

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 155/MP/2012**

Subject : Application under Section 79 of the Electricity Act, 2003 evolving a mechanism for Regulating including changing and-or revising tariff on account of frustration and-or of occurrence of force majeure (Article 12) and-or change in law (article 13) events under the PPAs due to change in circumstances for the allotment of domestic coal by GOI-CIL and enactment of new coal pricing Regulation by Indonesian Government

Date of hearing : 19.7.2012

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)

Petitioner : Adani Power Limited, Ahmedabad

Respondents : Uttar Haryana Bijli Vitran Nigam Limited, Panchkula  
Dakshin Haryana Bijli Vitran Nigam Limited, Panchkula  
Gujarat Urja Vikas Nigam Limited, Vadodara

Parties present : Shri C.A.Sundaram, Senior Advocate for the petitioner  
Shri Vikram Nankani, Advocate for the petitioner  
Shri Amit Kapoor, Advocate for the petitioner  
Miss Poonam Verma, Advocate for the petitioner  
Miss Apoorva Mishra, Advocate for the petitioner  
Shri JatinJanlundhwala, APL  
Shri Arun Bagat, JSA  
Shri Malav Deliwala, APL  
Shri Kandrap Patel, APL  
Shri Arun Kumar, APL  
Shri Yogesh, APL  
Shri M.G Ramchandra, Advocate for GUVNL  
Shri Swapna Seshadri, Advocate for GUVNL  
Shri Vankatesh, Advocate for HPPC

## Record of Proceedings

Learned senior counsel for the petitioner submitted that the present petition has been filed under Section 79 (1)(b) and Section 79(1)(f) of the Electricity Act, 2003 ( the Act) seeking to evolve a mechanism to revise the tariff under the PPA and restore the petitioner to the same economic position as prior to occurrence of events resulting into change in fuel price. Revision in tariff is being sought on account of:

- (a) Unforeseeable and uncontrollable change in circumstances for the allotment of domestic coal by Government of India/Coal India Limited; and
- (b) Enactment of New Coal Pricing Regulation by Indonesian Government frustrating the existing contracts.

2. In response to Commission`s query regarding maintainability and jurisdiction of the Central Commission to deal with the present Petition, learned senior counsel for the petitioner referred to the following provisions:

- (a) Section 61 of the Electricity Act, 2003 provides the guidelines to be followed by the Appropriate Commission for the determination of tariff which specifically recognises that the generation and supply of electricity be conducted on commercial basis, economical use of resources, recovery of the cost of electricity in a reasonable manner and the National Electricity Policy and Tariff Policy.
- (b) Section 62 is the main provision for determination of tariff by the Appropriate Commission for supply of electricity by a generating company to distribution licensee. It further provides that the Appropriate Commission may amend the tariff more than once in a financial year in respect of any changes in terms of fuel surcharge formula.
- (c) Section 63 provides for adoption of tariff by the Appropriate Commission if the tariff has been determined through transparent process of bidding.
- (d) Section 86 (1) (a) provides that the State Commission shall determine the tariff for generation and supply of electricity within the State. Section 86 (1) (b) provides that the State Commission shall regulate electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from the generating

companies through agreements for purchase of power for distribution and supply within the State.

(e) Section 79 (1) (b) provides that the Central Commission shall regulate the tariff of generating companies if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

(f) Under Section 79 (1) (f), the Central Commission is empowered to adjudicate upon disputes involving generating companies or transmission licensees in regard to matters connected with Section 79(1)(a) to (d) brought before it.

3. In response to Commission's query as to whether the petitioner's power project fulfills the conditions of composite scheme and whether Central Commission has jurisdiction when the tariff has been adopted by the respective State Commissions, learned senior counsel for the petitioner submitted that petitioner's Mundra Power Project is supplying power to more than one State i.e. Gujarat and Haryana and the petitioner for the said power project has entered into a composite scheme by entering into the Power Purchase Agreements with the said two States i.e. Gujarat and Haryana. Therefore, the condition of Section 79 (1) (b) regarding entering into composite scheme is fulfilled. Section 79 (1) (b) specifically provides "enter into" or "have" composite scheme. In the present case, the petitioner has entered into a composited scheme and therefore, falls within the ambit of Section 79 (1) (b) of the Act.

