

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**Case No. 99 of 2010**

**In the matter of**

**Petition of M/s. JSW Energy Limited seeking adjudication of dispute with  
Maharashtra State Electricity Distribution Company Limited arising from a  
Power Purchase Agreement dated 23<sup>rd</sup> day of February, 2010.**

**Shri. V.P. Raja, Chairman**  
**Shri. Vijay L. Sonavane, Member**

M/s. JSW Energy Limited

... Petitioner

Versus

Maharashtra State Electricity Distribution Company Limited.

... Respondent

**ORDER**

**Dated: May 25, 2011**

Initially a Petition was filed by M/s. JSW Energy (Ratnagiri) Limited under affidavit on 14.12.2010 under Section 86(1) (f) of the Electricity Act, 2003 (“EA 2003”) for adjudication of dispute with Maharashtra State Electricity Distribution Company Limited arising from a Power Purchase Agreement entered on 23<sup>rd</sup> February, 2010. Subsequently, the Petitioner filed an application seeking amendment of the cause title of the Petition to delete the name of M/s. JSW Energy (Ratnagiri) Limited and in its place substitute M/s. JSW Energy Limited, in view of an Order dated 24<sup>th</sup> September 2010 passed by the Hon’ble High Court, Bombay in Company Scheme Petition No. 510 of 2010, vide which Order, the Hon’ble Court has, *inter alia*, allowed a Scheme of Amalgamation of JSW Energy (Ratnagiri) Limited with

JSW Energy Limited under Sections 391 to 394 of the Companies Act. The said application was allowed during the hearing before the Commission and accordingly JSW Energy Limited (“JSWEL”) is considered as the Petitioner.

2. The prayers in the Petition are as follows:

“

- a) *Adjudicate upon the disputes that have arisen between JSW Energy (Ratnagiri) Ltd. and Maharashtra State Electricity Distribution Company Limited as detailed herein-above or in the alternative refer the disputes for adjudication through Arbitration;*
- b) *Pass an order directing the Respondent to pay to the Petitioner the costs of the present proceedings.*

..”

3. The Petitioner JSWEL, in its Petition, submitted as under:

- a) JSWEL is generating company and has established a – 300 MW (one of the proposed 4 X 300 MW) Power Plant at Jaigad, Ratnagiri in the State of Maharashtra.
- b) In 2007, the Respondent had initiated a competitive bidding process for procurement of power from generating companies. The bid deadline was 14<sup>th</sup> February, 2008. The Petitioner submitted the Bid for supply of 300 MW of power on 21<sup>st</sup> February 2008 and was selected as the successful bidder to supply 300 MW of electricity to the Respondent. Consequently, the Petitioner and the Respondent entered into a Power Purchase Agreement dated 23<sup>rd</sup> February 2010.
- c) The Petitioner had applied for and obtained all the necessary statutory approvals for setting up the Power Project including the Environmental Clearance, which was issued by the Government of India, Ministry of Environment and Forest (MoEF), on 17.05.2007. The Environmental Clearance granted to the Petitioner, inter-alia, had many conditions, one of them which are as follows:

*“ 3. .... ii) The detailed study regarding the impact of the project, if any, on Alphanso mango and marine fisheries as recommended in the report of Dr. B. S. Konkan Krishi Vidyapith shall be undertaken. Based on the same, additional safeguard measures as may be required will be taken by the proponent with prior approval of the MoEF. A copy of the report will be submitted to the Ministry. The cost towards undertaking the study*

*and implementation of safeguard measures, if any, will be borne by the project.*

*iii) Space provisions shall be made for installation of FGD of requisite efficiency of removal of SO<sub>2</sub>, if required at later stage.*

.....”

