

**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.

**Coram
Dr. Pramod Deo, Chairperson
Shri S.Jayaraman, Member
Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member**

Date of Hearing 12.2.2013

Petitioner Adani Power Limited

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

Present:

Shri Amit Kapur, Advocate, APL
Ms Poonam, Advocate, APL
Shri Gautam Shahi, Advocate, APL
Ms Shruti Sabharwal, Advocate, APL
Shri Jatin Jalundhwala, APL
Shri Malav Deliwala, APL
Shri Kandrap Patel, APL
Shri Paritosh, APL
Shri Sandeep Somsetty, APL
Shri M G Ramachandaran, Advocate, UHBVN/DHBN and GUVNL
Ms Swapna Seshadari, Advocate, UHBVN/DHBN and GUVNL
Shri V K Agarwal, UHBVN
Shri A K Prashar, UHBVN
Shri P J Jani, GUVNL

Shri M G Ramachandaran, learned counsel for the respondents placed the following documents before the Commission during the course of hearing, namely:

- (i) Write-up regarding working out of landed cost of fuel,
- (ii) Copy of the judgment dated 7.1.2013 in Petition No 1210/2012 by the Gujarat Electricity Regulatory Commission (State Commission), and

- (iii) Extracts from certain judgments referred to by him in the course of his arguments.

2. Taking his arguments further learned counsel for the respondents made the following submissions:

- (a) The petitioner took parallel proceeding before the State Commission for giving effect to the changes in law on account of levy of additional duties/taxes by filing a petition (No 1210/2012) before the State Commission which in its order dated 7.1.2013 held that it had the jurisdiction in the matter.
- (b) Based on the formula given in this Commission's tariff regulations for the tariff period 2009-14 for working out energy charge, and considering the parameters for gross station heat rate, auxiliary energy consumption, gross calorific value of fuel as per the State Commission's order dated 7.1.2013 the landed price of primary fuel (coal) by back calculations works out to ₹3.041/Kg.
- (c) On conversion of landed price of coal of ₹3.041/Kg into cost in \$/tonne at the exchange rate of ₹45/USD as applicable on the time of bidding and based on energy charge of ₹1.345/kWh as considered by the petitioner for the bid dated 2.1.2007 submitted to GUVNL, the coal price works out to \$67.6/tonne with coal of GCV of 5200 Kcal. After adjusting the freight and other incidental charges at the rate of \$12/tonne, the rate is equivalent to the rate of \$51/tonne (CIF). In case of Haryana bid dated 24.11.2007, the energy charge was ₹1.900/kWh, and accordingly landed cost of coal works out to \$95.5/tonne and after adjusting freight and other incidental charges of \$12/tonne, the landed price of coal come to about \$83/tonne (CIF) for coal with GCV of 5200 Kcal.
- (d) For coal of GCV less than 5200 Kcal, the landed cost steadily reduces and for coal with GCV of 4300 Kcal the landed price works out to \$55.9/tonne and \$78.9/tonne for the energy charge of ₹1.345/kWh and ₹1.900/kWh respectively bid by the petitioner for GUVNL and Haryana utilities.
- (e) For almost all grades of coal the current prices come to the same level as in Jan 2010 after indexation with reference to coal prices/price indices published by Indonesian Government up to January 2013.
- (f) The petitioner can use coal of lower GCV instead of coal with GCV of 5200 Kcal and thereby reduce energy charge.
- (g) The exchange rate of ₹55/USD considered in the petition has nothing to do with promulgation of Indonesian Regulation as FERV risk is of the petitioner who must have factored it in the bids made.
- (h) The petitioner has not placed correct material but has merely stated that the minimum coal price is \$91/tonne and the maximum coal price is \$102/tonne.