4. Learned senior counsel submitted that the respective State Commission i.e. Gujarat Electricity Regulatory Commission (GERC) and Haryana Electricity Regulatory Commission would not have jurisdiction to revise the tariff to make it uniformly applicable to both the States. At best, each State Commission can look into the issues of generation and supply within the State under Section 86(1)(a) of the Act. The provisions of Section 86(1) (b) of the Act are applicable to the distribution licensees and not to the generating company. The generating company cannot approach the State Commission under the said provision whereas Section 79 is applicable when the project is supplying power to more than one State. He further submitted that in the present case, the generation activity is being carried out in the State of Gujarat and the power is being sold to the State of Gujarat and is committed to be sold to Haryana from August 2012 onwards. In this factual background, since two States are involved, the Central Commission has the jurisdiction to regulate the tariff of the petitioner.

The term 'regulate' appearing in Section 79 (1) (b) of the Act is a broader term as compared to the term 'determine' used in Section 86(1) (a) of the Act. The expression 'regulate the tariff' used in Section 79(1) (b) also includes in the power of revision or correction of the tariff which may include tariff adopted under Section 63 or determined under Section 62 of the Act..

5. Learned senior counsel submitted that under Section 79 (1) (f), the Central Commission is empowered to adjudicate upon the disputes involving generating companies or transmission licensees in regard to matters connected with Section 79(1)(a) to (d) brought before it. It may be noteworthy that:

- (a) The issue raised in the present petition is covered under Section 79(1) (b) of the Act.
- (b) Petitioner has written letters to GUVNL and in the letter dated 25.7.2011, petitioner has quantified the loss likely to be suffered by it and the impact of increase in coal price on the cost of generation. The cost of generation by using the imported coal at the increased price is around Rs. 3.30 per unit whereas the realization by the petitioner is ₹ 2.3495 per unit. In response, GUVNL's in its letter dated 15.09.2011 has specifically stated that it is impossible for GUVNL to revisit the tariff. Hence, revision of tariff is a disputed issue.

6. Learned counsel submitted that in the view of the above, only the Central Commission has jurisdiction to revisit the tariff Learned senior counsel also pointed out that it is not appropriate to approach the two State Commissions separately on the same issue for the reason that it will lead to (a)Multiplicity of proceedings and (b)Non-uniformity of tariff.

7. Learned senior counsel submitted that the GERC may have jurisdiction to revisit the tariff since the power is being generated and supplied within the State of Gujarat, however, the same is not true for the State of Haryana. The power is not being generated in the State of Haryana and is only being supplied to the State of Haryana. He further submitted that the SERC did not have the jurisdiction to regulate the tariff as it was only the Central Commission which would regulate/ determine tariff for a generating company with a composite scheme. The Electricity Act, 2003 does not distinguish or differentiate between a unit within a generating station and the generating station itself. In that respect, reference was also made to Section 2(30) for the definition of 'generating station'.

8. Learned counsel submitted that in view of the increased price of imported coal, it is impossible for the petitioner to perform as per the tariff committed under the PPAs. In UK, only legal impossibility is being recognised whereas in India the scope is much wider and it is a settled position of law that if the performance of the contract becomes impracticable due to commercial impossibility, then it must be held that the performance of the contract has become impossible and the object and purpose of the parties to enter into the contract stands frustrated under Section 56 of Indian Contract Act, 1856. In view of the unforeseen, uncontrollable commercial and practical difficulties being faced by the petitioner, the petitioner is left with no option but to invoke the jurisdiction of the Central Commission to pass appropriate orders including allowing adjustment of tariff and directing GUVNL, UHBVNL and DHBVNL to make payments at the revised tariff.

9. In response to the Commission's query regarding the issue pending before Hon'ble Supreme Court, learned Senior Counsel submitted that the issue before Hon'ble Supreme Court deals with termination of PPA with Gujarat Discoms due to non-fulfillment of conditions subsequently i.e. non execution of Fuel Supply Agreement. The present petition has been filed for a new and separate cause of action (subsequent events) which falls within the jurisdiction of the Appropriate Commission i.e Central Commission. In the present case, only Central Commission has jurisdiction since it is sale of power in more than one State, and State Commission has no role to play.

10. Learned counsels appearing on behalf of GUVNL and Haryana Discoms requested three weeks time to file detailed response to the petition.

11. The Commission observed that the issue of maintainability is required to be decided first before going into the merit of the petition. Accordingly, Commission directed to issue notice to the respondents, who shall file their replies to the petition within three weeks from the date of submission of petition and the petitioner may file its rejoinder within one week thereafter.

12. The petition shall be listed for hearing on 28.8.2012 on the question of maintainability.

**By the order of the Commission,  
SD/-  
(T. Rout)  
Joint Chief (Law)**