

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 159/MP/2012

Coram:

**Dr. Pramod Deo, Chairperson
Shri S. Jayaraman, Member
Shri V. S. Verma, Member
Shri M. Deena Dayalan, Member
Shri A. S. Bakshi, Member (EO)**

Date of Hearing: 27.09.2012
Date of Order : 25.10.2012

In the matter of

Petition under Sections 61, 63 and 79 of the Electricity Act, 2003 for establishing an appropriate mechanism to offset in tariff the adverse impact of the unforeseen, uncontrollable and unprecedented escalation in the imported coal price due to enactment of new coal pricing Regulation by Indonesian Government and other factors

And in the matter of

Coastal Gujarat Power Limited

Petitioner

Vs

1. Gujarat Urja Vikas Nigam Limited
2. Maharashtra State Electricity Distribution Company Ltd
3. Ajmer Vidyut Vitran Nigam Ltd
4. Jaipur Vidyut Vitran Nigam Ltd
5. Jodhpur Vidyut Vitran Nigam Ltd
6. Punjab State Electricity Board
7. Haryana Power Generation Corporation Ltd
8. Union of India through Secretary, Ministry of Power

Respondents

Present:

1. Shri Aspi Chinoy, Senior Advocate, CGPL
2. Shri Amit Kapur, Advocate, CGPL
3. Shri Mansoor Ali Shoket, Advocate, CGPL
4. Shri Nitin Kala, Advocate, CGPL
5. Ms. Divya Chaturvedi, Advocate, CGPL
6. Shri Ramesh Subramanyam, CGPL
7. Shri Arun Srivasatva, CGPL
8. Shri Bomi J Shroff, Tata Power



9. Shri Amulya Charan, Tata Power
10. Shri M.G. Ramachandran Advocate for GUVNL
11. Shri Padamjeet Singh, PSPCL
12. Ms. Ashwini Chitnis, Prayas
13. Shri Shantanu Dixit, Prayas

ORDER

In this petition, filed under Section 79 of the Electricity Act, 2003 (the Act), the petitioner seeks the following relief:

- “(a) *Establish an appropriate mechanism to offset in tariff the adverse impact of*
- (i) *The unforeseen, uncontrollable and unprecedented escalation in the imported coal price and*
 - (ii) *The change in law by Government of Indonesia.*
- (b) *Evolve a methodology for future fuel price pass through to secure to the Project a viable economic condition while building suitable safeguards to pass to Procurers benefit of any reduction in imported coal price.*
- (c) *Pass such other order as the Hon’ble Commission may deem fit in the facts and circumstances of the present case.”*

2. Presently, we are examining the question of admission of the petition. Therefore, the brief facts necessary for this purpose are being considered.

3. The petitioner was incorporated by Power Finance Corporation Ltd. as its wholly owned subsidiary in order to carry out the international competitive bidding to select a successful bidder in accordance with the competitive bidding guidelines (Bidding Guidelines) issued by the Central Government under section 63 of the Electricity Act, 2003 (the Act). Mundra Ultra Mega Power Project (the Project), with a total capacity of 4000 MW at Mundra in the State of Gujarat, was conceived by the Central Government for operation based on imported coal for supply of power to the States of Maharashtra, Gujarat, Rajasthan, Punjab and Haryana. On 31.3.2006, the

petitioner, as a shell company, invited bids in accordance with the Bidding Guidelines for execution of the Project on Build, Own, Operate and Maintain basis. Tata Power Company Ltd which submitted its bid on or around 7.12.2006 was declared as the successful bidder with equivalent levelised tariff of ₹2.26367/kWh and the Letter of Intent dated 28.12.2006 was issued in favour of Tata Power Company Ltd. Subsequently, Tata Power Company Ltd acquired the entire stake in the petitioner. Thus, the petitioner is presently the wholly owned subsidiary of Tata Power Company Ltd. After its takeover by Tata Power Company Ltd, the petitioner executed the Power Purchase Agreement (“PPA”) dated 22.4.2007 with the procurers, which have been impleaded as Respondent Nos. 1 to 7, with Gujarat Urja Vikas Nigam Ltd being the Lead Procurer.

4. The tariff discovered in the process of competitive bidding was adopted by this Commission in its order dated 19.9.2007 in Petition No 18/2007.

5. The petitioner has stated that Tata Power Company Ltd participated in the bidding process by factoring the price of coal imported from Indonesia and quoted the tariff accordingly. Tata Power Company Ltd had therefore entered into Coal Sales Agreement dated 30.3.2007 with Indo-Coal Resources (Cayman) Limited for yearly supply of approximately 10.11 Million MT of coal for its generating stations, which included the coal requirement for the Project.

6. According to the petitioner, Article 3.1.2 (v) of the PPA mandated the petitioner to execute a Fuel Supply Agreement (“FSA”) within 12 months from the effective date, that is, the date of execution of the PPA. The petitioner has stated that

the FSA dated 30.3.2007 with coal to be sourced from Indonesia was duly submitted to the first respondent on 18.12.2008.

