

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.

Date of hearing: 19.07.2012

Coram: Dr. Pramod Deo, Chairperson
Shri S Jayaraman, Member
Shri V.S.Verma, Member
Shri M. Deena Dayalan, Member
Shri AS Bakshi, Member (EO)

Petitioner: Coastal Gujarat Power Limited

Respondents : Gujarat Urja Vikas Nigam Limited and Others

Parties present : Shri Jaideep Gupta, Senior Advocate for the Petitioner
Shri Amit Kapur, Advocate for the petitioner
Shri Mansoor Ali Shoket, Advocate for the petitioner
Shri Nitin Kala, Advocate for the Petitioner
Ms. Divya Chaturvedi, Advocate for the petitioner
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

RECORD OF PROCEEDINGS

At the outset, the Commission desired to know under which provisions of law the petition is maintainable before the Commission. Learned Senior Counsel appearing for the Petitioner submitted that since the Power Purchase Agreement (PPA) has been signed with procurers from several states, the project has a

composite scheme for generation and supply of power in more than one State. Therefore the Central Commission has the jurisdiction if it has otherwise the jurisdiction under the statute. Learned Senior Counsel referred to Article 1 of the PPA which defined the appropriate Commission as the Central Commission. Moreover, the Central Commission has approved the adoption of tariff of Mundra UMPP for supply of power to several states mentioned in the PPA. Learned counsel referred to page 338 of the petition and submitted that the tariff based bidding process is based on imported coal and based on the bidding, tariff was adopted as per Schedule 11 of the PPA. The elements of tariff has escalable and non-escalable elements.

2. Learned Senior Counsel submitted that the Petitioner is seeking intervention of Commission to establish an appropriate mechanism to offset in tariff the adverse impact of the unforeseen, uncontrollable and unprecedented escalation in the imported coal price and change in law by Government of Indonesia; and 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.

3. Learned Senior Counsel submitted that the PPA itself requires the petitioner to disclose the supply arrangement for the purpose of arranging fuel. The petitioner had tied up for fuel with Indo Coal Resources. The basis of this agreement was that 55% of the contracted quantity would be obtained at a nominal escalation of 2.5% per annum for five years and 45% of the contracted quantity would escalate per month on pro rata at the escalation rate notified by the Commission. Thus part of the fuel was escalable and part of the fuel was non-escalable as per the Coal Supply Agreement entered into by the petitioner. Learned Senior Counsel further submitted that this agreement had to be changed because on 23.9.2010, the Govt of Indonesia promulgated the Regulation of Ministry of Energy and Mineral Resources No. 17 regarding procedure for setting the mineral and coal benchmark selling price. These regulations effectively obliged the holders of mines permits for production and operation of mineral and coal mines to sell coal and minerals after 23.9.2011 both in

the domestic and international market with reference to the benchmark price which is set on the basis of prevailing prices in the domestic and international markets and to ensure that all export from Indonesia as per the pre-existing agreements are aligned with the Indonesian Regulations. As a result of these regulations, the Coal Supply Agreement which had been the basis for the bid has to be changed to bring it in alignment with the benchmark market price as decided by Indonesian Regulations. The Agreement has been changed to ensure compliance with the Indonesian Regulations. Learned Senior Counsel further submitted that the market price of fuel has shown an escalation which has never been seen before. These two factors combined together have led to a situation where if the petitioner were to supply electricity as per Schedule 11 of the PPA, the networth of the company would be eroded almost immediately. However the petitioner has complied with the terms and conditions of the PPA. The UMPP has been set up. The first unit has been synchronised on 8.1.2012 and COD was declared on 7.3.2012. The second unit has been synchronised on 10.7.2012 and the petitioner is in the process of declaring the COD. Though the project is ready, if it is necessary to supply at the rate fixed in Schedule 11, the project will fail. In these circumstances, the petitioner has approached the Commission by way of the present petition.

