

**CENTRAL ELECTRICITY REGULATORY COMMISSION,
NEW DELHI**

Petition No.159/MP/2012

Sub: Petition 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.

Coram: Shri Gireesh B.Pradhan, Chairperson
Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member
Shri A.K. Singhal, Member

Date of Hearing: 1.11.2013

Petitioner : Coastal Gujarat Power Limited

Respondents: Gujarat Urja Vikas Nigam Limited and Others.

Parties present: Shri Amit Kapur, Advocate for the Petitioner
Shri Apoorva Misra, Advocate for the Petitioner
Shri Abhishek Munot, Advocate for the Petitioner
Shri Kunal Kaul, Advocate for the Petitioner
Shri K. K. Sharma, CGPL
Shri Bijay Mohanty, CGPL
Shri R. Subramanyan, CGPL
Shri Pragya Gupta, CGPL
Shri Sandeep Somisetty, CGPL
Shri M.G Ramchandran, Advocate for Gujarat, Rajasthan and Haryana
Ms. Anushree Bhandari, Advocate, Gujarat, Rajasthan and Haryana
Ms. Apoorva Saighal, Advocate, Gujarat, Rajasthan and Haryana
Shri P.K.Jani, GUVNL
Shri K.P.Jangid, GUVNL
Shri V.K.Gupta, JVVNL
Shri Dinesh Singh, JVVNL
Shri Anand Ganeshan, Advocate for PSPSCL
Ms. Swaparna Seshadri, Advocate, PSPCL
Shri Padamjit Singh, PSPCL
Shri Lakhvinder Singh, PSPCL

Ms. Teena Sharma, PSPCL
Ms. Ashwini Chitnis, Prayas
Shri Shantanu Dixit, Prayas
Shri Samir Malik, Advocate, MSEDCL
Shri Varun Pathank, Advocate, MSEDCL
Shri Pushpendra Surna
Shri SalimInamdar, Advocate for the Applicant for Impleadment

Record of Proceedings

Learned counsel for MSEDCL submitted that a letter dated 8.10.2013 was circulated on behalf of MSEDCL seeking 90 days' time to file response to the Committee Report as the approval of the Committee Report from the State Government is still awaited. In response, to the said submission, staff of the Commission as well as the counsel for the petitioner pointed out that no such letter has been received by them. The Commission observed that when the representative of the State Government had participated in the proceedings of the Committee then there is no reason why such long time is being taken. The Commission directed the staff to issue notice to MSEDCL to provide its comments on the Committee Report.

2. Learned counsel appearing for Shri Pushpendra Surana submitted that his client is a Chartered Accountant by profession and a public spirited person and has filed IA No. 36 of 2013 seeking impleadment in the present matter in order to safeguard interest of consumers as the applicant is a consumer of electricity and will be impacted by any order that will be passed in the present matter. Learned counsel for the applicant requested the Commission to issue similar direction as issued in Petition No. 155/MP/2013. In response, learned counsel for the petitioner objected to this and pointed out that in the present case Prayas is involved from very beginning and has been representing the consumer interest. The Commission directed the petitioner to supply copy of the petition to the applicant immediately. The Commission directed that the applicant would be given an opportunity of hearing if the applicant or its counsel is present during the hearing after completion of the arguments of the petitioner and the respondents.

3. Learned counsel for the petitioner commenced his submissions and submitted that the basis on which the bid was submitted has been wiped out due to the Promulgation of the Indonesian Regulations and unprecedented increase in the prices of coal. Learned counsel submitted that if the relief is not granted to the

petitioner, the petitioner will not be able to service its debts and will be forced to wind up its business and resultantly will not be able to generate and provide electricity to the Respondents. Learned counsel further submitted that the cost for the Respondents for taking power from any alternative source for one year is to the tune of ₹ 11131.34 crore. In that regard, the Commission desired to know the approximate cost estimate in case the electricity is generated using domestic coal. In response, learned counsel submitted that in the instant case, the bid was based on the generation of electricity on the basis of the imported coal and there was no element of domestic coal involved. This case is different from the case of Adani Power Limited which was based on the generation of electricity on domestic coal and was subsequently changed to the generation of electricity on imported coal. Learned counsel also submitted that all these aspects have already been explained by the petitioner during hearings conducted before this Commission prior to the passing of the order dated 15.4.2013.