- d) The Petitioner had submitted the bid for supply of 300 MW of power on 21<sup>st</sup> February 2008 in terms of the Competitive Bidding Process initiated by the Respondent. As on the date of submission of the bid there was no requirement to install Flue Gas Desulphurisation System (FGD). The installation of FGD was envisaged only as a future event if the Government Authorities decided the same. The Petitioner has contended that such a decision of the Government Authorities would amount to “Change in Law” within the meaning of Article 13 of the Power Purchase Agreement dated 23<sup>rd</sup> February 2010, read with the definition of “Law” in Article 1.1 of the said PPA.
- e) In these circumstances the cost of FGD was not taken into account by the Petitioner while submitting the bid to the Respondent.
- f) The environmental clearance granted to the Petitioner was challenged by way of appeal before the National Environmental Appellate Authority (NEAA), which was dismissed by NEAA on 12.09.2008, and then the said order was again challenged by way of Writ Petition No. 388 of 2009 before Delhi High Court. Delhi High Court vide its order dated 18.09.2008 directed the Ministry to re-examine the Environmental Clearance granted after a project site visit by a sub-committee. The subcommittee submitted the report to MoEF.
- g) The Expert Appraisal Committee considered the sub-committee’s report and while it upheld the Environmental Clearance granted to the Petitioner on 17.05.2007, it imposed additional conditions, which included that, in the event of any evidence of damage to the mango, cashew and fisheries, adequate mitigation measures including FGD should be adopted by the Power Proponent. This report was tabled on 11-12 January, 2010
- h) On 16.04.2010, after considering the recommendations of Expert Appraisal Committee, the Ministry of Environment & Forests, Government of India, imposed a condition that the FGD plants should be installed by the Petitioner prior to the commissioning of the Power Project. This was a condition subsequent to signing of PPA.
- i) Due to imposition of this condition on 16.04.2010, the Petitioner informed the Respondent vide letter dt 20.07.2010 that this is a Change in Law due to which it was required to install the FGD before the commissioning of the

plant, attracting a huge additional cost of Rs 600 Crores over and above the project cost.

- j) The Respondent did not accept the claim of the Petitioner and contended that it was the obligation of the Petitioner as per PPA to maintain all required consents for the Power Project and as such there was no Change in Law in terms of the Clause 13 of the PPA.
- k) On 20.08.2010 the Petitioner issued a notice to the Respondent under clause 17.2.1 of the PPA for resolution of dispute. The Petitioner submitted that, inspite of the disputes that have arisen between the parties; the Petitioner shall continue to perform its obligations under the PPA without prejudice to its claim. A meeting was held on 07.09.2010, however as there was no outcome of this meeting the parties decided to proceed (with the provisions laid down in Article 17.3 of the PPA) for resolution of dispute by way of referring the matter for adjudication. Hence, the Petitioner has filed the present Petition before the Commission for resolution of dispute.

4. The Commission vide its Notice dated December 28, 2010, scheduled a hearing in the matter on January 12, 2011 and directed Petitioner JSWEL to serve a copy of the Petition along with its accompaniments to the Respondent and authorised Consumer Representatives. The Respondent was directed to file their written submissions/reply, if any, with a copy served to the Petitioner and authorised Consumer Representatives.

5. During the hearing, the Commission directed the Petitioner to submit the following information:

- a. Has the Petitioner signed the PPAs for all the 1200 MW with MSEDCL? If not, is Petitioner proposing to sell certain portion of Power on merchant basis?
- b. Whether the FGD Plant will be common for all the units or separate for each unit? What is the cost of one unit?
- c. What are the clauses in the PPA dealing with "Allocation of Risk"?

6. The Petitioner vide his letter dated 01.04.2011 filed an affidavit with summary of events, Orders passed by NEAA and Delhi High Court, in reply to the information sought by the Commission. The Petitioner in his reply submitted that, it has contracted with the Respondent to sell 300 MW of electricity from one unit only. On 16.04.2010, the MoEF, Govt of India mandated the installation of the FGD and by letter dated 28.06.2010 it directed that the FGD is to be installed within a period of 23

months from 21.06.2010 for the first unit and within 3 months thereafter for the other three units.

