

**Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**

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Case No. 67 of 2011

**In the matter of Petition filed by JSW Energy Limited under Section 86(1)(f) of the
Electricity Act, 2003 regarding levy of Clean Energy Cess and Counter Veiling Duty on
import of coal as notified by the Ministry of Finance, affecting its power purchase
agreement with MSEDCL**

Shri. V.P. Raja, Chairman

Shri. Vijay L. Sonavane, Member

JSW Energy Limited

... Petitioner

Versus

Maharashtra State Electricity Distribution Company Limited

... Respondent

ORDER

Dated: December 1, 2011

JSW Energy Limited (“JSWEL”) submitted a Petition under Section 86 (1) (f) of the Electricity Act, 2003 (“EA”) for adjudication of dispute with Maharashtra State Electricity Distribution Company Limited (“MSEDCL”).

2. The prayers in the Petition are as follows:

“

- a) *Hold that the imposition of the Clean Energy Cess by the Finance Act, 2010 and the Excise Duty/ Countervailing Duty by the Finance Act, 2011 as applicable on imported coal amounts to 'Change in Law' under Article 13 of the PPA.*
- b) *Approve the calculations of the financial impact on the Petitioner on account of the above Change in Law as provided in Annexure I hereto and direct the Respondent to make payments in accordance thereof.*
- c) *Pass such other order(s) as the Hon'ble Commission may deem just in the facts of the present case.”*

3. The Petitioner has made following submissions in its Petition:

- a) JSWEL is a Company incorporated under the provisions of the Companies Act, 1956 and JSWEL has established a generating station at Jaigad, Ratnagiri in Maharashtra and operates the unit of 300 MW (one of the proposed 4 X 300 MW).
- b) In the year 2007, the Respondent had initiated a competitive bidding process under Section 63 of the EA 2003, for procurement of power from generating companies. In terms of the process initiated, the Petitioner participated in the bid and was selected as the successful bidder to supply 300 MW of Power. In view of that the Petitioner and Respondent entered into a Power Purchase Agreement (“PPA”) on 23rd February,2010
- c) The Government on India - Ministry of Finance (Department of Revenue) vide its Notification No's 3/2010 and 6/2010 dated 22nd June,2010 has levied Clean Energy Cess at the rate of Rs.50 per Tonne on raw coal, raw ignite and raw peat, with effect from 1st July,2010. In terms of Circular No. 01-2010 dated 24th June, 2010 issued by the said Ministry, the levy of Clean Energy Cess would be applicable as an excise duty on imported coal in the form of additional custom duty .
- d) The Petitioner sent a letter dated 27th July,2010 informing the Respondent, MSEDCL regarding the levy of Clean Energy Cess in order to invoke Article 13

of the PPA, wherein inter alia the principles, manner and treatment of 'change in law' is provided. It was further informed in the said letter that JSWEL shall claim from the Respondent, the increased Fuel Energy Charges, as shall be effective due to the levy of Clean Energy Cess.

- e) In reply to the above, MSEDCL by letter dated 08th October,2010 informed JSWEL inter alia that in terms of Article 13.2(b) of the PPA , the charges put forward by JSWEL towards applicable Clean Energy Cess will be reviewed by MSEDCL on approval from the Commission. It is the contention of JSWEL that MSEDCL has not denied the liability to pay for the Clean Energy Cess charges, and has only stated that the same needs to be approved by the Commission.
- f) Subsequently, Government of India - Ministry of Finance (Department of Revenue) vide its Notification No.1/2011 dated 01st March,2011, have levied Counter Veiling Duty (CVD) of 1% plus Education Cess and Higher Education Cess on all types of coal, as excise duty. JSWEL by its letter dated 23rd March 2011 informed MSEDCL inter alia that charges towards Clean Energy Cess and CVD accounted for an additional expenditure of around Rs. 10.27 crore per annum for the purchase of coal as necessitated under PPA. It was reiterated that payment of the said charges should be made by MSEDCL on account of change in law. Further the Ministry of Finance (Department of Revenue) under its D.O.F. No. B-1/3/2011/TRU dated 25th March,2011 issued a clarification that CVD on all types of coal shall be of 5% plus Education Cess and Higher Education Cess, and not 1% as earlier notified, and the same shall be with effect from 01st March,2011.
- g) JSWEL sent a letter on 29th March, 2011 to MSEDCL informing that on account of the said clarification as issued for the levy of CVD, and together with applicable Clean Energy Cess, an additional expenditure of Rs.35 crore per annum is being incurred by JSWEL on the coal used in their 300 MW unit. JSWEL informed further that the additional expenditure is liable to be reimbursed by MSEDCL as per the terms of the PPA.

