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 7.2.2013

Petitioner Adani Power Limited

Respondents 1.Uttar Haryana Bijli Vitran Nigam Limited, Panchkula
2.Dakshin Haryana Bijili Vitran Nigam Limited, Panchkula
3.Gujarat Urja Vikas Nigam Limited, Vadodara

Present:

Shri Amit Kapoor, Advocate, APL
Shri Nankani, Advocate, APL
Shri M G Ramachandaran, Advocate, Haryana Utilities and GUVNL

RECORD OF PROCEEDINGS

Continuing his arguments from the previous day's hearing, Shri Amit Kapoor, learned counsel made the following submissions:

(a) Clause (b) of sub-section (1) of Section 79 empowers the Commission to 'regulate' the tariff of generating companies not owned or controlled by the Central Government if such generating companies have entered into or otherwise have a composite scheme for generation and sale of electricity in more than one State. By virtue of this power to regulate, the Commission has the power to determine, adjust tariffs as the 'power to regulate' includes power to adjust, order or govern by rule, method, or established mode; to adjust or control by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule, to control, govern, or direct by rules or regulations.

(b) Power to regulate includes within itself the power to regulate either by increasing the rate or decreasing the rate, the test being that it is necessary or expedient to be done to maintain, increase or secure supply of essential articles at fair prices.

(c) The word 'regulate' used in Section 79 is comprehensive and extends to changing and revision, of tariff or correction of tariff which may include tariff adopted under 63 or determined under 62 in the light of principles contained in Section 61.

(d) While explaining the meaning of 'power to regulate', the following judgments were relied upon:

(i) PTC India Ltd Vs CERC (2010) 4 SCC 603

(ii) U P Power Corporation Ltd Vs NTPC (2009) 6 SCC 235

(iii) State of UP Vs Hindustan aluminium Corporation (1979) 3 SCC 229

(e) The Appellate Tribunal in its judgement dated 23.4.2012 in Patikari case has held that the Regulatory Commission can review the already concluded PPA in accordance with its regulations.

(f) The International Institute for Unification of Private Law to whose statute India is a signatory, recognises the principle that hardship as the basis for renegotiation or termination of long-term contract. Article 51 of the Constitution of India provides in the directive principles of the State policy that the State shall endeavour to maintain just and honourable relations between nations and to foster interest for international law and treaty obligations in dealings. Therefore, the aforesaid principle be kept in mind while interpreting contracts having international ramifications. The PPAs will have to be interpreted in a manner to serve the interest of the public at large, that is, the supply be secured to meet the demand.

(g) Constitution of India is based on the principle of separation of powers of legislature, executive and judiciary. The PTC case recognises that the Commission aggregates all these three powers.

(h) The statutory framework governing tariff envisages and contemplates the role of the Appropriate Commission even if the tariff is determined by competitive bidding.

(i) The definition of 'law' given in the PPAs is "in relation to this agreement".

(j) It was one of the conditions of the PPA with Haryana that the petitioner would have executed the FSA, which is the part of project documents, and provided copies of the same to the respondents, unless it is affected due to the respondents' failure to comply with certain obligations, or by any *Force*

Majeure event or any of the activities specifically waived by the respondents. The respondents neither insisted on performance of this condition nor waived nor terminated the PPA even though the FSA is intrinsic to the PPA. GERC in its order dated 31.8.2010 in Petition No 1000/2010 filed by GUVNL against termination of the PPA by the petitioner for reason of non-materialisation of coal supply from Morga mines, at the instance of GUVNL took cognisance of the FSA dated 24.3.2008 signed by the petitioner with Adani Enterprises Limited. The order of GERC was upheld by the Appellate Tribunal. Therefore, GUVNL by acquiescence has accepted that there is a fuel supply agreement and cannot now change its position, particularly so when, as held by the Appellate Tribunal, the petitioner had an obligation to explore other source of indigenous or imported coal so that its contractual obligations could be fulfilled in light of the fact that the PPA was not dependant on supply of fuel to project from any identified process.

(k) The following settled principles are relevant for decision in the matter:

(i) The regulatory jurisdiction entrusted under the statute cannot be abridged, reduced or taken away by a contract or the PPA.

(ii) Section 63 is only an exception and overrides 62, it does not eclipse or alter the tariff principles under 61 as also the regulatory powers under 79 which power is cast as an obligatory function, to be exercised to attain the objectives of the statute and principles under 61.

(iii) The regulatory jurisdiction is not excluded for the entire life cycle of a generating company covered by section 63.

(iv) Section 79 is independent of Sections 62 and 63, and the ambit of Section 79 is much wider.

(l) The competitive bidding guidelines and the PPA are to be read consistent with Section 61 and not contrary to it because at places there are ambiguities as the Parliament chose to set certain principles that guide all determination of tariff, whether under Section 62 or Section 63.

(m) Determination of tariff under Section 63 is when after the successful completion of the bidding process the parties approach the Commission for adoption of tariff because at this stage the Commission needs to verify that the bidding guidelines have been satisfied.

(n) The bid documents and the PPA envisage the role of the Commission and this takes away the argument that the tariff determined under Section 63 is outside the Commission's jurisdiction.

(o) The principle of law is that exclusion of jurisdiction must be express.

(p) Supreme Court has held that for tariff determination the only authority in the country in electricity is the Regulatory Commission concerned.

(q) The objective of the Electricity Act, The National electricity Policy and the tariff policy is to ensure financial viability of the sector. Any circumstance such as subsequent events, as in present case, which have the effect on negating the objective of the law and policy manifested in the intention of the Government must be neutralized to ensure economic stability.

