

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

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

**Coram:**

**Shri Gireesh B. Pradhan, Chairperson**

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

**Shri M. Deena Dayalan, Member**

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

**Date of Hearing: 8.11.2013**

**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.

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 Amit Kapur, 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 Shashank Kumar, APL  
Shri M.P.Krishnarao, APL  
Shri Sameer, APL  
Shri M.G.Ramachandran, Advocate, Haryana and Gujarat  
Ms. Anushree, Advocate, HPPL  
Shri Ravi Juneja, HPPL  
Shri K.P.Jangid, GUVNL  
Shri Jayant Bhsuhan, Senior Advocate for the Applicant for Impleadment  
Shri SalimInamdar, Advocate for the Applicant for Impleadment

**Record of Proceedings**

Learned counsel appearing on behalf of the Gujarat and Haryana (respondents) referred to paras 87 and 89 of the Commission`s order dated 2.4.2013 and submitted that the Commission had directed the parties in the said order to set

down to a consultative process to find out acceptable solution in the form of compensatory tariff. Therefore, the effort was to find out an acceptable compensatory solution and not re-determination of tariff. Learned Counsel referring to para 69 of the order submitted that what was to be considered by the Committee was only the impact of Indonesian Regulations on the increase in fuel price and impact of the increase in price of domestic coal is not covered. He also submitted that the Committee Report has not been signed by any of the parties including the petitioner. The respondents have raised certain objections on various issues considered in the report.

2. Learned counsel for the respondents handed over a copy of the compilation containing the working of variable charges for coal and submitted that in case of GUVNL, the petitioner had quoted the levellised variable charge of ₹ 1.345 per unit and in case of Haryana, the petitioner had quoted the levellised variable charge of ₹1.93 per unit on the basis of which the petitioner was selected and was awarded the bids. Referring to the case of GUVNL, learned counsel submitted that based on the variable charge quoted, landed cost of coal considered by the petitioner at the time of the bid works out to be around USD 67.6/MT. After accounting for the transportation and handling charges of about USD 10 to 12/MT, the landed cost of coal is coming to not less than USD 55/MT. This has been noted in the order dated 2.4.2013 and becomes the base figure for consideration of hardship. Learned counsel referred to the benchmark price with the markers (upto September 2013) published by the official website of Indonesia and submitted that the benchmark price of coal is almost matching USD 55/MT except a few months when it went upto USD 92/MT. Learned counsel submitted that these two figures are available and hardship should have been considered on that basis.

3. The Commission desired to know whether the above information was submitted to the Committee. Leaned counsel for the respondent submitted that in para 4 of the Haryana affidavit dated 4.10.2013 clearly states that the report of the Committee forwarded to the Commission does not represent the complete views of the Haryana Government and Haryana utilities. In line with the approval of the Govt. of Haryana, the Haryana Utilities have given in-principle approval as regards the Committee report with certain observations raised by Haryana Utilities which have not been considered by the Committee as mentioned in Annexure-A to the affidavit. Learned counsel clarified that the information regarding USD 67/MT was considered by the Commission in the order dated 2.4.2013 which was available to the Committee.

4. Learned counsel for the respondents referring to Annexure-A to the affidavit dated 4.10.2013 submitted that the Committee has calculated loss to Adani Power Limited from the date of SCoD to 31.3.2013 as ₹ 486 crore in case of Haryana. Learned counsel submitted that the compensatory tariff that may be finally accepted should be applicable on prospective basis from the date of final order of the Commission. In reply to the query of the Commission as to why the compensatory

tariff should not be applicable retrospectively from the date of hardship, learned counsel for the respondent submitted that the petitioner is not legally entitled to the compensatory tariff. Moreover, Haryana Utilities have arranged their affairs on the basis of a particular tariff and accommodating the petitioner for the compensatory tariff cannot put the Haryana Utilities to hardship for the past. Accordingly, Haryana Utilities have put it as a condition for an acceptable solution contemplated by the Commission in paras 87 and 88 of the order dated 2.4.2013. Otherwise, it will amount to re-determination of tariff by the Commission if the tariff is allowed retrospectively without the acceptable solution by overruling the objections of the Haryana Utilities. In reply to another query of the Commission as to whether the respondents are accepting the calculated loss of ₹486 crore, learned counsel clarified that submissions with regard to grant of compensatory tariff prospectively are in alternate to the submission that formula provided by the Committee for compensatory tariff is incorrect