- (i) The petitioner quoted the levelised variable charge of ₹1.3495/kWh for entire 25 years though the bid document gave it an opportunity to provide for formula escalation for aligning the energy charge to market forces and the bids given by other bidders such as CGPL. Reliance Power etc quoted escalable energy charge.
- (j) The petitioner quoted levelised tariff of ₹2.3495/kWh for Gujarat bid dated 2.1.2007 with a view to edging out competition.
- (k) In the bid dated 24.11.2007 submitted to Haryana the petitioner quoted the levelised tariff of ₹2.89/kWh, much more than the levelised tariff of ₹2.3495/kWh for Gujarat bid and sought to earn a windfall.
- (l) Although the tariff policy, competitive bidding guidelines, etc provide that all factors should be taken into account for enabling the investment in the generation sector, but these factors should be taken into consideration at the stage of the bidding, and not after the selection process is over.
- (m) No relief can be given in exercise of regulatory of power as it is not contemplated under Section 63 as the risk allocation under Section 62 is different where tariff is fixed by the Commission.
- (n) The tariff based competitive bidding is not new to the electricity sector as the Ministry of Power notification dated 30.3.1992 contemplated a tariff based competitive bidding.
- (o) The judgement in Aluminium Company of America relied by the petitioner lays down that the mutual mistake by the parties can be ground for review of price, but there is no such allegation of any mutual mistake between the parties in the present case.
- (p) The judgments on the subject consistently point out that performance of a contract becoming onerous is not a *Force Majeure* as *Force Majeure* is something which completely prevents or unduly delays performance of obligations as contemplated in Article 12 of the PPAs.
- (q) When Haryana bid was submitted there was no commitment by CIL for supply of coal. The Letter of Assurance issued by CIL in favour of the petitioner was subsequent to submission of the bid. The bid was submitted based MoU with KOWA company but no price was mentioned in the MoU. Thus the claim that the bid was made on assumption that indigenous coal would be available is not correct.
- (r) The petitioner has an obligation to supply 1100-1200 MW, 80% of the contracted quantity, to Haryana and if coal is made available from CIL for 70% of installed capacity it will be sufficient for supply of 1100-1200 MW at the price charged by CIL which is not subject matter of *Force Majeure*.

(s) In the presentation made by Mercados, the consultant engaged by the petitioner mentioned that the transmission charges of 35 paise/kWh or so from Mundra to Mohindergarh were included into the energy charge. However, there is no existing document to show that the transmission charges were a part of energy charge. Therefore, to say that energy charge includes transmission charges of 35 paise/kWh or so is a wrong.

3. Learned counsel submitted that he would file the written submissions on behalf of the respondents.

4. Shri Amit Kapur in his oral rejoinder to the submissions made by learned counsel for the respondents submitted as under:

(a) The petitioner has sought relief by invoking provision of the Electricity Act read with National Electricity Policy, tariff policy and competitive bidding guidelines as well as the PPAs.

(b) The Commission is a creation of statute vested with plenary regulatory jurisdiction over subject matter assigned to it in terms of Sections 79, 61, 62 and 63 of the Electricity Act

(c) The fuel related crisis have been caused by unforeseen and uncontrollable circumstances which have destroyed the financial equilibrium of the project. The crisi situation has been caused because of the following:

(i) Non-grant by GMDC of the previously assured Morga coal mine linkage for 100% capacity required by units 5 and 6 of the Mundra power plant for supply of power to Gujarat as the bid price was premised on supply from Morga coal mine.

(ii) At the instance of GUVNL, GERC by its order dated 31.08.2010 directed the petitioner to specifically perform the PPA based on imported coal. The order of GERC was upheld by the Appellate Tribunal in the judgment dated 7.9.2011 in Appeal No 184/2010. Thus supply from GMDC was substituted by imported coal and therefore the price impact on account of increase in price of imported coal automatically comes.

(iii) The petitioner did not quote escalable energy charge because of the Letter of Assurance by GMDC and therefore the petitioner did not have to factor international prices.

(iv) Shortfalls in domestic coal supply by CIL and changes in domestic coal linkage policy overlap with the period of bidding and implementation of the two PPAs.

(v) In case of Haryana PPA it has altered the bid premise from 70-30, 70% domestic and 30% imported, which due to current shortfall can deplete to 20% of domestic coal supply.

