APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

IA NO. 1428 OF 2018 IN

APPEAL NO. 289 of 2018

(Application for stay under Rule 30 of the Appellate Tribunal for Electricity (Procedure, Form, Fee and Record of Proceedings) Rules, 2007)

Dated : 5th December, 2018

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

In the matter of:

TANGEDCO .... Appellant(s)

Versus

Central Electricity Regulatory Commission & Ors. .... Respondent(s)

Counsel for the Appellant(s)	:	Mr. G. Umapathy Mr. S.Vallinayagam Ms. S. Amali
Counsel for the Respondent(s)	:	Mr. Sanjay Sen, Sr. Adv. Mr. Vishrov Mukherjee Mr. Yashaswi Kant for R-2

O R D E R

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. The appeal is directed against the order dated 16-3-2018 passed by Central Electricity Regulatory Commission (CERC) in Petition No. 1/MP/2017. The Petition was filed claiming compensation on

account of impact of change in law subsequent to the cut off date, in terms of PPA entered into between the parties.

2. According to Appellant, all regular invoices raised by the Respondent generator towards energy supplied were paid regularly. And they are not subject matter of appeal. Appellant contends that in terms of Schedule 4 pertaining to tariff, the method of determination of tariff, payments is clearly indicated. So also Schedule 6 pertains to Escalation Index and Article 10 pertains to change in law in terms of PPA. Article 15 of PPA provides miscellaneous provisions.

2.1 According to the Appellant, every six months CERC publishes Escalation Index depending on the wholesale price index and the consumer price index of coal and other components which have financial implication in the process of generation of electricity. This index does not provide escalation so far as energy charges. Similarly, escalation providing for escalation of cost of coal or transportation of coal cannot be considered to escalate energy charges. Similarly, it does not provide for escalation of taxes or duties or cess or levies and profit margin of generator. The basis upon which generator applies the Escalation Index relating to cost of coal and transportation charges for escalating the taxes, levies, duties, profit margin and cess is wrong since they were not

envisaged under PPA. However, CERC failed to go into this aspect in spite of resistance by the Appellant. There is no transparency in the calculations, i.e. cost of various components which constitute energy charges which were submitted by generator. The generator under these circumstances cannot make insistence to make payment. There cannot be unilateral escalation of the charges which were provided under PPA since PPA provides for levelised tariff for the entire term of PPA.

2.2 That apart, Appellant in terms of Article 15.18 of the PPA had clearly agreed that generator shall bear and promptly pay all statutory taxes, duties, levies and cess levied on the seller/contractors or their employees that are required to be paid by the seller as per law in relation to the execution of the agreement as well as supply of power in terms of the agreement.

2.3 There was no proper enquiry on the part of CERC to arrive at the conclusion wherein the direction was granted in favour of the Respondent. Reliance placed by the Commission in the judgments in Appeal Nos. 161 of 2015 and 205 of 2015 was incorrect. The Commission has wrongly interpreted all the Articles and clauses in the agreement.

2.4 Unless a Public Notice was issued, the escalation tariff to be paid to the generator by the Appellant cannot be allowed since ultimately it passes through to the consumers of electricity. CERC has to have prudence check of the tariff in terms of Section 79 of the Act. CERC ought to have ascertained and determined whether at all there is any impact on account of change in law as claimed by the petitioners and ensure that the generators have not been permitted to claim unilaterally enhanced tariff which is detrimental to the public at large. Any payment made to the generator in the present scenario will amount to illegal, unjust enrichment of the generator at the cost of public exchequer. The impact of change in law if not permitted to be recovered till disposal of the appeal, will not have any adverse effect on the generator. PPA is for 15 years with the Appellant and the agreed tariff is regularly paid. Therefore, no prejudice would be caused to the generator if impugned order is stayed pending disposal of the appeal. With these averments, they have sought for the following reliefs:

(a) Stay the operation of the impugned order dated 16-3-2018 passed by the Central Electricity Regulatory Commission in 1/MP/2017 till the disposal of the appeal;

(b) In the alternative restrain the respondent generator from adjusting the payments made by the appellant towards regular tariff invoices against the claim under change in law;

(c) Pass any other order or orders as this Tribunal may deem fit and proper in the facts and circumstances of the case.