4. The Commission vide Notice dated May 09, 2011, scheduled a hearing in the matter on May 19, 2011 and directed the Petitioner JSWEL to serve a copy of the Petition along

with its accompaniments to the Respondent and Authorized Consumer Representatives. The Respondent was directed to file their reply, if any, with a copy served to the Petitioner and Authorized Consumer Representatives.

5. In the hearing held on May 19, 2011, Shri S. Srivastava, Advocate appeared for JSWEL. Shri A. Deshpande, ED (Comml) and Shri S. G. Metre, EE(PP), appeared for MSEDCL. MSEDCL submitted **that they agree to the prayers** made in the Petition and have no dispute on the fact that the levy of Clean Energy Cess of Rs.50 per Ton and 5% Excise Duty on coal and corresponding CVD of 5% plus Education Cess and Higher Education Cess on imported coal, constitute change in law in terms of the PPA. MSEDCL submitted that the Commission may direct the JSWEL to submit detailed data of claim in comparison to the data submitted at the time of submitting bid in 2008 for finalizing calculations of charges in accordance thereto. JSWEL sought time for submission of details. The Commission directed JSWEL to submit relevant data to MSEDCL. It was further directed that both parties should mutually finalize the claim amounts and thereafter approach the Commission jointly for approval. The Commission also directed MSEDCL to file its reply.

6. MSEDCL filed a letter on 24th May, 2011 in the office of the Commission which has been marked and sent to JSWEL. In the said letter MSEDCL has mentioned that in terms of the directions of the Commission in the said hearing on May 19, 2011, the claim of JSWEL on the amount of Clean Energy Cess and CVD as may affect the cost of coal needs to be reconciled. It was submitted that Article 13 in the PPA should be applicable on those changes in law that occurred after February 2008. It was mentioned that CVD on import of coal is applicable on the CIF value of coal as on February 2008, and not on the FOB value of coal as on the present day, which is a much higher cost. MSEDCL, therein, had further requested JSWEL to provide details on the amount of applicable CVD and Clean Energy Cess. Subsequently, on 06th June 2011, MSEDCL filed a similar letter in the office of the Commission.

7. The matter was further heard on June 8, 2011. JSWEL sought time to submit data and details on the computation of applicable Clean Energy Cess and CVD that affects the cost of coal. The Commission directed JSWEL to comply with earlier directions in this regard, and submit the said details.

8. JSWEL filed a letter on 24th June,2011 in the office of the Commission submitting details with regard to the computation of applicable Clean Energy Cess and CVD affecting the cost of coal, along with a letter dated 16th June,2011 whereby such details and data was served on MSEDCL. MSEDCL filed a letter on the same day in the office of the Commission, which was marked and sent to JSWEL, mentioning that the assessment of cost of coal as on July 2010 as per the fuel supply agreement should be on the cut-off date of (FOB/CIF) with indexation used if any to arrive at actual cost. Further, it was mentioned that calculation for kg/kWh specifying SHR and GCV of coal needs to be submitted by JSWEL.

