

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

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

**Coram:**

**Shri Gireesh B. Pradhan, Chairman**

**Shri V.S.Verma, Member**

**Shri M. Deena Dayalan, Member**

**Shri A.K. Singhal, Member**

**Sub :** 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 : 30.10.2013

Petitioner : Adani Power Limited, Ahmedabad

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

Parties present : Shri Amit Kapoor, Advocate, APL  
Ms. Poonam Verma, Advocate, APL  
Shri Gaurav Dudeja, Advocate, APL  
Shri Malav Deliwala, APL  
Shri Jatin Janlundhwala, APL  
Shri Kandarp Patel, APL  
Shri Sashnak Kumar, APL  
Shri Anand Ganesan, Advocate, GUVNL  
Shri K.P.Jangid, GUVNL  
Shri K.P.Jani, GUVNL  
Shri Avineash Menon, Advocate, Haryana  
Ms. Anushree Badhan, Advocate  
Ms. Poorva Saigal, Advocate  
Shri Vikrant Saini, HPPC  
Shri Ravi Juneja, HPPC  
Shri S.Sarkar, SBI  
Shri Jayant Bhushan, Senior Advocate for the Applicant for impleadment  
Shri SalimInamdar, Advocate for the Applicant for Impleadment

## Record of Proceedings

Learned senior counsel appearing on behalf of the Applicant for impleadment submitted that the Commission's order dated 2.4.2013 was an interim order and it is open to the Commission to go into the all questions decided in the order dated 2.4.2013 including the question whether the tariff adopted through competitive bidding can be amended or not. The Commission after taking the *prima facie* view had formed a Committee to finally decide the issues. Therefore, Commission at this stage can take a different view than the view taken in the interim order dated 2.4.2013. Learned senior counsel also submitted that any order not disposing of the petition is an interim order.

2. In response, learned counsel for the petitioner submitted that final view has already been taken by the Commission in the order dated 2.4.2013 and the matter is at implementation stage now and the issues raised by learned senior counsel cannot be raised at this stage. Learned counsel for the petitioner submitted that the Commission in the said order had taken a conclusive view and not a prima-facie view. The Commission in the said order has taken a final view on the prayers of the petitioner and has decided that the petitioner needs to be compensated for the intervening period with a compensation package over and above the tariff discovered through the competitive bidding. He further submitted that no review has been filed by the applicant against the said order. The order dated 2.4.2013 is in the nature of preliminary decree and not interim order. He also submitted that the principle of *res-judicata* applies in the present case as the issues decided at an earlier stage cannot be allowed to be reagitated at a subsequent stage (implementation stage) in the same proceedings. Therefore, the question whether tariff adopted through competitive bidding can be amended or not cannot be raised by the Applicant at this stage as the same stands finally decided in the order dated 2.4.2013. At this stage, the Commission is only concerned with the implementation of the order dated 2.4.2013.

3. Learned counsel for the petitioner also submitted that the order dated 2.4.2013 was passed by the Commission after due participation of the individual consumers. First, Shri Amarsinh Chavda intervened in the present petition. However, on receiving all the relevant papers from the petitioner, was satisfied with the whole process and withdrew his application. One, Shri Prahlada Rao also participated in the present petition by filing its affidavit. Therefore, the statement of the learned senior counsel that there was no consumer representation before passing of the order dated 2.4.2013 is not correct.

4. Learned counsel for the petitioner referred to para 40 of the Judgment of Hon'ble Supreme Court passed in West Bengal Electricity Regulatory Commission Vs. CESC Ltd. [(2002) 8 SCC 715] and submitted that rights of hearing/representation of the consumers is neither indiscriminate nor unregulated and is regulated by the Regulations. Referring to Judgment of Hon'ble Supreme Court passed in Grid Corporation of Orissa Ltd. Vs. Gajendra Haldea [(2008) 13

SCC 414], learned counsel for the petitioner submitted that the Applicant being a resident of Ghaziabad, (U.P.) does not fall within the definition of consumer as per Section 2 (15) of the Electricity Act, 2003 and does not have any *locus standi* to widen the scope of the proceedings. He clarified that he is not making these submissions on the issue of as to what extent the Applicant can make submissions at this stage of fag end of the matter, even if he is impleaded.