3. In response to this, second Respondent submits that Central Electricity Regulatory Commission by its order dated 16-3-2018 was justified in granting compensation on account of change in law events. According to the Respondents, in terms of Article 15.18.1 the Respondent No. 2, GMR Warora Energy Limited (GWEL) is required to pay all taxes it is liable to pay under law. It does not restrict GWEL's right to claim compensation on account of change in law events. The interpretation proposed by Appellant will render Article 10.1.1 and especially fifth bullet of Article 10.1.1 otiose. A holistic reading of Article 10 and 15.18 amply clarifies the position that compensation for any change in taxes will have to be allowed. Article 15.18 only deals with the responsibility for payment of such taxes and it does not restrict the right to claim compensation on account of change in taxes.

3.1 That apart, in terms of Para 6.2(4) of revised tariff policy, change in taxes, duties and levies has been recognised as change in law. This

is recognised in terms of Competitive Bidding Guidelines (Clause 4.7), the *Sasan* judgment as well as the direction by the Ministry of Power dated 27.8.2018.

3.2 It is categorically contended by second Respondent that claims raised by GWEL are not covered under the Escalation Index as claimed by the Appellant. Such statement by Appellant is misplaced. On the other hand, Escalation Index takes into account only the base price of coal and railway freight and not the taxes and levies imposed on it. This was made clear in terms of judgment of the Tribunal in Appeal No. 119 of 2016 dated 14-8-2018 in ***Adani Power (Rajasthan) Limited vs. RERC.*** This Tribunal also made it clear in Appeal No. 288 of 2013 dated 12-9-2014 in ***Wardha Power Company Ltd. Vs. Reliance. Infra. Limited*** that escalable index / indexing of cost is not applicable in case of change in law wherein the impact of change in law is to be determined on actual basis. Therefore, contentions raised by Appellant TANGEDCO are already answered by this Tribunal

3.3 With regards to *force majeure*, TANGEDCO was aware of change in law provisions and consequently relief under Article 10 of PPA when it issued Request For Proposal (RFP) and signed the PPA.

However, GWEL has not based its claim on *force majeure* or issued any notice of *force majeure* to petitioner.

3.4 Coming to the contentions that GWEL has not placed any material to substantiate its loss, the said statement is totally misconceived. GWEL provided all documentary evidence, i.e. notification by Indian Government Instrumentalities and the event-wise change in law impact as sought by the Ld. Central Commission during the proceedings of the Petition in question. Only after taking into consideration the documents filed by all the parties including the Appellant and Respondent No. 2, CERC has passed the impugned order.

3.5 With regard to Article 10.1.1, only taxes on the supply of power are covered is also erroneous which is already answered by this Tribunal in terms of ***Adani*** judgment and reaffirmed in ***GMR Warora Energy Limited Vs. CERC*** judgment dated 14-8-2018.

3.6 In terms of judgment in ***Energy Watchdog Vs. CERC [(2017) 14 SCC 80]***, the deviation in New Coal Distribution Policy (NCDP) was held to be a change in law event by the Hon'ble Supreme Court.

3.7 Apparently, GWEL had been granted coal linkage from SECL in terms of various Letters of Assurances. GWEL premised its bid

based on the said linkage. Since in terms of Schedule 5 of PPA, the primary source of coal was domestic coal and the fuel source was clearly indicated as CIL linkage. FSA was accordingly entered into so far as Unit-1 on 22-2-2013 and Unit-2 on 7-8-2013. These FSAs were amended from time to time based on commencement of supply of power. In terms of LOAs and FSAs, there was assurance of supply of coal for 100% of GWEL requirement. At no point of time, neither LOAs nor FSAs limited / reduced quantity of coal to be supplied to GWEL.

3.8 In terms of CCEA Resolution dated 21-6-2013 read with letter dated 31-7-2013 issued by the Ministry of Power, the Hon'ble Supreme Court held it as change in law in ***Energy Watchdog*** judgment. The revised tariff policy allows compensation on account of shortfall of linkage coal. This is also in terms of ***Energy Watchdog*** judgment. The Tribunal in the judgment in ***GMR Warora*** held that shortfall in linkage coal and deviation in NCDP is to be considered as change in law event for the very same project.