9. During the hearing in the matter on June 27, 2011, MSEDCL submitted that there is no dispute regarding the amount to be paid towards applicable Clean Energy Cess, but the amount calculated for applicable CVD is under dispute. The arguments of MSEDCL were in terms with its letter dated 24th May, 2011 as filed in the office of the Commission. Considering the submission of MSEDCL that the amount of applicable Clean Energy Cess is not under dispute, the Commission directed MSEDCL to pay the undisputed amount to JSWEL.

10. During the hearing held on 20th July2011, MSEDCL submitted that payments on the amount not under dispute has yet not been made to JSWEL and that the same shall be made within three days. On 04th August 2011, in a further hearing, MSEDCL submitted that a proposal for approval for payment of the undisputed amount has been made before its Board, and sought one week's time to release payments to JSWEL. The Commission directed MSEDCL to release the appropriate payments to JSWEL in seven days, failing which delayed payment charges will be imposed on MSEDCL.

11. During the hearing held on 12th August 2011, MSEDCL submitted that its Board has approved the payment of the said undisputed amount to JSWEL and it was submitted that payment of the same shall be made to JSWEL on 16th August2011. The Commission directed MSEDCL to release payment of the said undisputed amount by the said date.

12. During the hearing held on 07th September 2011, JSWEL submitted that the undisputed amount has been received from MSEDCL excluding the component which pertains to Education Cess on CVD which is under consideration of MSEDCL. On a query

raised by the Commission, MSEDCL submitted that the approval for payment of the said component is under examination and needs to be settled.

13. In light of the submissions and averments made by both parties the Commission's findings are as follows:

(i) Clause 13 pertaining to Change of Law in PPA signed by both the parties on 23rd February, 2010 reads as under:-

“Change in Law” means the occurrence of any of the following events after the date. Which is seven (7) days prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, is final authority under law for such interpretation.

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

Application and Principles for computing impact of Change in Law

While determining the consequence of Change in Law under this Article 13, the 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, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.

b. Operation Period:

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined by the Maharashtra State Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law and effective from date specified in 13.4.1

Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a Contract Year.

{Emphasis supplied}

14. The Commission has examined in light of the above highlighted clause the details of calculations submitted by the Petitioner regarding claims due to Change in Law on account of Environment Cess and CVD on coal.

The Commission notes that the total LC amount for 300 MW PPA is Rs.64 Crores and 1% of LC amount is Rs. 0.64 Crores. The amount claimed on Environment Cess at the rate of Rs. 50/per tonne with effect from 1st July, 2010 amounts to Rs. 4.24 Crores/Annum and Environment Cess and CVD at the rate of 5% with effect from 1st March, 2011 amounts to Rs. 35.32 Crores / Annum. Thus, the amount claimed is more than 1% of equivalent LC amount in aggregate for the contract year.

15. The Commission therefore concludes that:-

- a. The imposition of Clean Energy Cess and the Excise Duty/ CVD by the Government of India on imported coal has the effect of Change in Law in India as per Article 13.1.1/13.2.b of the PPA, which was not at the time of execution of the PPA; therefore there is a Change in Law.
- b. MSEDCL had not denied these claims at any point of time and as per its submissions during the proceeding and subsequent action of making payment towards disputed amount indicates acceptance of Change in Law.
- c. Regarding prayer (b) of the Petitioner to approve the calculations of the financial impact on account of change in law, Commission has noted that claims are more than 1% and meet the requirements of clause no 13.1.1/13.2 (b) of the PPA executed between the Petitioner and the Respondent. The Commission also notes that the Petitioner shall be claiming the additional amounts payable by the Respondent on account of financial impact of Changes in Law along with necessary documentary

evidence as per billing cycle agreed in the PPA .The Respondent shall scrutinize the bills and pay the amount admissible. This process is mutual to both the Petitioner and the Respondent and is continuous in nature, till survival of the Long Term PPA and / or further Statutory changes by Govt of India. The Commission therefore considers it appropriate to leave the calculation and settlement of financial impact to Petitioner and Respondent themselves.

The matter stands disposed of accordingly.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V.P. Raja)
Chairman