7. The petitioner has further stated that on 23.9.2010, the Indonesian Government promulgated "Regulation of Ministry of Energy and Mineral Resources No 17 of 2010 regarding procedure for Setting Mineral and Coal Benchmark Selling Price" ("Indonesian Regulation") which became effective from 1.9.2011. The Indonesian Regulation directed the holders of mining permits for production and operation of mineral and coal mines in Indonesia to sell mineral and coal in domestic as well as international markets as per the prescribed benchmark price and all pre-existing contractual arrangements were to be aligned accordingly. The petitioner has submitted that Indonesian Regulation envisages punitive consequences and sanctions including suspension and revocation of mining permit for violation thereof. In response to our query whether the petitioner has made any efforts separately to arrange coal from other sources, the learned counsel for the petitioner clarified that due to the unprecedented and unforeseeable change in international coal prices and promulgation of Indonesian Regulation, it is no more possible for the petitioner to secure coal at agreed contracted price and to perform its obligations under the PPA. The petitioner has submitted that annual cumulative effect of rise in prices of coal on the Project is ₹1873.00 crore.

8. Through the present petition, the petitioner seeks to offset the impact of increases in price of coal because of change in Indonesian Regulations.

9. We heard learned senior counsel for the petitioner as well as learned counsel for the first respondent, the Lead Procurer. We also heard the representatives of Punjab State Power Company Ltd and Prayas, a consumer representative organization on admission. The petitioner has filed a written submission vide its affidavit dated 16.10.2012.

10. Learned senior counsel submitted that after Indonesian Regulation came into effect, the petitioner had to pay exorbitantly high cost for import of coal from Indonesia on account of which the petitioner would lose about 67 paise/kWh, aggregating to annual loss of around ₹1900 crore. This development, according to the petitioner, necessitated revision of tariff adopted by this Commission. Learned senior counsel submitted that the respondents were not agreeing to increase in tariff and thus a dispute had arisen. According to learned senior counsel, the petitioner's case was covered under Article 13 of the PPA providing for the consequences of Change in Law. Learned senior counsel pointed out that the definition of 'Law' as given in the PPA was an inclusive definition and therefore included all laws, including foreign laws, and not only the Indian laws. Learned senior counsel submitted that applicability of the foreign law was a question of fact, requiring adjudication by this Commission. According to learned senior counsel, examination of the consequences of change in foreign law under Article 13 of the PPA did not involve interpretation of foreign law. Learned senior counsel urged that in view of this Change in Law envisaged under Article 13 of the PPA logically included enactment of Indonesian Regulation as well since the bids invited/submitted were based on imported coal. Learned senior counsel in particular relied upon Article 13.2 of the PPA according to which, learned senior counsel submitted, the consequence of Change in Law is that

the parties have to be restored to the economic position such that Change in Law had not occurred.

11. Learned senior counsel, relying upon the definition of *Force Majeure* given under Article 12.3 of the PPA argued that any event or circumstance which is beyond the reasonable control of a party that prevents the party, or delays, in the performance of its obligations under the PPA falls within the scope of term *Force Majeure*. Learned senior counsel argued that *Force Majeure* events could not be restricted to the events enumerated in the PPA as the definition of *Force Majeure* Events given in the PPA was inclusive definition. Explaining further the scope of Article 12.4 of the PPA which excludes changes in cost of fuel from *Force Majeure* Events, learned senior counsel argued that this Article did not exclude from *Force Majeure* the unprecedented increase in fuel cost caused by an event of *Force Majeure*, that is, an event that was beyond the control of the parties. Therefore, learned senior counsel argued, the circumstances under which the petition was filed were such that they were squarely falling within *Force Majeure* Events under Article 12 of the PPA. Alternatively, learned senior counsel argued that in any case Article 13 pertaining to Change in Law strictly applied. According to learned senior counsel, the PPA had to be read in such a manner that gave meaning and effect to the commercial arrangement and if that was not done the PPA would become unworkable and commercially impracticable. Learned senior counsel explained that the PPA had a mechanism to deal with the situation that had arisen and the petitioner was seeking revision of tariff in terms of the provisions of the PPA.

12. Learned senior counsel underscored the applicable legal framework. Learned senior counsel submitted that clause (b) of sub-section (1) of Section 79 of the Act read with clause (f) thereof conferred jurisdiction on the Commission to adjudicate the disputes presently raised. Further, according to learned senior counsel, para 5.1.7 of the Bidding Guidelines also provides that where any dispute arises claiming any change in or regarding determination of tariff or any tariff related matters such dispute is to be adjudicated by the Appropriate Commission and this Commission is the Appropriate Commission in the present case since the petitioner is selling power to five states under the PPA. Learned senior counsel further referred to Article 17.3.1 of the PPA which confers jurisdiction on this Commission to resolve any dispute relating to tariff.