3.9 Coming to levy of Service Tax, *Swachh Bharat Cess and Krishi Kalyan Cess,* in terms of judgement of Tribunal in ***GMR Warora*** and Revised Tariff Policy, such imposition of domestic taxes, levies, duties etc. have to be treated as change in law and compensation

has to be paid accordingly. Similarly, change in excise duty has been held to be change in law event by the Tribunal in terms of ***GMR Warora*** judgment. Therefore, any increase in assessable value of coal in which Central Excise duties levied, it would lead to increase in the excise duty payable by GWEL. Since such increase falls under change in law arena in terms of ***GMR Warora*** judgment, the second Respondent GWEL is entitled for compensation towards such excise duty. Similarly, levy of transportation of Fly Ash cannot be compensated as contended by the Appellant, is misplaced; but it is clearly covered under PPA and it amounts to change in law event.

4. Based on the above pleadings, now we are required to see

(1) whether there is *prima facie* case in favour of Appellant,

(2) in whose favour the balance of convenience lies,

(3) whether Appellant would be put to irreparable loss or hardship if stay is not granted.

4.1 The admitted facts which would arise for our consideration are as under:

4.2 GMR Warora Energy Limited (GWEL) owns and operates 600 MW thermal power plant located in Warora, Maharashtra. It is supplying power from its project under different PPAs: supply of power to Maharashtra State Electricity Distribution Company Limited under PPA dated 17-3-2010, Electricity Department of Union Territory of

Dadra and Nagar Haveli under PPA dated 21-3-2013, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) by virtue of PPA dated 3-5-2014 between GWEL and GTEL along with back-to-back PPA dated 27-11-2013 to TANGEDCO. It is not in dispute that the cut off date of change in law in terms of PPA pertaining to TANGEDO is dated 27-2-2013. Vide impugned order dated 16-3-2018, Central Commission (CERC) has allowed the following claims made by GWEL against TANGEDCO:

(1) Clean Energy Cess (till 30-6-2017) : Rs.36.60 crores.

(2) Service Tax on transportation of coal (till 30-6-2017): 1.03 crores.

(3) Charges towards DMF and NMET: 6.64 crores.

(4) Chhattisgarh Paryavaran & Vikas Upkar: 0.9 crore.

(5) Countervailing Duty and ED on spares and equipment: Not claimed.

(6) Swachh Bharat Cess (till 30-6-2017): 0.2 crore.

(7) Change in fuel supply Agreement and Deviation from New Coal Distribution Policy (NCDP): 22.80 crores

(8) Transportation of Fly Ash: In-Principle approval granted.

(9) Krishi Kalyan Cess: 0.16 crore.

(10) Central Excise Duty on assessable value of coal (till 30-6-2017): 1.83 crores.

4.3 The principal contention of TANGEDCO seems to be that in terms of Escalation Index, the claims made by GWEL are not payable. However, this argument came to be rejected in another appeal by this Tribunal, i.e. Appeal No. 288 of 2013 dated 12-9-2013 in ***Wardha Power Co. Ltd. Vs. Reliance Infrastructure Ltd. & Anr.*** Apart from this, in ***GMR Warora Ebnergy Limited Vs. CERC*** judgment dated 14-8-2018, the Tribunal has reaffirmed the opinion of the Tribunal expressed in the above mentioned ***Wardha*** judgment, so also in terms of judgment dated 14-8-2018 in Appeal No. 119 of 2016 in case of ***Adani Power (Rajasthan) Limited vs. RERC***. It was clearly mentioned as under:

> *"xvi. From the above discussions it is clear that the CERC escalation index for transportation covers only the basic freight charges. The Bidder was required to suitably incorporate the other taxes, duties, levies etc. existing at the time of bidding. The Bidder cannot envisage any changes happening regarding taxes, levies, duties etc. in future date. As such, any increase in surcharges or imposition of new surcharge after the cut-off date i.e. 30.7.2009 in the present case cannot be said to be covered under CERC Escalation Rates for Transportation Charges, which is indexed for basic freight rate only …"*