- (vi) The unforeseen change has occurred in the legal framework governing Indonesian coal industry such that the regime that had permitted long term bilateral coal supply contracts to hedge price and quantity since 1967 stood substituted by Indonesian Regulation with effect from 24.9.2011.
- (d) There has been a sudden and unforeseen spike in international coal price due to sharp rise in demand by countries like China and India but still supply of coal from Indonesia remains the cheapest source of imported coal for India by a margin of 30% in FOB price and besides being closer than Australia and South Africa has less implication in fuel transportation etc.
- (e) If the above situation is not addressed through grant of suitable adjustments in the tariff structure given in the PPAs it would be commercially impracticable to implement since it is bound to result in bankruptcy of the petitioner within next couple of years.
- (f) PPA defines *Force Majeure* to cover any event or circumstance which could not be reasonably foreseen and which is beyond the control of the seller. The circumstances giving rise to the present petition are not excluded but are included through double negative. Change in supply of domestic coal policy by CIL and prohibition introduced by Govt of Indonesia are circumstances beyond the control of petitioner and constitute *Force Majeure* under Article 12 as these factors have substantially increased the generation cost making it commercially impracticable for the petitioner to supply power at the quoted rates.
- (g) Exclusion of coal price from *Force Majeure* in Article 12.4 is related to normal increase or decrease in price due to market forces and not because of *Force Majeure* event.
- (h) Definition of 'Law' given in the PPAs covers all laws by design and not by chance.
- (i) The principles of interpretation of documents and contracts as culled out from the judgments relied upon by the petitioner and their implications in instant case are that
 - (i) Whenever a commercial contract has to be implemented it has to be implemented in a manner that it is actually commercially efficacious.
 - (ii) The documents which are intrinsic to the same transaction are to be considered to find out the correct interpretation. The FSAs, which have been accepted as a part of the project documents and were required to be submitted to the respondents as a condition subsequent to be dealt in a manner that becomes a binding part of the transaction cannot be overlooked while interpreting the contract.

- (iii) Whenever something is expressly mentioned the other things must be taken to have been deliberately omitted. Further, the words that follow 'including' cannot ever restrict the wider term used before including. These principles must be applied in interpreting the definition of the expressions 'law' and 'change in law' used in the PPAs do not qualify or limit to Indian law and is distinct from the expression 'Governing Law' used in Article 17 which limits it to Indian laws.
- (iv) The doctrine of contra preferendum provides that if there is an ambiguous term it must be construed against the party that imposed its inclusion in the contract. The interpretation will therefore favour the party that did not insist on its inclusion. In the case on hand the PPAs were the standard bidding document issued by the procurers after approval by the concerned State Commissions and thus the provisions have to be read against them and in favour of the petitioner.
- (j) The FSA dated 8.12.2006 based on which some arguments have been made relates to units 1-4 of Mundra power plant and is not concerned with units 5 to 9.
- (k) The respondent's argument that the petitioner made a windfall gain in Bid 1 ignores the fact that in Bid 1 the technology is sub-critical, which is less efficient and higher auxiliary consumption.
- (l) The petitioner quoted tariff in the bids in 2007, Indonesian Regulation was not in force.
- (m) The letter dated 8.6.2012 from the Indian High Commission in Indonesia clearly recounted that since 1967 the law permitted long term contracts on bilateral basis, The petitioner had an assured understanding of a particular commercial arrangement and predicated his bids on a long term contract where there was no third party interference. Then the law was changed. The Indonesian Regulation has interceded and changed the scenario of coal supply, a factor which is beyond the control of the petitioner.
- (n) The role of the regulators is wider than that of a court of law
- (o) The Twelfth Five-Year plan contemplates addition of 88000 MW of which 50% must come from private sector. In this type of regime it will be difficult to get investment.
- (p) In calculating the landed cost of coal the respondents have assumed freight charges of \$10-12/tonne. However, freight is not the only cost to be added to CIF cost. The generator has to incur inland transport charges, LC charges and others as stated in the note circulated.

- (q) In their calculations of landed cost of coal the respondents have relied upon on Indonesian Coal Index when stipulation is HBA.
 - (r) Paras 4.7 and 5.17 of the bidding guidelines provide for tariff adjustments during the life of the project by this Commission.
 - (s) In broad guidelines the courts agree that the doctrine of impracticability and frustration resemble the doctrine of mistake. All the three doctrines discharge an obligor from duty to perform the contract where a failure of basic assumption of the parties produces a grave failure of equivalence of value in the exchange of the parties. Doctrine of impracticability requires that the non-occurrence of the event or the non-existence of the fact causing the impracticability be a basic assumption on which the contract is made. Doctrine of frustration of purpose similarly rests on the same non-occurrence or non-existence basis of assumption.
 - (t) The petitioner's assumption that GMDC will honor its commitment, GMDC being company of Govt of Gujarat. Several letters on record where Govt of Gujarat and GUVNL themselves write to GMDC for allocation of mines.
 - (u) The commercial principles of generation is that the generator must recover the cost and a bit more.
5. The Commission granted liberty to the parties to file their written submissions within two weeks.
6. Subject to above, the Commission reserved order on the petition.

By Order of the Commission

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Jt. Chief (Law)