7. Out of the total cost of Rs.600 Crores, the cost of the equipment and the installation is about Rs.527 Crores. The FGD is common to all four units. The present PPA dated 23.02.2010 is for sale of Power from one unit of 300 MW. Out of balance three Units of 300 MW each, Power from one unit is for captive consumption and balance if any to be sold on merchant basis till long term PPA are executed. For remaining two units no agreement has been finalised, but presently the Petitioner has proposed to sell electricity to the MSEDCL under its Medium term tender for the period from March 2011 to February 2013. The Petitioner further submitted that, the Petitioner is not claiming the entire cost of the FGD in the present Petition.

8. The Respondent, MSEDCL filed its affidavit in reply on April 18, 2011 and stated that:

- i. The Petitioner was aware of the issues relating to FGD Plant and pending litigation in terms of prior Environmental Clearance dated 17.05.2007 prior to the cut off date i.e. 14.02.2008 for the application of the provision of change in law, (being 7 days prior to the bidding deadline). Therefore there is no change in law as claimed by the Petitioner.
- ii. Further the Respondents MSEDCL submitted that, the Petitioner had infringed Clause 1.5 of Schedule 9 of the PPA regarding the Representations and Warranties submitted by the Petitioner. While submitting the bid the Petitioner has made positive assertion/warranties in consonance with condition 2.5 of Schedule 9 that no litigation was pending or threatened against the Petitioner. By such positive assertion the Petitioner suppressed the pendency of litigation regarding Environmental Clearance and took upon itself full responsibility and consequences of the said positive assertions and any consequential burden or charge arising as a result of the said suppression.
- iii. The Respondent MSEDCL submitted that, there is no change in law. The Respondent stated that FGD installation at a later stage, if required, with inclusion of cost in the project cost itself, was stated in the Environmental Clearance dated 17.05.2007. There is no mandate of law which has been subsequently inserted as claimed by the Petitioner.
- iv. The Respondent MSEDCL further raised the issue relating to gross suppression, misrepresentation and other issues which should deny the petitioner any relief.

v. Further Clause 4.1.1(a) of the PPA read with Schedule 1 clearly casts the responsibility to obtain all requisite consents and approvals on the Petitioner.

9. During the hearing on April 20, 2011, the Commission heard both the parties. Both the Petitioner and the Respondent reiterated the facts of the Petition and reply filed by them respectively. The Petitioner orally submitted that, the FGD plant is common for all the four units and the Petitioner is claiming the proportionate cost of FGD Plant of Rs.150 crore (i.e. 1/4<sup>th</sup> of the Rs. 600 crore) from the Respondents MSEDCL towards cost of the FGD Plant.

10. The Respondent MSEDCL in its argument apart from the submission of its reply sought the attention of the Commission on condition 3. (iii) and Condition 3. (xx) of the Environmental Clearance dated 17.05.2007, which reads as follows:

*“3. (iii)*

*Space provisions shall be made for installation of FGD of requisite efficiency of removal of SO<sub>2</sub>, if required at later stage.*

*(xx) Separate funds should be allocated for implementation of environmental protection measures along with item wise break up. These cost should be include as part of the project cost. The funds earmarked for the environment protection measures should not be diverted for other purposes and year wise expenditure should be reported to the Ministry. “*

Thus, in terms of law applicable as on that date, the Petitioner was aware of the condition that the Petitioner may be required to install FGD of required capacity at a later stage. Also, the aforesaid condition 3(xx) called upon the Petitioner to allocate funds for implementation of environmental protection measures and that includes this cost as part of the overall project cost and not diverted for any other purpose. Thus, there is no change in law subsequent to the signing of the PPA in accordance with Clause 13.1.1 as contended by the Petitioner. Respondent contended that under these circumstances, the petition should be dismissed with exemplary costs as the Petitioner has approached the Commission with unclean hands.