4. Learned Senior counsel further submitted that Fuel Supply Agreement is an integral part of the PPA in accordance with Article 3.1.2 (vi) of the PPA. Learned counsel referred to Article 13 of the PPA regarding change in law and particularly Article 13.1.1(iii) and submitted that the change which has been necessitated by change in the Indonesian law to the Coal Supply Agreement would be one of the consents or approvals which has been obtained for the project which for no default on the part of the petitioner has resulted in change of cost. Learned Senior Counsel referred to Article 13.2 of the PPA regarding the consequence of change in law and submitted that since the project is in the operation stage, it is the Central Commission which is competent under Article 13.2(b) of the PPA to decide the compensation on account of change in law. Under Article 13.3, the affected party is to serve notice on the other party for change in law and the petitioner has given notices to the procurers. Learned counsel further referred to Article 17.3.2 of the PPA regarding dispute resolution and submitted that the petitioner took up the matter

with the procurers but no resolution has been found. Therefore the petitioner has approached the Commission through the present petition.

5. With regard to the requirement of notice to the Procurers under the PPA, the Learned Senior Counsel for the Petitioner submitted that the procurers have been notified a number of times about the issues relating to change in law situation as also the fuel escalation due to Indonesian Regulations and international coal market scenario. Learned Senior Counsel referred to (a) Representation/Communication dated 4.8.2011 issued by Petitioner to MoP; (b) Representation/ communication dated 12.12.2011 issued by Petitioner to various authorities viz. such as members of the Planning Commission, Ministry of Power (Government of India), Central Electricity Authority, Government of Gujarat and Government of Maharashtra emphasizing the gravity of the issue of unforeseeable and unprecedented rise in cost of imported coal; (c) Minutes of Meeting of JMC dated 6.2.2012 and the Communication dated 6.3.2012 issued by Petitioner to GUVNL , being the lead procurer, to show that the procurers had enough notice. Learned Senior Counsel further submitted that vide communication dated 6.3.2012, all the information was provided to procurers. However none of the procurers have come forward to resolve the dispute of fuel cost escalation and its impact on the tariff. He submitted that once the Petitioner has raised an issue and there is no response from the other side, a dispute has arisen.

6. The Commission after perusal of the documents observed that though these documents show that discussions have been taking place between the petitioner and the procurers, no specific notice crystallizing the claims as also seeking appropriate action as per the PPA have been made by the petitioner. The Commission further observed that after March 2012, there has been no follow up. Ld Senior Counsel for the Petitioner submitted that regular meetings have taken place between the Petitioner and the Procurers, though the minutes of the meetings have not been recorded. He submitted that the petitioner shall file an affidavit bringing on record the details of the meetings held with the Procurers.

7. In reply to the query of the Commission whether the case is mature enough to seek intervention of the Commission, Learned Senior Counsel submitted that irrespective of the dispute resolution mechanism provided in the PPA, section 79 empowers the petitioner to approach the Commission independently. Learned Senior Counsel referred to section 79(1)(b) of the Act and submitted that power to regulate also includes the power to adjudicate the disputes.

8. The Commission referred to the minutes of the JMC meeting at page 904 of the petition and asked whether the petitioner has taken all steps to exhaust the remedies mentioned in the minutes. Learned Senior Counsel for the petitioner submitted that as stated in page 12 of the petition, the petitioner approached the Indonesian Government and was told that no exception could be made in case of the petitioner in implementing the regulations. In response to a further query whether the matter was formally taken up with the Indonesian Government and any response was received, or it was only a verbal discussion, Ld Senior Counsel submitted that this aspect could be checked and submitted. He further submitted that there was no possibility of approaching the judiciary in that country since increase in coal price by Indonesian Government is a policy decision and a foreign entity's commercial difficulty would not result in a judicial proceeding in that country.

9. The Commission desired to know whether the Indonesian Regulations would have retrospective operation to modify the contracts executed prior to issue of the notification, Ld Senior Counsel for the petitioner clarified that in this case there is no retrospective operation of the regulations. Every agreement which is executory in future, is not retrospective if it is told now that the agreement has to be brought in line with the regulations. In the present case all contracts are to be aligned with the Indonesian Regulations by 23.9.2011 and till that date, the price as per the contract is applicable. After 23.9.2011, no agreement will survive unless aligned with the Indonesian Regulations. He further submitted that the Coal Supply Agreement of the petitioner has been aligned with the Indonesian Regulations in May 2012.