5. Learned counsel for the petitioner submitted that as per the usual tariff determination procedure, the Commission refers the matter to the staff of the Commission, which looks into the figures and details of tariff. Similarly, in the present matter, this Commission had referred it to the Committee comprising financial and technical experts.

6. Learned senior counsel for the applicant for the impleadment submitted that the Commission in its ROP for the hearing dated 15.10.2013 has allowed the applicant to participate in the proceedings and accordingly, he would make submission after the arguments of the parties are completed.

7. In addition to submissions made by learned counsel for the petitioner on the last date of hearing on third issue raised regarding the Foreign Exchange Rate Variation (FERV), learned counsel for the petitioner submitted that the Commission in its order dated 2.4.2013 has recognized and dealt with FERV. He further submitted that in para 48 of the order dated 2.4.2013, the Commission noted petitioner's submission seeking for adjustment on account of the increase in the 'cost of fuel'. He referred to para 79 of the said order wherein the Commission held that the Appropriate Commission has to ensure recovery of 'cost of generation'. Learned counsel for the petitioner submitted that 'cost of fuel' and 'cost of generation' includes variation in Forex. Learned counsel for the petitioner submitted that the petitioner has pleaded regarding FERV in its affidavit dated 1.2.2013 at page 3 and 6 and also in its written submissions dated 21.2.2013.

8. The Commission desired to know what action has been taken by the petitioner to ensure Rupee-Dollar parity since the bid was quoted for 25 years. In response, learned counsel for the petitioner submitted that Gujarat bid document did not allow the petitioner to quote tariff in USD. Similarly, Haryana bid document did not allow to quote tariff for blended fuel and tariff was quoted in INR as the premise of quote at the time of bid was domestic coal. He further submitted that Quoted Energy Charge in both the cases does not have any break up of element wise tariff component for FOB, Ocean Freight, port handling Charges, Forex, transmission charges etc. It was also submitted that although the case in hand was of case I bidding, the procurer was required to provide FSA to the procurers as per the condition subsequent of the PPAs.

9. In response to another query of the Commission as to why the consumers should suffer on account of the petitioner not factoring the dollar-rupee variation, learned counsel for the petitioner referred to letter of Ministry of Power dated 31.7.2013 addressed to Regulatory Commissions and submitted that CCEA/MoP/CERC have taken the decision to allow pass through of cost of imported coal including implication of Forex variation of energy charges being used, due to shortage of domestic coal with linkage. He further submitted that current draft standard bid document for Case-I and Case-II projects provides that foreign exchange risk would be borne by procurers as developer has no means to hedge such risk on long-term basis.

10. Learned counsel for the petitioner further submitted that the principle of current compensation as recommended by the Committee is based upon adjusting the entire cost of coal and that has been decided keeping in view the interest of the procurer/consumers since compensation as per the mechanism adopted by the Committee is the lowest. Further, he submitted that formula is based on actuals therefore, in case of any favourable movement in any of the parameters existing, it will also result in reduction of compensation.

11. Learned counsel for the petitioner submitted that without addressing the foreign exchange fluctuation which is an integral part of fuel cost, the compensatory tariff will not reflect the true hardship being faced by the petitioner and render the project unviable. The project unviability will be against the interest of the consumers and public at large. The petitioner's plant is not a captive plant, it supplies electricity to the consumers of State Discoms of Haryana and Gujarat. Therefore, project unviability will directly affect the continuous supply of power to consumers of Gujarat and Haryana.