11. In reply to the argument made by Respondents MSEDCL, the Petitioner submitted that, there was no misrepresentation at all, as per Clause 13.1.1 of the PPA, there has been change in Law. The condition in Environmental Clearance dated

17.05.2007 was not mandatory, as stated future event may or may not be required. Regarding the condition 3(xx) separate funds have been created for various works, but not for the FGD. Imposition of the condition to install FGD later on was a statutory obligation, thus there has been a change in law as the condition was imposed after executing a PPA.

12. Having heard the parties and after considering the materials placed on record, the Commission has following observations:

(i) The Petitioner states that as per Article 13.1.1 of the PPA dated 23<sup>rd</sup> February 2010, it is entitled to claim financial benefits due to change in law of that of the condition to install FGD imposed under a letter dated 16<sup>th</sup> April 2010 of the MoEF issued to the Petitioner imposing the following as “**additional conditions**” under paragraph 2(i) in the said letter which is extracted as follows

*“Flue Gas Desulphurisation System (FGD) shall be installed before commissioning of the project and action in this regard shall be submitted within three months to the Ministry”*

(ii) On account of the “**additional conditions**”, the Petitioner has sought to claim Rs. 150 Crore as an increase in the project cost (one fourth of total projected cost of 600 Crore of FGD plant) subsequent to signing of the PPA and which is stated to have a significant cost impact on the contracted capacity of 300MW to be supplied to the Respondent.

(iii) it is necessary therefore to examine Article 13.1.1 of the PPA dated 23<sup>rd</sup> February 2010 as follows:-

*“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 the interpretation of any Law by a Competent Court of law, tribunal of Indian Governmental*

*Instrumentality provided such Court of law, tribunal on Indian Governmental Instrumentality 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.”*

(iv) As per the Environmental Clearance dated 17.05.2007, the direction was given to keep the space for installation of the FGD if required and also for allocation of separate funds for that purpose. The letter dated 16.04.2010 issued by the GOI MoEF binds the Petitioner to install the FGD before commissioning of the project. The Petitioner contended that this subsequent imposition of the condition is a change in law. As per the above quoted provision of change in law, the contention of the Petitioner is nowhere sustained in the definition. Furthermore, as per the Clause 5.4 of the PPA the Seller i.e. the Petitioner shall be responsible for obtaining all consents required for developing, financing, constructing, operating and maintenance of the project, the Petitioner shall also be responsible for obtaining/maintaining/renewing the Initial Consents and for fulfilling all conditions specified therein.

(v) As per Clause 3.1.2.i of the PPA, the Petitioner shall have received the initial Consents as mentioned in Schedule I either unconditionally or subject to conditions which do not materially prejudice its rights or the performance of its obligations under the Agreement. Schedule I include the Clearance of State Pollution Control Board/ MoEF. All these clauses of the PPA cast the burden on the Petitioner and further the condition (xx) in the Environmental Clearance dated 17.05.2007 directs the Petitioner to maintain separate fund for implementation of environmental protection measures and that this cost should be included as part of the project cost and not diverted for any other purpose. Even though the Petitioner stated that he has not included the cost of the FGD in the bid and now claiming for enhancing the capital cost and tariff, this claim is untenable. This claim of the Petitioner shows that, the Petitioner has disregarded the directions of the MoEF.

(vi) The Petitioner has made positive assertion/warranties in consonance with Condition 2.5 of Schedule 9 that no litigation was pending or threatened against



the Petitioner. By such positive assertion the Petitioner suppressed the pendency of litigation regarding Environmental Clearance. While the Commission records the above contention of Respondents and notes that the Petitioner has not disputed the same, this matter cannot be taken up in the present proceedings of the Petitioner.

**In view of the above, the present Petition is hereby dismissed.**

Sd/-

(Vijay L. Sonavane)  
Member

Sd/-

(V. P. Raja)  
Chairman