10. In reply to the query of the Commission whether the petitioner has explored other sources for supply of coal, Learned Senior Counsel submitted that Petitioner has undertaken all necessary steps/measures, which it could to mitigate the adverse impact of unprecedented and unforeseeable increase in the international coal price, and explored opportunities to buy early stage mines in various countries like South Africa, Australia, Indonesia and Mozambique to secure coal supplies on cost plus basis. However, the Petitioner could not do so due to the completely altered conditions in the market. He submitted that even as on date, the Indonesian coal remains the cheapest imported coal.

11. The Commission pointed out that as per Article 17.2 of the Power Purchase Agreement, either party is entitled to raise any claim, dispute or difference arising under, out of or in connection with the agreement by giving a written notice to the other party and the other party is required to furnish its counter-claim and defences within thirty days and both parties shall meet to settle the dispute amicably. Only when the parties fail to resolve the dispute amicably, the dispute shall be referred for dispute resolution. The Commission observed that in this case the dispute has not yet crystallised as there is no claim or counter-claim by the parties.

12. The Learned Senior Counsel submitted that though there have been several rounds of discussion to resolve the issue of fuel cost escalation with the Procurers, the Petitioner is still open to negotiation and would submit the workings of the impact of fuel cost escalation to the Procurers, if so directed by the Commission, for necessary action.

13. Learned Counsel appearing for GUVNL submitted that CERC *per-se* has the jurisdiction to deal with the issues raised in the Petition. He further submitted that there have been several rounds of discussions on the issue of fuel cost escalation between the Procurers and the Petitioner; but so far the procurers have not accepted the claims of the petitioner. With reference to the query of the Commission whether any discussion has taken place after March 2012, learned counsel replied that

though it is not on record, this has to be checked and confirmed whether there was a JMC meeting after March 2012 or not.

14. Shri Padamjeet Singh, representative of PSPCL referring to the clarification issued by Ministry of Power, Government of India in its letter dated 30.9.2011 submitted that in accordance with the said clarification, the PPA is a legally binding document between the procurers and the developer and any issue arising therein is to be settled in terms of the PPA between the contracting parties for which Gujarat being the lead procurer should take necessary action. He further submitted that in the 11th meeting of JMC held on 6.2.2012, the procurers sought details from the petitioner and the issue is still open. Therefore, the dispute should be settled in accordance with PPA. If the petition is admitted, then the process would be derailed. In response to a query of the Commission whether any details were provided, he replied in the negative. He further submitted that the order of the Commission adopting the tariff has attained finality and the petitioner has not prayed for reopening of the said order.

15. After hearing the learned counsel and the representative of PSPCL, the Commission observed that for amicable settlement in terms of Article 17.3 of the PPA, a specific proposal containing the claim should be made by the petitioner to the lead procurer who should convene a meeting of procurers to consider the said proposal. In response, Learned Senior Counsel for the Petitioner submitted that the Petitioner will make a representation to the procurers giving details of the specific claim for tariff change within one week.

16. The Commission allowed the petitioner to make a representation regarding its claims for change in tariff in terms of Article 17.3 of the PPA to the lead procurers with copy to other procurers. If such an application is made, GUVNL as the lead procurer may convene a meeting of the procurers to consider the proposal of the petitioner to resolve the issues and convey the decision to the petitioner within a period of thirty days from the date of receipt of the representation.

17. The Commission did not express its views on any aspect of the petition and directed that the petition would be kept in abeyance during the process of amicable settlement by the parties. The petitioner and the lead procurer are directed to file on affidavit the outcome of the amicable settlement process by 14.9.2012. The petition shall be listed for further proceeding on any day thereafter.

(By Order of the Commission)

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Joint Chief (Law)