5. The Commission desired to know what exactly the Haryana Government is in agreement 'in-principle' with the report of the Committee. Learned counsel for the respondents submitted that the Haryana Government has given approval in principle to the consideration of compensatory tariff over and above the PPA tariff subject to the consideration of the objections of Haryana Utilities. In this connection, learned counsel read out the submission of Haryana Utilities in paras 14 and 15 of the affidavit dated 4.10.2013.

6. Learned counsel for the respondents referred to affidavits dated 13.9.2013 filed by GUVNL and submitted that consent of Government of Gujarat was given subject to the modifications mentioned in the affidavit dated 13.9.2013 and also subject to the approval of the Govt. of Gujarat and GUVNL to be obtained through High Level Committee. Learned counsel for the respondents referred to para 3 of the additional affidavit dated 14.10.2013 filed by GUVNL and submitted that objections were raised by GUVNL in its letter dated 20.5.2013 before the committee. Learned counsel further referred to para 5 of the said affidavit and submitted that objections were raised by GUVNL to the draft report in its letter dated 29.7.2013 addressed to the Chairman of the committee. Learned counsel submitted that the committee has not included the views and suggestion of Government of Gujarat/GUVNL in the report. Learned counsel submitted that since the matter has significant implications on the State of Gujarat, its DISCOMs and end-consumers, the Board of Directors of GUVNL considered it appropriate to seek directives from the Government of Gujarat for further course of action in the matter. Learned counsel submitted that based on the decision in the meeting dated 5.10.2013 of the High Level committee appointed by the Gujarat Government, GUVNL has made additional submission for consideration of the Commission as stated in para 11 of the affidavit dated 14.10.2013.

7. Learned senior counsel for the Applicant seeking impleadment submitted that the scope of the order dated 2.4.2013 does not include re-determination of tariff

adopted under section 63 of the Act. Learned senior counsel submitted that the order dated 2.4.2013 does not say that irrespective of the fact that the tariff has been determined through a bidding process and irrespective of the fact that tariff has to be adopted under section 63 of the Act, yet the Commission has the power to re-determine the tariff. In this connection, learned senior counsel referred to sections 62 and 63 of the Act and submitted that it is absolutely mandatory under section 63 of the Act for the Commission to adopt the tariff discovered through competitive bidding and the Commission cannot revisit the tariff of the lowest bidder even though Commission is satisfied that the lowest bidder would suffer a loss on account of the low bid. Learned senior counsel referred to paras 63 to 69 of the order dated 2.4.2013 and submitted that the Commission after considering the submissions of the parties has rejected the prayers under '**force majeure**' and '**change in law**' under the PPA. Learned senior counsel submitted that the Commission has however held that the Indonesian Regulation has a crippling cost on the petitioner and the consumers will not get power. Learned senior counsel submitted that as a sequiter, the Commission has not come to a finding that under the circumstances, the tariff adopted under section 63 of the Act would be re-determined. In this connection, learned senior counsel referred to paras 72 and 87 of the order dated 2.4.2013 and submitted that even though an argument was advanced that the tariff adopted under section 63 could not be reopened under section 62 of the Act, the Commission explicitly did not answer this question and instead emphasised that sanctity of the bid should be maintained and directed the parties to confer to find out and agree to a compensation package to deal with the impact of Indonesian Regulations. Learned senior counsel referred to para 89 of the order dated 2.4.2013 and submitted that the Commission has directed the parties to set down to a consultative process to find out an acceptable solution and the order does not envisage that despite the disagreement between the parties, the Commission can pass a binding order. Learned senior counsel submitted that the committee has given a report and there is no agreement between the parties on the report and therefore, no further directions with regard to the compensatory tariff can be issued by the Commission.