4.4 Contention of the Appellant is that in terms of Article 15.18.1 of the PPA, all taxes, duties, levies, cess are to be paid by GWEL and cannot be passed on to TANGEDCO, one has to read both Article 15.18.1 and so also Article 10.1.1 together and they cannot be read in isolation. In terms of Article 15.18, it refers to responsibility for payment of such taxes but does not limit or put a bar to the right of the generator to claim compensation on account of change in taxes. In terms of Article 10, any change in taxes will be allowed as compensation. Apart from that, in terms of Revised Tariff Policy and Directions of the Ministry dated 27-8-2018, change in taxes, duties and levies are clearly recognised as change in law. In an earlier occasion in Petition No. 189/MP/2016 dated 13-12-2017, CERC observed as under:

> *"37. Article 15.18.1 provides that the seller shall bear all charges that are required to be paid by the seller for supply of power as per the terms of the agreement. There is no non-obstruction (sic 'non-obstante') clause in this Article which will prevent operation of Article 10 of the PPA. A harmonious construction of both Articles reveals that while the taxes, cess, duties and levies, etc. shall be payable by the seller, the same to the extent permissible under Change in Law provision can be*

recovered from the procures. Accordingly, the objection of TANGEDCO is rejected."

4.5 Similarly, contention of TANGEDCO that taxes on the supply of power are covered, and in terms of Article 10.1.1 cannot be accepted, such contention is already rejected by this Tribunal in ***Adani Power*** judgment dated 14-8-2018 which is reproduced as under:

"f) The Discoms have also reproduced the definition of Change in Law under different PPAs under Section 63 of the Act. We have gone through the said provisions and we find that the other provisions of the PPA are similar to that in the other PPAs under Section 63 of the Act except the fifth bullet which is additional specifically covering tax on supply of power. The judgements of the Hon'ble Supreme Court relied upon by the Discoms were under different context and could not be equated to the scheme of power procurement by Discoms under Section 63 of the Act which is based on guidelines issued by GoI under different scenarios wherein the treatment of taxes depends upon the specific conditions of the RFP and tariff quotes by the bidders.

g) In view of our discussions as above and after duly considering the earlier judgements of this Tribunal, we are of the considered opinion that any change in tax/levies/duties etc. or application of new tax/levies/duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the Discoms."

The same was reaffirmed in Appeal pertaining to ***GMR Warora*** judgment dated 14-8-2018.

4.6 Then coming to amounts allowed as compensation to be paid by Appellant to Respondent so far as clean energy cess, it was assessed till 30-6-2017 as 36.60 crores by the Commission. Such clean energy cess was directed to be paid by virtue of judgment of this Tribunal dated 14-8-2018 in Appeal Nos. 111 of 2017 and 290 of 2017 in ***GMR Warora.*** Service tax on transportation of coal is also allowed by this Tribunal in the judgment of ***GMR Warora***. So far as Swachh Bharat Cess till 30-6-2017, it is claimed as 0.2 crores and the same is covered in terms of ***GMR Warora*** judgment mentioned above. Change in fuel supply Agreement and Deviation from NCDP, this is clearly covered in terms of ***Energy Watchdog Vs. CERC*** reported in ***(2017) 14 SCC 80***. So far as facts of the case are concerned, how there is deviation in terms of NCDP, the following

letters indicating grant of coal linkage from SECL clarifies the position:

(a) *Letter of Assurance dated 19.10.2006 for 1.327 MTPA of Grade F coal from the Korba / Raigarh coalfield of SECL.*

(b) *Letter of Assurance dated 03.06.2010 for 1.3 MTPA of Grade F coal from the Korba / Raigarh coalfield of SECL.*

4.7 It is seen that in respect of first and second unit of GWEL the FSAs are dated 22-2-2013 and 7-8-2013 which were amended from time to time. There was 100% assurance of supply of coal so far as requirement of GWEL. At no point of time, LAOs or FSAs limited or reduced the quantity of coal to be supplied to GWEL. However, the shortfall came in pursuance of CCEA Resolution dated 21-6-2013 read with letter dated 31-3-2013. Therefore, in terms of ***Energy Watchdog*** judgment of the Apex Court, it is a clear case of change in law. Since shortfall of linkage coal has relation to Revised Tariff Policy which has force of law and as GWEL premised its coal linkage in terms of Schedule 5 of PPA, the primary source of coal was domestic coal, i.e. source was CIL linkage. Hence, it is clear that there is shortfall in linkage coal and deviation in NCDP. Therefore, it is nothing but change in law event. However, in the earlier judgment pertaining to ***GMR Warora*** dated 14-8-2018, this Tribunal held that change in fuel supply agreement and deviation from NCDP

is a circumstance indicating change in law resulting in right to the GWEL to claim compensation.