12. In respect of fourth issue raised by both Gujarat and Haryana regarding Station Heat rate, learned counsel for the petitioner submitted that the Committee has verified that the design SHR of the petitioner's plant is 2210 Kcal/kWh. The Committee considered the design SHR of 2210 kcal/kWh and 6.5% allowance for site operating conditions (per CERC norms) according to which the SHR works out to 2354 kcal/kWh. Learned counsel submitted that the Committee considered that with the proposed GCV of 4500 kcal/kWh, SHR of 2354 kcal/kWh is realistic and will arrive the optimum fuel cost. The petitioner in its affidavit dated 1.2.2013 has submitted SHR of 2230 kcal/kWh for first three years and heat rate degradation at 0.25% per annum for balance period of PPA. Accordingly, levelised SHR works out to 2257 kcal/kWh. He added that the petitioner considered above mentioned SHR of 2257 Kcal/Kwh while quoting tariff considering domestic coal linkage as source of coal. He submitted that the moisture content in domestic coal is around 10%-12% and the coal being used i.e. Indonesian coal has 33-35% moisture. He further submitted that use of coal with high Moisture deteriorates SHR, every percentage increase in moisture leads to increase of SHR to around 8 kcal/kWh. He submitted that duly corrected SHR, after considering deterioration due to higher moisture in

Indonesian coal will be around 2390 kcal/kWh. However, the Committee in consultation with Technical Consultant has only agreed to consider SHR of 2354 kcal/kWh.

13. Learned Counsel for the petitioner submitted that in the proceedings initiated by GUVNL before the GERC in Petition No. 1210 of 2012, the petitioner had submitted SHR of 2150.28 Kcal/kWh based on Coal with GCV of 5200 Kcal/kg. However, within the OEM specs/boiler design parameters, the petitioner is using coal with GCV of 4500 Kcal/kg in order to reduce the fuel cost. He also submitted that para 26.3(c) of the Statement of Objects and Reasons of Central Electricity Regulatory Commission (Terms and Condition for Tariff) Regulations, 2009 allows 6.5% loss towards variation for actual site condition for Thermal Generating Station achieving COD on or after 01.04 2009. He submitted that considering the design SHR of 2210 kcal/kWh and 6.5% allowance for site operating conditions (as per CERC norms), SHR works out to 2354 kcal/kWh as also verified by technical consultant.

14. Learned counsel for the petitioner submitted that the methodology adopted by the Committee being based on actuals, lower SHR will be used for determining compensatory tariff if actual SHR achieved by the Petitioner is lower than 2354 kcal/kWh.

15. On the fifth issue of sharing of profit from mining raised by both Gujarat and Haryana, Learned counsel for the petitioner submitted that the committee after considering the suggestion of GUVNL observed the difficulty in implementing the said suggestion as it is not possible to separate the incremental profit/loss from the overall profit/loss in a realistic way where in totality Indonesian mines have incurred losses. The Committee also observed that even if it is computed, it will be hypothetical/ based on assumptions which would not give a realistic conclusion.

16. With regard to sixth issue of sharing of profit from sale of power in excess of 80% raised by both Haryana and Gujarat, Learned counsel for the petitioner submitted that although the committee has suggested sharing of profit between the petitioner and the procurers in the ratio of 50:50, the petitioner agrees to share profit of 60:40, as suggested by the procurers. Learned counsel for the petitioner submitted that as sought by the Discoms, the petitioner in-principle agrees to provide incentive up to 10 paise to the respondents, in case the share of respondents from merchant sale is less than 10 paise and incentive beyond 80% availability should be calculated as per the illustrative calculation given in the committee's report. To achieve optimum level of availability and for sale of power beyond 80%, the petitioner will have to put additional resources into the process. The standard bidding documents contemplated/envisage grant of incentive beyond normative availability. He also submitted that the petitioner should be made available the incentives in the existing the PPA which provides for incentive beyond 85% of the capacity.