4. The Commission desired to know the meaning of the term 'hardship' in the context of the order dated 15.4.2013 and from when the 'hardship' has started on the petitioner. In response, learned counsel for the petitioner referred to Para Nos. 71, 80 and 84 of the order dated 15.4.2013 and submitted that the hardship in the context of the present case refers to the hardship caused to the petitioner due to the change in the price of coal, due to the Promulgation of the Indonesian Regulations and unprecedented increase in the price of coal. The hardship on the petitioner has started from the date of SCOD i.e. 7.3.2013.

5. Learned counsel for the petitioner submitted that in pursuance to the order of the Commission dated 15.4.2013, the Committee has given its report and the respondents have filed their replies. Learned Counsel discussed the various issues raised by the respondents. Learned counsel submitted that the respondents contention that the date of final order of this Commission should be the date of applicability of compensatory tariff has no basis. Learned counsel submitted that the petitioner's prayers are two fold – the petitioner's first prayer deals with the payment of compensatory tariff for the past losses and the second prayer deals with the payment of compensatory tariff for the future losses. The payment of compensatory tariff is due to the hardship caused due to the promulgation of Indonesian Regulations and due to unprecedented escalation in the price of the coal. The Commission has, in its order dated 15.4.2013 recognised the hardship caused due to the the promulgation of the Indonesian Regulations and unprecedented increase in price of coal and held that a mechanism should be devised to overcome the

hardship. Thus, the intent of the order dated 15.4.2013 is clear that the compensatory tariff should be payable from the date on which the hardship was caused and not from the date of the order passed by this Commission. Learned counsel submitted that it is a settled position of law that the compensation is to be paid from the date of cause of action and relied upon the following judgements:

- (i) N. Narasimhaiah and Others Vs State of Karnataka and Others[(1996)3SCC 88];
- (ii) Asst. Collector of Customs Vs. Associated Forest Products Ltd. [(2000) 9 SCC 258];
- (iii) Shriram Fertilizers and Chemicals Vs UoI [(2005)BC 287];
- (iv) DCM Shriram Consolidated Ltd. VsUoI [(2005) ACC 371];
- (iv) DCM Shriram Consolidated Ltd. VsUoI [(2005) ACC 371];
- (v) Lebeaupin v. Richard Crispin and Company [1920 King's Bench Division714];
- (vi) Oil and Natural Gas Corporation Ltd v. Oil Country Tubular Limited [2011 vol. 113 (3) Bom. L.R. 1417].

6. Learned counsel for the petitioner submitted that in the present case, the cause of action has arisen from 7.3.2012 i.e., SCOD - the date when the petitioner commenced supply of electricity on commercial basis to the Respondents.

7. The Commission asked the petitioner to confirm if it was known to the petitioner at the time of submission of bid that the Indonesian Government was proposing to pass a law by which the coal would be sold only at a price which was not less than the International Benchmark Price. In response, learned counsel for the petitioner submitted that sourcing fuel from overseas brings along with it the inherent factum of sovereign governments changing their laws and regulatory regime governing their own fuel/coal during the life-cycle of the project. In the present case, Indonesian Government changed their legal framework, in place since 1967, which permitted long term bilateral supply contracts with fixed quantity and price. The Indonesian Regulation which came into effect in September 2011 now requires the price of Indonesian coal to be based on Benchmark Price aligned with the international price, altered every month by the Government, and which overrode all pre-existing contracts. Unfortunately, this change came in a regime in place since 1967 within 3 years of signing the PPA when substantial investments had been made. Learned counsel further submitted that there were speculations regarding the change of law, however, the petitioner had no reason to believe that there would be a change in the regulatory regime in Indonesia which would have a major impact on its project.

8. With respect to the second issue, Learned counsel for the petitioner submitted that the suggestions raised by the procurers relating to price of coal on FOB basis is not in line with the final order dated 15.4.2013 passed by this Commission where the Commission had observed that the basis on which the bid was submitted has been wiped out and the petitioner should be compensated for the increase in the price of the coal, otherwise the PPA will become frustrated. The suggestion of the procurers was considered by the Committee appointed pursuant to the directions of this Commission and was rejected due to the reasons mentioned in the Committee Report.

