in law in the case on hand, which will cause adverse impact upon the performance of PPA. As a matter of fact, the relevant portion of the reply is extracted, which reads as under:

> *"The non-availability of coal and inaction on the part of Central Government also put the case of the petitioner within the scope of Change in Law. It is stated that the Change in Law is also a result of failure on the part of the Government of India instrumentality to provide linkage coal supply to Kawai Project in accordance with the assurance*

given to the petitioner as well as in line with the New Coal Distribution Policy dated 18.10.2007."

15. They contended before the State Commission that they are entitled for reliefs in terms of Article 10.3.2 to 10.3.4 of the PPA, whereby they shall be restored through monthly tariff payments to the same economic position as if such change in law event had not occurred. They sought relief with effect from 31.05.2013, the date from which power supply under PPA was commenced on achieving the commercial operation of Unit 1 of Kawai project, in terms of Competitive Bidding Guidelines.

16. Now the Appellant-Discoms contend that the situation referred to and discussed in the Judgment of the Supreme Court is not applicable to the present case in view of the fact that APRL had no coal linkage or letter of assurance from any coal company on the date of bidding, which has been taken away by the introduction of NCDP 2013 replacing NCDP of 2007. The 1st Respondent/ State Commission after referring to various terms of PPA and contentions of both the parties opined that the principle laid down in the Energy Watch Dog's

case squarely applies to the facts of the present case and therefore the relief claimed by APRL deserves to be allowed.

17. According to the Appellant-Discoms if only APRL had allocation of coal from Government of India or coal linkage arrangement and any shortfall or deficiency in such quantity of such linkage or supply of coal, question of payment of compensation arises on account of change in NCDP of 2007, which came to be replaced by NCDP of 2013. In the impugned order, the State Commission did refer to the Request for proposal dated 31.07.2009 in order to appreciate the stand of the parties. In the bid, APRL specifically quoted domestic coal as primary fuel and imported coal as fall back support arrangement. It would mean that primarily the domestic coal will be the main fuel and imported coal will be replaced or used only as a fall back fuel.

18. In support of their contention that they would be primarily depending on domestic coal, they have produced the correspondence between the Government of Rajasthan and APRL including the Memorandum of Understanding signed by

the Government of Rajasthan and APRL. APRL was expecting the allotment/allocation of coal or coal linkage (domestic coal) as main fuel to be used for generation in terms of NCDP of 2007. Government of Rajasthan was consistently making all attempts to get allocation of coal to APRL. It seems that the bid of APRL was accepted not because of fuel supply agreement produced in support of imported coal, but it was based on the rate quoted, which was considered as most competitive rate when compared to other participants. It seems after fully appreciating the fact that domestic coal linkage can be obtained by the APRL as per the conditions of PPA the bid came to be accepted. The fact of recent allocation of coal by Government of India under Shakti Scheme and looking to the bid of APRL, the terms of PPA and also order of State Commission adopting tariff *prima facie* indicate that APRL bid was based on domestic coal and imported coal was only a fall back support arrangement. As a matter of fact, Appellant-Discoms sought clarification from the APRL on what basis its bid shall be evaluated. APRL clarified the position saying that the bid should be evaluated on the basis of domestic coal tie up as it has Memorandum of Understanding with Government of

Rajasthan, wherein the State Government has assured in making its best effort to get coal linkage in favour of APRL from any other source for the project. Considering these facts, on the face of record, at this stage, we are of the opinion that*prima facie* case lies in favour of APRL rather than Appellant-Discoms.

19. Coming to the issue in whose favour balance of convenience lies, it is seen that from the commissioning of 1st unit in May 2013 due to non-availability of coal linkage, APRL is using costlier alternate coal such as imported coal, market based e-auction coal for supply of power to Appellant-Discoms. The Appellant-Discoms contend that the amount payable runs into more than 5000 Crores of rupees, which would break the backbone of business of Appellant- Discoms, who are already facing financial crunches. According to APRL, they have exhausted all available options for arranging the necessary working capital including taking support from group companies and additional working capital loans from banks and financial institutions. Since the hardship has continued for more than five years from May 2013, they contend that no lenders are coming forward to extend any further financial support. The

present situation faced by APRL is not on account of their default but it is beyond the control of APRL. Hence, we find that balance of convenience lies in favour of APRL.