(r) In the present scenario due to Governmental restrictions under Indonesian law there has been an unimaginable increase in coal price destroying the very foundation of the PPAs and have undergone major and substantial changes. Consequently, the petitioner cannot continue to supply power at the existing tariff.

(s) In the facts and circumstances of present case, the terms and provisions of the Contract Act once the contract becomes commercially impracticable for implementation under 56 the same because unenforceable in law.

(t) The interpretation of word 'impossible' used in Section 56 of the Contract Act has not been restricted to physical impossibility and has been expanded to commercial impossibility by the Supreme Court. In this context the following is noteworthy:

(i) Even the performance of acts which may be possible but impracticable commercially and materially affecting the performance of the contract itself would be liable to be held void under the doctrine of frustration.

(ii) An untoward event or change of circumstances which completely upsets the foundation of the bargain can make it impossible for a promisor to act on his promise.

(iii) The impossibility of performance should be inferred from the nature of the contract and surrounding circumstances when parties entered in to the contract.

2. Learned counsel made submissions on the following aspects based on 'Note for Hearing' placed before the Commission at the hearing on 6.2.2013 and therefore the detailed submissions have not been incorporated herein.

(a) Principles for interpretation of contracts,

(b) Change in Law (Article 13 of the PPAs),

(c) Frustration of Contracts (Sections 32 and 56 of the Contract Act)

(d) Sustainability of Operations under PPA, and

(e) Applicability of *Force Majeure* (Article 12 of the PPAs).

3. Learned counsel also referred to the following publications:

(a) The Interpretation of Contracts

Author: Sir Kin Lewison

(b) "Granting and Renegotiating Infrastructure Concessions"

Author: J Luis Gausche – World Bank Institute

(c) The relationship between regulation and contracts in infrastructure industries: Regulation as ordered renegotiation.

Author: Jon Stern, Centre for Competition and Regulatory Policy, Department of Economics, City University, London, UK.

4. Learned counsel for the respondents made the following submissions in reply to the submissions of the learned counsel of the petitioner:

(a) First and foremost issue to be considered is whether there is *Force Majeure* condition. There is no *Force Majeure* condition since increase in price does not impact the performance of the contract. The price increase by virtue of Indonesian regulation does not prevent the petitioner from generation of electricity but makes performance of the obligations under the PPAs more onerous. This does not amount to *Force Majeure* condition. Under the PPA, change in price is an exclusion from the *Force Majeure* condition. Article 12.4 of the PPAs cannot be invoked unless Article 12.2 is satisfied

(b) The definition of 'law' given under the PPA does not include the laws of a foreign country. To read into the definition the foreign laws will lead to absurd results. Therefore, under Article 13 (Change in Law) benefit is available for change of Indian law.

(c) Under clause (b) of sub-section (1) of Section 79 the Commission has only the regulatory power and the adjudicatory power is conferred under clause (f) of sub-section (1). When a contracting party claims the consequences of *Force Majeure* or change in law as per PPA, it does not require exercise of regulatory jurisdiction under clause (b) of sub-section (1). If there is any dispute between the parties on the interpretation, application, implementation of the PPA that would come to the Commission for adjudication as contemplated under the PPAs.

(d) As far as the procurer is concerned the bid was neutral irrespective of source of supply of coal as the bid was tariff-based so long the electricity is supplied. Only condition subsequent was to supply a copy of the FSA. The concept is that if FSA is not entered into the project developer might not proceed with the project.

(e) In the bid it was mentioned that the indigenous coal requirement was tied up with GMDC from Morga coal block and also with Coal Orbis Trading GMBH and Kowa Company Ltd under separate MoUs. As an alternative it

was mentioned that Mundra project site was being evaluated with blended/imported/washed coal.

(f) So far as Hayana bid is concerned, the petitioner had not indicated that any FSA was already in place. On the other hand against the relevant columns regarding arrangement for coal supply with CIL or whether coal supply was covered under APM, it was stated 'not applicable'.. Therefore the bid was not premised on the basis of 70% coal supply from India or domestic coal and 30% imported coal. In terms of the bid made by the petitioner, indigenous coal was to be used without connecting the supply to coal linkage.

(g) Adani Enterprises in the FSA dated 8.12.2006 had represented to the petitioner that the former had entered into arrangements for supply of coal from mines in the countries like Indonesia, South Africa and was in a position to meet the petitioner's requirement for a period of 15 years. The agreements and arrangements made by Adani Enterprises were more than one and not only one contract from Indonesia.

(h) Under the above FSA, CIF price for coal supplied effective for 5 years of the commercial operation date of the plant was agreed to be US $ 45 per tonne of the standard coal CIF and was to be referenced to GCV of 6000 Kcal. The CIF price was to remain firm for the first 5 years of the commercial operation and after the first 5 years commencing from commercial operation date it was to be indexed to an international index in a manner such that the value of such international index in the effective date is linked to the CIF price of US $ 45 per tonne. Thus it is assumed that the etitioner made a representation of 74% of Adani Enterprises shareholding in the Indonesian Coal Co, and Adani Enterprises may have got some concession at 30-45$ at that time because of 74% equity invested.

(i) This FSA was given to GUVNL along with bid No 1 which was for ₹2.89/kWh, against bid No 2, for ₹2.32/kWh and thus made a windfall in the second bid.

(j) Learned counsel argued that on the basis of backward calculation of energy charges it can be established that the difference between the quoted tariff calculated based on the coal price prevailing at the time of submission of bids and the tariff computed on current coal prices is very less and thus discounted the correctness of the petitioner' claim.

5. The Commission adjourned the hearing of the case to 12.2.2013.

By Order of the Commission

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Jt. Chief (Law)