13. Learned counsel for the first respondent, the Lead Procurer, submitted that there are differences between the parties on the interpretation of the Articles 12 and 13 of the PPA and the same call for adjudication by this Commission. Learned counsel submitted that the petitioner's interpretation of *Force Majeure* Event and consequences of Change in Law is not correct and is not in sync with the interpretation of the procurers. According to learned counsel, arranging for fuel is an obligation of the petitioner who is free to procure it from anywhere in the world. Learned counsel submitted that the procurers are not having any objection to maintainability of the present petition. He sought to make the detailed submissions on merits in the reply to be filed by the procurers.

14. The representative of PSPCL submitted that Ministry of Power, Government of India in its letter dated 30.9.2011 has clarified that the PPA is a legally binding

document between the procurers and the developer and any issue arising therein is required to be settled in terms of the PPA between the contracting parties for which Gujarat being the lead procurer should take necessary action. He submitted that the argument of the petitioner that the resolution of the issue is within the framework of the PPA itself was not presented by the petitioner and was not deliberated upon in the Procurers meeting. He submitted that the petitioner ought to have made the proposal to the procurers before approaching the Commission. He further suggested that a meeting of the procurers and the petitioner be convened to discuss the line of arguments advanced on behalf of the petitioner at the hearing and this Commission should intervene in case they were unable to resolve the issue. The representative of PSPCL argued that power of this Commission under Section 63 of the Act is restricted to adoption of tariff arrived at through the transparent process of competitive bidding but the Commission does not have the power to tinker with the tariff arrived through the competitive bidding process.

15. It was submitted on behalf of Prayas that this Commission while deciding the petition should bear in mind its serious implications on the consumers. It was submitted that the definition of "Law" given in the PPA was limited to Indian Law and further that the PPA specifically excluded revision in tariff on account of increase in fuel cost as it was at the petitioner's risk. It was further submitted that the *Force Majeure* clause did not apply in the matter on hand since for an event to fall under the definition of Direct non-natural *Force Majeure* Event would have to be declared as unreasonable by an appropriate court. The representative of Prayas urged that the petitioner's claim for revision of tariff by 60 paise/kWh should not be allowed

since it would cause great injustice to the L2 Bidder whose bid was higher by 40 paise/kWh than the tariff quoted by the petitioner.

16. We have considered the submissions made by the parties. As already noted, the tariff for the Project was adopted by this Commission under Section 63 of the Act. The power from the Project is being supplied to more than two States. The dispute raised in the petition is in regard to impact on tariff of increase in prices of coal in the international market. We agree with learned senior counsel that the existing statutory framework as well as contractual arrangements accepted by the parties under the PPA clothes this Commission with power and authority to adjudicate the dispute raised in the petition. We are of the opinion that there are arguable issues requiring adjudication by this Commission. In fact, learned counsel for the Lead Procurer which represents the interest of other procurers as well, has favoured adjudication of the claim on merits within the terms and conditions of the PPA and has not opposed maintainability of the petition on technical grounds. The representative of PSPCL also did not raise objection to the adjudication by this Commission but suggested that the parties be in the first instance be relegated to mutual discussion to resolve the dispute and in case of their failure to do so, this Commission may intervene. It bears notice that this Commission had at the first hearing held on 19.7.2012 called upon the parties to make efforts to resolve the dispute among themselves in terms of Article 17.3 of the PPA. GUVNL, the lead procurer in its affidavit dated 3.9.2012 submitted that the petitioner in its letter dated 27.7.2012 made a proposal to all the procurers with a request to the lead procurer to convene a Procurers meeting'. GUVNL has submitted that it convened the Procurers

Meeting on 3.8.2012 to discuss the proposal of the petitioner. After discussion of the proposal, the representatives of the procurers opined to take approval of their respective management and convey their decision to the lead procurer. GUVNL has filed the responses of all procurers through the said affidavit and has submitted that none of the procurers has agreed to the proposal of the petitioner. It is seen that PSPCL in its letter dated 27.8.2012 has rejected the proposal of the petitioner as not acceptable. Therefore, the consultative process in terms of Article 17.3 of the PPA has failed. The petition was listed for hearing on admission after GUVNL the lead Procurer reported failure of the consultative process. The representative of Prayas did not make any submission opposing admission of the petition, but raised arguments on merits of the petitioner's claim. In the light of submissions made by the parties in their written pleadings and during the hearing, we are of the view that a prima facie dispute has arisen between the parties which needs to be adjudicated by the Commission in exercise of power under section 79(1)(f) of the Act read with other relevant provisions of the Act and the PPA. Accordingly, the petition is admitted for hearing on merit.

17. We direct the respondents, and also Prayas to file their replies to the petition on merit latest by 15.11.2012, with copies to the petitioner who may file its rejoinders, if any, by 26.11.2012. The representative of Prayas may inspect the file on the judicial side and obtain the copies of the documents pertaining to this case if it considers necessary, without payment of fee.

18. The petition shall be re-notified for hearing on 4th December 2012.

sd/-	sd/-	sd/-	sd/-	sd/-
(A. S. Bakshi) Member (EO)	(M. Deena Dayalan) Member	(V.S. Verma) Member	(S. Jayaraman) Member	(Dr. Pramod Deo) Chairperson