20. On the point of irreparable harm and injury, except pleading that the claim is more than 5000 crore of rupees, which will break the back bone of the business of the Appellant-Discoms, nothing else is pleaded on behalf of the Appellant-Discoms. On the other hand, it is seen that if the dues remain unpaid, it may lead to a situation where APRL would not be in a position to continue the operations, which would jeopardise interest of public at large. APRL will have to service its obligations to the lenders like banks and other financial institutions apart from losing revenue due to non-availability of power plant for generation of power. In view of Circular of Reserve Bank of India dated 12.02.2018, APRL is at risk of being declared as a Non-Performing Asset (NPA). It is evident that irreparable injury would be caused to APRL and not the Appellant-Discoms.

21. Letter dated 27.08.2018 addressed to the Chairperson, CERC from the Ministry of Power is very relevant which reads as under:

"No. 23/43/2018-R&R
Government of India
Ministry of Power
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Shram Shakti Bhawan, New Delhi
Dated, the 27th August, 2018

To

The Chairperson
Central Electricity Regulatory Commission,
Chanderlok Building, Janpath,
New Delhi.

Subject: Direction to the Central Electricity Regulatory Commission under section 107 of the Electricity Act, 2003 for allowing pass-through of any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, after the award of bids, under "Change in Law" unless otherwise provided in the PPA

Sir,

Para 6.2 (4) of Tariff Policy 2016 provides that after the award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, the same may be treated as "Change in Law" and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission.

2. It has been brought to the notice of this Ministry that Generating Companies are facing difficulties in getting pass-through of changes in cost due to any change in domestic duties, levies, cess and taxes imposed

by Central Government, State Governments/Union Territories or by any Government instrumentality under "Change in Law" by Appropriate Commission. The difficulty is mainly because of considerable time being consumed in the approval process resulting into severe cash flow problems to the Generating Companies. This has also resulted in stress in the Power Sector.

3. Now, in order to address the above issue and ensure sustainability of the electricity market in the larger public interest, the Central Government, in exercise of the powers conferred under section 107 of the Act, hereby issues this direction to the Central Electricity Regulatory Commission:

a) Any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, may be treated as "Change in Law" and may unless provided otherwise in the PPA, be allowed as pass through.

b) Central Commission will only determine the per unit impact of such change in domestic duties, levies, cess and taxes, which will be passed on.

c) A draft order for determination of per unit impact under change in law shall be circulated by Central Commission to all the States / Beneficiary on 14th Day of filing of petition. Any objection/ representation shall be submitted by them within 21 days of filing of petition.

d) The order for pass through giving the calculation for per unit impact will be issued within 30 days of filing of petition.

e) The impact of such Change in law shall be effective from the date of change in law.

f) Where CERC has already passed an order to allow pass through of changes in domestic

duties, levies, cess and taxes in any case under Change-in-law, this will apply to all cases ipso facto and no additional petition would need to be filed in this regard.

4. This issues with the approval of Minister of State (Independent Charge) for Power and New and Renewable Energy, Government of India.

Yours faithfully,

(D. Chattopadhyay)
Under Secretary to the Govt. of India
Tel: 2373 0265

Copy to:

1. *All Joint Secretaries/Directors/Deputy Secretaries, Ministry of Power*
2. *PS to MOS(I/C) for Power & NRE*
3. *PPS to Secy(P), PPS to AS(SNS), PPS to CE(R&R), PS to Director (R&R)*
4. *Technical Director, NIC, Ministry of Power with the request to upload this communication on MoP's website."*

22. Though it is addressed to the Chairperson, CERC, we cannot close eyes to the factual and actual scenario.

23. Since APRL is supplying power for the last five years in terms of PPA (valid for a period of 25 years) and the total claim against the Appellants in terms of supplementary

invoices comes to Rs.1855.60 crores and Rs.3274.82 crores certified by auditors towards change in law compensation, we are of the opinion that the following order would meet the ends of justice.

(a) The stay application being I.A. No.915 of 2018 stands dismissed.

(b) Pending final decision in the appeal, the Appellant-Discoms shall pay 70% (seventy percent) of the compensation claimed/ demanded by APRL as provisional compensation within two weeks from the date of receipt of the copy of this order. Such payment is subject to the final decision in the appeal.

(c) If APRL is found not entitled to their claim, as per the final decision in the present appeal, the amount now received shall be adjusted against future payments along with interest at 9% p.a. that are payable to APRL by the Appellant-Discoms towards power supply.

24. The Application is disposed of in the afore-stated terms.

25. List the main appeal for hearing on ***11.10.2018.***

(S. D. Dubey) **(Justice Manjula Chellur)**
Technical Member **Chairperson**

REPORTABLE/NON-REPORTABLE