4.8 Then coming to Swachh Bharat Cess and Krishi Kalyan Cess. This came to be allowed by the CERC and so also in the earlier judgment pertaining to ***GMR Warora*** dated 14-8-2018 which reads as under:

> *"x. Thus we hold that, the Central Commission has considered that GWEL could not have factored in the costs/change in costs related to excise duty/clean energy cess/service tax / Swachh Bharat tax as the same were not applicable as on the cut-off date. The imposition / change of the said taxes / duty / cess has resulted in increase in cost of generation for GWEL. We have already held that such imposition / change in taxes / duty / cess qualify for Change in Law event and GWEL is required to be compensated for the same.*
>
> *Accordingly, these issues are answered against the Discom / MSEDCL."*

4.9 Then coming to transportation of Fly Ash. In principle, such transportation of Fly Ash was allowed by the Commission though there was no actual assessment of claim. However, this was not covered in earlier judgment of this Tribunal in ***GMR Warora*** or ***Adani*** case. Therefore, this can be considered at the time of final hearing of the appeal. Similarly, Countervailing Duty and ED on spares and

equipment can be considered at the time of deciding the Appeal on merits.

4.10 So far as Central Excise Duty, as on cut-off date of PPA, Central duty was not calculated on royalty and stowing duty by CIL subsidiaries. Subsequently, Coal India Limited by letter dated 5-3-2013 advised its coal producing subsidiaries to include royalty and stowing duty for the purpose of arriving at the assessable value of coal for levy of Central Excise Duty. The following are the relevant facts to consider the claim of the Appellant for increase in Central Excise Duty as change in law:

(a) The inclusion of royalty and stowing duty in the assessable value of coal for calculation of Central Excise Duty was pursuant to the CIL letter dated 5.3.2013 which falls within the definition of Law under the TANGEDCO PPA.

(b) The letter dated 5.3.2013 was issued by CIL which is a Corporation under the control of Government of India which is an Indian Governmental Instrumentality under the TANGEDCO PPA.

(c) The Notification was effective after the cut-off date.

(d) The inclusion of components, such as Royalty and Stowage Excise Duty in the assessable value has led to additional recurring expenditure.

This Tribunal by virtue of ***GMR Warora*** judgment dated 14.8.2018 has already opined that change in excise duty has been held to be change in law event. As could be seen from records and the arguments placed on behalf of the Appellant and Respondent, we are of the opinion there is no *prima facie* case in favour of the Appellant, rather a *prima facie* case made out in favour of the second Respondent, GWEL.

4.11 So far as balance of convenience, it is seen that the claim on the Appellant up to July 2018 is about 70.17 crores. The Appellant is directed by Commission vide detailed order to pay the above amount. That apart, similar issues were already confirmed by judgment of this Tribunal dated 14-8-2018 in ***GMR Warora*** and ***Adani*** cases. Therefore, balance of convenience is in favour of the second Respondent/GWEL.

4.12 So far as who will suffer irreparable loss or hardship, admittedly, the issues are answered in favour of the second Respondent not only by the Commission, but also by this Tribunal in earlier judgments dated 14-8-2018. It is the generators who are facing financial stress on account of various issues including delay in payment of amounts due to them. The Appellant has long term agreement with the second Respondent. If the amounts due are not paid, the Respondent would suffer irreparable injury and therefore justice requires rejection

of stay application and direction in favour of second Respondent. Hence, the Appellant is directed to immediately pay 80% of Rs.70.17 crores which is calculated up to July 2018. They shall continue to pay 80% of claims under different Heads in future also as and when bills are raised so far as the above mentioned claims which are already allowed by the Commission. In case the issues are answered in favour of Appellant on merits in the appeal, the same can be adjusted towards monthly tariff charges to be paid to the second Respondent since Appellant has long term PPA with second Respondent.

4.13 Under the circumstances, parties shall bear their own costs.

4.14 **List the main appeal for hearing on 6-2-2019.**

4.15 **Pronounced in the Open Court on this 5th day of December, 2018.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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