17. On the seventh issue of transmission charges raised only by Haryana, Learned counsel for the petitioner submitted that the petitioner concurs with the option (a) suggested by Haryana utilities that transmission charges be calculated as per PoC mechanism. He submitted that PoC mechanism is an established and undisputed mechanism which may be adopted by CERC taking 100% LTA quantum under PPAs with Haryana utilities. He further submitted that the dispensation has to be appreciated in the spirit of mitigation of enhanced cost implication due to exceptional hike in imported coal prices by the surplus generated from sale of power on merchant basis. He also submitted that as per FCA mechanism of the Committee, benefit on account of reduction in PoC charges, if any, will be passed on to Haryana Discoms.

18. With regard to eight issue raised by both Gujarat and Haryana regarding unconditional option of no procurement of power, Learned counsel for the petitioner submitted that the same was not raised before the Committee. He submitted that the said concern of the petitioner will be addressed through merit order dispatch operation. He also submitted that prayer (b) sought by the petitioner regarding discharge from performance of the PPAs has already been dismissed by the Commission by its order dated 2.4.2013.

19. With regard to ninth issue of GCV of domestic coal raised by both Haryana and Gujarat, Learned counsel for the petitioner submitted that the committee has deliberated on the said issue at length and observed that actual rate of coal and GCV of coal on fired basis will be considered after due analysis by the third party sampling agency. He further submitted that the Regulatory Commissions (HERC and CERC) have recognized that GCV of domestic coal for HPGCL and NTPC power plants are deteriorating every year. He also submitted that difference between billed GCV and actual GCV of coal received adds to hardship as it increases the quantity of imported coal being used in the plant to fulfil the PPA obligations.

20. With regard to the tenth issue raised only by Gujarat, Learned Counsel for the petitioner submitted that the Committee has deliberated the three options suggested by GUVNL by its letter dated 20.5.2013 at Page 67-69 of the Report and has given cogent reasoning regarding difficulty in implementation of all three options. He further submitted that the options suggested are in the teeth of order of the Commission dated 2.4.2013 providing for compensatory package. With regard to third option suggested by Gujarat that the petitioner be given only O&M charges, Learned counsel for the petitioner submitted that this option amounts to expropriation. He added that if Gujarat wants to expropriate the petitioner, it should buy out the petitioner.

21. With regard to eleventh and twelfth issues raised by Gujarat viz; Statements in brief overview of Draft Report disputed should be deleted as per their letter dated 29.7.2013 and information related to merit order of GUVNL in para 5.2 of Draft Report are incorrect as per letter *ibid*, respectively, Learned counsel for the petitioner submitted that the said issues does not survive as disputed statements have been removed from final Committee Report and merit order mentioned in the Committee Report is the one which was submitted by GUVNL itself.

22. On the thirteenth issue raised by Gujarat regarding provisional tariff to be the ceiling for true up, learned counsel for the petitioner submitted that the Committee observed that said concern raised by GUVNL will be addressed through merit order dispatch operations. The Committee modified the mechanism, that the provisional tariff for a particular year may be revised in case the landed coal price varies by more than 5%, to address the concerns raised by GUVNL. He further submitted that Committee Report at Page 40 provides the Fuel Cost Adjustment formula with implementation details. He added that true up is a common mechanism used in case of sale of electricity. He also submitted that putting ceiling upsets the essence behind providing of compensatory tariff i.e. to mitigate the hardship faced by the petitioner due to inadequacy of domestic coal linkage and promulgation of Indonesian Regulation.

23. On issue No. 14 regarding Transit Loss and Handling Loss raised only by Gujarat, Learned Counsel for the petitioner submitted that the Committee decided that transit and handling losses will be as per actual or as per CERC norms, whichever is lower.

24. With regard to issue No. 15, raised only by Gujarat, regarding contribution by banks to mitigate hardship, learned counsel for the petitioner submitted that the Committee called for lender's meeting to address the said issue. However, banks have informed that interest can be reduced only for competitive reasons. He further added that banks have informed that the petitioner would have a good case of reduction of interest rate if rating of the petitioner improves on grant of compensatory tariff.