9. With respect to the objection of the Respondents relating to technical parameters used by the Committee in its report, Learned counsel for the petitioner submitted that the technical parameters were suggested by the Technical Consultant and norms recommended by the Technical Consultant are more stringent than the norms prescribed by CERC. Learned counsel further submitted that the petitioner has considered steam driven boiler feed pump at the time of bidding and the assumptions relating to technical parameters were based on that design. However, post bidding, the Motor Driven Boiler Feed Pump was used to fulfill its commitment under the PPA. Thus, the technical parameter had to be changed due to the change in the design and engineering of the Power Plant. The revised technical parameter was devised in such a manner that the cost of generation of electricity is reduced. This was also confirmed by the technical consultant.

10. With respect to objection relating sharing of profits from mines, learned counsel for the petitioner submitted that the suggestion of the procurers is incorrect as Tata Power only has 30 percent equity investment in the Indonesian Coal Mining Companies and consequently its share of profit in dividend and profit is limited to 30 percent. Learned counsel submitted that in para 86 of the final order dated 15.4.2013, this Commission has clearly stated that the Compensatory Tariff has to be adjusted keeping in mind the profits earned by Tata Power from sale of coal to the petitioner for Mundra UMPP. Since the issue has already been settled, it is binding on the Respondents and cannot be re-agitated as it will be against the principle of *res-judicata*. Learned counsel relied on the following judgment in this regard:

- (i) Ajay Mohan v. H.N. Rai [(2008) 2 SCC 507];

- (ii) C.V. Rajendran v. N.M. MuhammedKunhi [(2002) 7 SCC 447];
- (iii) IshwarDutt v. Collector (LA) [(2005) 7 SCC 190];
- (iv) Bhanu Kumar Jain v. Archana Kumar [(2005) 1 SCC 787].

11. With respect to the fifth issue relating to sale above 80%, learned counsel for the petitioner submitted that the petitioner is in principle agreeable to sharing of profits equally by selling the electricity to a third party. Learned counsel further submitted that since the Respondents have taken different stand, this Commission may take a final decision in this regard.

12. The Commission directed learned counsel to explain if the order dated 15.4.2013 would impact all the PPA's executed on cost plus basis. In response, learned counsel for the petitioner submitted that *per se* the order dated 15.4.2013 will not be applicable on all the PPA's which are executed on cost plus basis. However, the prudential value of this order will have to be separately analysed on case to case basis, keeping in view of the factual background of those cases.

13. With respect to issue raised by Rajasthan that the petitioner should not be given compensatory tariff for escalation upto 10.46%, learned counsel for the petitioner submitted that the petitioner has not accounted for an escalation of 7% p.a. over and above historical escalation rate while quoting the bid i.e. escalation of 10.46% p.a. is not embedded in the bid tariff. The petitioner had while working out its bid tested the scenario where there is an escalation in the price of coal by 7% p.a. as against the historical escalation of 3.46% p.a. and found that project will still be commercially viable. However, this has been wiped out after the promulgation of the Indonesian Regulations.

14. With respect to the additional issues raised by Gujarat suggesting directions to be issued by this Commission to Government of India for reduction in taxes and allocation of coal mine in India and direction to the lenders for reducing the interest rate and increasing the tenor of the loan, learned counsel for the petitioner submitted that the petitioner has no objection if such directions were issued by the Commission. Learned counsel in detail explained the Committee finding with respect to this issue.

15. With respect to the recommendation of GUVNL regarding conducting a new competitive bid to discover competitive tariff, learned counsel for the petitioner submitted that the Committee had considered this and concluded that the bidding process is a long drawn process and moreover the estimated total tariff (including

compensatory tariff) would be much lower than the bid out tariff which is clearly evident from the recent bids conducted by Rajasthan, Uttar Pradesh and Tamil Nadu. This was considered by the Committee and was rejected.

