

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 159/MP/2012

Sub: 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

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: 27.9.2012

Petitioner : Coastal Gujarat Power Limited

Respondents: Gujarat Urja Vikas Nigam Limited and Others

Parties present: Shri Aspi Chinoy, Senior Advocate, CGPL
Shri Amit Kapur, Advocate, CGPL
Shri Mansoor Ali Shoket, Advocate, CGPL
Shri Nitin Kala, Advocate, CGPL
Ms. Divya Chaturvedi, Advocate, CGPL
Shri Ramesh Subramanyam, CGPL
Shri Arun Srivasatva, CGPL
Shri Bomi J. Shroff, Tata Power
Shri Amulya Charan, Tata Power
Shri M.G. Ramachandran Advocate for GUVNL
Shri Padamjeet Singh, PSPCL
Ms. Ashwini Chitnis, Prayas
Shri Shantanu Dixit, Prayas

Record of Proceedings

Learned senior counsel for the petitioner summed up the salient features of the petition by bringing to the Commission's notice that the bid by Government of India for Mundra Ultra Mega Power Project with a total capacity of 4000 MW ultra mega power project was based on imported coal. It was submitted that in terms of RFP and RFQ as also Article 3.1.2(v) of the Power Purchase Agreement (PPA), the FSA was to be submitted to the Procurers within 14 months of execution of the PPA. Learned senior counsel stated that the FSA with coal to be sourced from Indonesia was duly submitted within the stipulated time. It was brought out before the Commission that two units of the project (1600 MW) were already declared under

commercial operation, the third unit was to be so declared by the end of the month and the project is likely to achieve COD by the end of this year.

2. Learned senior counsel submitted that on 23.9.2010, the Indonesian Government promulgated a regulation ("Indonesian Regulation") which 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. He submitted that Indonesian Regulation envisaged punitive consequences and sanctions including suspension and revocation of mining permit for violation thereof.

3. Learned senior counsel further submitted that after Indonesian Regulation came into effect on 1.9.2011, 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 ₹1800 crore.

4. Learned senior counsel brought to the Commission's notice two important aspects of the PPA, which, according to him, are relevant for deciding the present case, these being Article 12 pertaining to Force Majeure and Article 13 pertaining to Change in Law. Learned senior counsel pointed out that the definition of 'Law' in the PPA was an inclusive definition and therefore included all laws, including foreign laws, and is not limited to Indian laws. Therefore, learned senior counsel urged, Change in Law envisaged under Article 13 of the PPA logically includes enactment of Indonesian Regulation as well since the bids invited/submitted were based on imported coal. Learned senior counsel referred to Article 13.2 of the PPA according to which 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. Learned senior counsel, relying upon the definition of Force Majeure given under Article 12.3 of the PPA argued that any event or circumstance beyond the reasonable control of a party that prevents the party, or delays, in the performance of its obligations under the PPA is included in the Force Majeure. He urged that Force Majeure events cannot be restricted to the events enumerated in the PPA as the definition given is an inclusive definition. Explaining the scope of Article 12.4 of the PPA which excludes changes in cost of fuel from the Force Majeure events, learned senior counsel argued that this Article did not exclude from Force Majeure unprecedented increase in fuel cost caused by an event of Force Majeure, which is beyond the control of the parties and thus a Force Majeure event. Therefore, learned senior counsel argued, the present circumstances were squarely falling within Force Majeure event under Article 12 of the PPA. However, learned senior counsel urged that if the said provision does not apply then alternatively Article 13 pertaining to Change in Law would apply. According to learned senior counsel, the PPA has to be read in such a manner that gives meaning and effect to the commercial arrangement and if that is not done the PPA would become unworkable and commercially impracticable.

5. Learned senior counsel explained that the PPA has a mechanism to deal with the situation that has arisen and the petitioner is seeking revision of tariff and

enforcement of the provisions of the PPA. Learned senior counsel referred to Article 17.3.1 of the PPA which confers jurisdiction on the Commission to resolve any dispute relating to tariff. As Indonesian Regulation is resulting in unprecedented increase in the cost of fuel for the project and has a direct bearing on tariff, the present dispute is required to be adjudicated upon by this Commission, learned senior counsel submitted.

6. Learned senior counsel also highlighted the applicable legal framework. The legal framework underscored by learned senior counsel was clause (b) of sub-section (1) of Section 79 of the Electricity Act which gives powers to the Commission to regulate tariff of generating companies other than those owned or controlled by Central Government having a composite scheme of generation and sale of electricity in more than one State, clause (f) of sub-section (1) of Section 79 which confers jurisdiction on the Commission to adjudicate the disputes and para 5.1.7 of the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees which 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. According to learned senior counsel, the Central Commission is the Appropriate Commission in the present case since the petitioner is selling power to five states under the PPA.

7. Learned senior counsel submitted that applicability of the foreign law is a question of fact. Therefore, examination of the consequences of change in foreign law under Articles 12 and 13 of the PPA does not involve interpretation of a foreign law.

8. Learned senior counsel requested the Commission to admit the petition.

9. Learned counsel for the lead procurer, GUVNL submitted that the petitioner through its letter dated 27.7.2012 had forwarded a proposal for revised tariff to the procurers and thereafter the same was discussed in the procurers' meeting held on 3.8.2012. Learned counsel submitted that there is a difference of opinion between the parties on the interpretation of the Articles 12 and 13 of the PPA and the same calls for adjudication by the 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 tune with the interpretation of the procurers. According to learned counsel, arranging for fuel was an obligation of the petitioner who was free to procure it from anywhere in the world. Learned counsel submitted that the procurers were not having any objection to maintainability of the present petition. He, however, submitted that the procurers would make detailed submissions on merits in their reply.

10. The representative of PSPCL submitted that the arguments raised by the petitioner stating that the resolution of the issue in hand is within the framework of the PPA itself was not presented by the petitioner and deliberated upon in the procurers' meeting. According to the representative of PSPCL, the petitioner should

have made the proposal to the procurers beforehand. He suggested that a meeting of the procurers and the petitioner be convened to discuss the line of argument advanced at the hearing and in case there is a deadlock the Commission should be approached. The representative of PSPCL argued that power of the Commission under Section 63 of the Electricity Act is restricted to adoption of tariff arrived at through the transparent process of competitive bidding. According to him, the Commission does not have the power to tinker with the tariff arrived in the competitive bidding process.

11. The representative of Prayas, Pune, a consumer representative organization submitted that the Commission while deciding the petition should bear in mind its serious implications upon consumers. She submitted that the definition of law given in the PPA is clearly limited to Indian Law. She pointed out that the PPA does not provide for revision in tariff on account of increase in fuel cost as the petitioner was free to choose the source of fuel and therefore, change in price of fuel was to the petitioner's risk. The representative of Prayas further submitted that the Force Majeure clause does not apply in the present matter since for an event to fall under the definition of Direct non-natural Force Majeure Event, it 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 67 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. The representative of Prayas also submitted that the copies of replies submitted by the respondent may also be made available to them to submit their replies.

12. The Commission after hearing the parties reserved the order on admissibility of the petition.

By Order of the Commission

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Joint Chief (Law)