25. In respect of issue No. 16 raised only by Gujarat concerning compensatory tariff being subject to approval by GERC, Learned counsel for the petitioner submitted that the same is contrary to Rule 8 of the Electricity Rules, 2005. He referred to APTEL's Judgment dated 4.9.2012 in Appeal No. 94 of 2012 (BRPL Vs. DERC) and submitted that in matters falling within the jurisdiction of Central Commission, State Commissions have no role.

26. Learned counsel for the petitioner submitted that issue No. 17 i.e. consumer interest is at heart of the matter. He submitted that the Commission while passing the order dated 2.4.2013 has observed that:

(a) There is an imminent need to find out a practical and acceptable solution to the problem for ensuring supply of power to the consumers at competitive price while seeking to ensure sustainability of the electricity sector.

(b) Objectives of the Act include taking of measures conducive to development of electricity industry, promotion of competition, protection of the interest of the electricity consumers as also the rationalisation of the electricity tariff.

(c) While safeguarding the interest of the consumers, the Appropriate Commission has to ensure recovery of cost of generation, transmission, distribution and supply of electricity in a reasonable manner.

(d) National Electricity Policy addresses the issues of recovery of cost of services to make the electricity sector sustainable, promotion of competition which ultimately benefits the consumers and protection of consumers' interests, among others.

(e) The consumers' interest is protected not only by fixing competitive tariff but it is equally imperative to ensure continuous, uninterrupted and reliable supply of electricity.

(f) The escalated price at which the petitioner is buying coal from Indonesia subsequent to the promulgation and operation of Indonesian Regulations for supply of power to the respondents has rendered the project unviable which will adversely affect the electricity sector and interest of the consumers.

27. Learned counsel for the petitioner submitted that if the tariff is not revised as recommended in the Report, the petitioner's plant will have to be closed down. The effect will be that the consumers will be deprived of continuous power available at the competitive rates. He submitted that the Committee decided to allow full pass through of fuel cost which makes the solution sustainable in long term and also in consumer interest as it remains cheaper as compared to alternate sources. He submitted that in the Government Resolution published by Govt. of Gujarat, it has been acknowledged that likely cost of generation of power from upcoming thermal power plants range between ₹ 3.50 to ₹ 4.50 per unit. Govt. of Gujarat further acknowledged that it will take about 3-4 years for only developer to supply power in



case fresh bid is invited and order of Committee to resolve the issue of mitigating hardships is to be considered to maintain continuity of power supply.

28. Learned counsel for the petitioner submitted that the compensatory tariff recommended by the Committee is based only on the losses suffered by the petitioner on account of energy charges only and not on account of capacity charges. The losses on account of capacity charges will still have to be borne by the petitioner. He further submitted that additional burden on the petitioner on account of working capital is ₹ 331 crore and ₹ 202 crore in case of Haryana and Gujarat respectively. Similarly, additional burden due to impact of secondary fuel is ₹ 3391 crore and ₹ 1926 crore for Haryana and Gujarat, respectively.

29. In response to Commission`s query that the order dated 2.4.2013 was limited to impact due to increase in price of imported coal and did not deal with domestic coal, Learned counsel for the petitioner clarified that bids of the petitioner were premised on domestic coal. Had the issue related to only domestic coal, it would have directly qualified to be a change in law as per the PPA.

30. Learned counsel for the petitioner submitted that even after revision of the petitioner`s tariff after adding compensatory tariff, the price would still be competitive. He also submitted that it would be lower than the tariff of power plants of respective States or NTPC.

31. Learned counsel for the petitioner submitted that compensatory tariff has to be decided in background of the fact that this is a preventive measure. If adequate compensatory tariff is not provided, banks will start taking action and the petitioner`s power plant will be rendered stranded which will not only affect the petitioner but also the consumers.

32. With this, the petitioner concluded his arguments. Due to paucity of time, the Commission directed the Respondents to advance their arguments on the next date of hearing.

33. The petition shall be listed for hearing on 8.11.2013.

By order of the Commission  
Sd/-  
(T. Rout)  
Chief (Law)