16. With respect to the recommendation of GUVNL regarding high O&M expenses, learned counsel for the petitioner submitted that the Committee has considered it and has recommended that the same is not commercially feasible at present due to the additional expenses on account of higher transportation and fuel handling cost over and above higher O&M cost.

17. Learned counsel for the petitioner submitted that Prayas cannot address the question of composition of the Committee in the present proceedings which are only for the implementation of the Committee Report. The composition of the Committee was provided in the final order dated 15.4.2013 and the Committee was constituted in accordance with the directions issued by this Commission, therefore the same cannot be questioned in these proceedings. Learned counsel also pointed out that certain observations made by Prayas are not factually correct such as the observation that the recommendations are not acceptable to all the procurers and therefore cannot be relied upon by this Commission. Learned counsel also pointed out the calculations errors made by Prayas which led to make incorrect observations in their written submissions.

18. The representative of Prayas gave a power point presentation reiterating their submissions as made in their written submissions dated 10.10.2013. The representative of Prayas pointed out that there are serious shortcomings in the methodology, analysis, perspective and approach followed by the Committee. The representative of Prayas concluded her arguments by suggesting the following for consideration of the Commission:

- (i) There should be independent evaluation of the need and extent of the compensatory tariff to be allowed to the petitioner;
- (ii) If the compensatory tariff is to be payable to the petitioner, the payment of compensatory tariff should be such that it should not take away the commercial risk to be borne by the bidder and it should protect the interest of the consumers by imposing equitable sharing of incremental burden on all the stakeholders, and not just only on the consumers;

- (iii) This should not be set as a precedent for revising the competitively discovered tariff;
- (iv) Some general principles should be laid down by the Commission in such cases;
- (v) Public process should be concluded before any decision is taken by this Commission.

19. After hearing the representative of Prayas at length, the Commission directed Prayas to file a copy of the presentation before the Commission and also provide a copy of the same to all the parties to the present petition.

20. Learned counsel for Rajasthan, Haryana and Gujarat stated that an appeal has been filed by Haryana against the final order dated 15.4.2013 in the Hon'ble Appellate Tribunal for Electricity on the limited ground of ability of the Commission to grant compensatory tariff under its regulatory power as provided in Section 79 of the Electricity Act. Despite that, Haryana participated in the process to arrive at the compensatory tariff for the petitioner. Learned counsel stated that the Committee Report has not been signed either by the Respondents or by the petitioner and therefore the recommendations in the Committee Report have not been jointly agreed between the petitioner and the Respondents, which was the mandate of the final order dated 15.4.2013. The scope of the final order dated 15.4.2013 was limited to find out a solution which is acceptable to all the parties. Since, the solution is not acceptable, the payment of compensatory tariff would amount to renegotiation of the tariff. Learned counsel submitted that PSPCL has not accepted the recommendations of the Committee. Since all the Respondents are to be treated equally no additional benefit should be given to PSPCL.

21. Learned counsel for Rajasthan, Haryana and Gujarat reiterated its submissions made in the affidavit filed before this Commission and stated that no compensation should be payable to the petitioner for escalation up to 10.46% as it would not have a serious impact on the viability of the project. Learned counsel further stated that the petition was filed on the premises that there was increase in the price of coal, and since the same does not exist now, no hardship exist and no compensation is payable to the petitioner. Learned counsel further submitted that 100% profit earned on coal tied-up for Mundra Power Project, should be used to offset the compensatory tariff. He pointed out that this is not related to adjustment of

legal rights. He further stated that the Committee recommendation cannot be relied upon as it has failed to take into account the capital appreciation while giving its recommendation. With respect to technical parameters, Learned counsel pointed out that the Committee could not have changed the technical parameters decided in the bid documents. In this regard, the Commission directed Learned counsel to share a note on the change in technical parameters.

22. Learned counsel appearing on behalf of PSPCL submitted that PSPCL has filed its affidavit before the Commission.

23. Due to the paucity of time, the Commission adjourned the matter till the next date of hearing. The Commission directed staff to issue notice to MSEDCL to file its reply and appear before the Commission through advocate or its authorised representative.

24. The petition is listed for further hearing on 8.11.2013.

By order of the Commission

Sd/-

(T Rout)
Chief (Law)