8. Learned senior counsel for the applicant submitted that despite the submission already made, if the Commission holds that the order dated 2.4.2013 permits the Commission to award the compensatory tariff, in that case the alternative submission is that the order dated 2.4.2013 is an interim order and every such order which is an interim order not disposing of the petition can be re-looked at the stage of final disposal of the petition. Learned senior counsel submitted that order dated 2.4.2013 is an incorrect order and should be rectified at the stage of final order as otherwise, it would ruin the whole bidding process. In this connection, learned senior counsel relied on the judgement of the Appellate Tribunal for Electricity dated 16.12.2011 in Appeal No.82 of 2011 (Essar Power Limited V UPERC & Another). Learned senior counsel submitted that allowing anything over and above the tariff agreed in the PPA which has been adopted under section 63 of the Act would amount to re-determination of tariff which is not permissible under the provisions of the Act.

9. Learned senior counsel for the applicant made his third submission that if the Commission proceeds to award the compensatory tariff, it has to be done through a public process by making a publication and inviting comments from the public. Learned senior counsel referred to Section 64(2) of Act and submitted that the Act makes it mandatory for publication of the application seeking determination of tariff. What has been left to the discretion of the Commission is the manner in which it has to be published in an abridged form. He submitted that the term used in Section 64(3) is 'public' and not 'consumers' only. Therefore, not only objections raised by the consumers but also the objections raised by public have to be considered. He further referred to Regulation 3 of Central Electricity Regulatory Commission (Procedure for making of application for determination of tariff, publication of the application and other related matters) Regulations, 2004 and submitted that the procedure prescribed therein has not been followed in the present case. Learned senior counsel submitted that the compensatory tariff is nothing but re-determination of tariff and any order directing the procurers to pay higher tariff over and above the tariff approved in the tariff order cannot be issued at the back of the public without following the procedure.

10. On merits, learned senior counsel for the applicant submitted as under:

(a) The Commission's order to the committee was limited to consideration of the impact of the Indonesian Regulations and any increase on account of increase in ocean freight, inland transportation, foreign exchange variations etc. could not have been gone into and even suggested by the Committee.

(b) The Commission has noticed that the coal supplier in Indonesia is a 100% subsidiary of Adani Enterprises Ltd. The Indonesian Regulations requires that benchmark price should be paid to the coal supplier. By invoking the principle of piercing the corporate veil, it is clear that the higher price paid by the petitioner is going to its subsidiary of Adani and therefore, there is no real impact on the petitioner except the higher tax and royalty paid to the Indonesian Government. Referring to para 89 (a) of the order dated 2.4.2013, learned senior counsel submitted that the directions in the said para does not truly reflect the impact of the Indonesian Regulations and it is open to the Commission to revisit this direction as order dated 2.4.2013 is an interim order. Learned senior counsel submitted that the excess amount which is being paid by the petitioner to the mining company due to promulgation of Indonesian Regulation minus the higher taxes and royalty being paid by the mining company should be considered for setting off the compensatory tariff. He submitted that the effect of the methodology adopted by the Committee is that in case Adani's Coal Generating Company incurs losses, then the same would be added in the compensatory tariff. Learned senior counsel submitted in CGPL's case, the impact has to be confined to 30% as Tata holds 30% stake in the coal company.

(c) The Committee has gone into cost of generation of one unit by the petitioner which is nothing but tariff determination under Section 62 of the Act. He submitted that Commission had asked the Committee to only go into the impact of Indonesian Regulation and nothing else. To support his contention,

he referred to Annexure-4 of the Committee Report. Learned senior counsel submitted that bidding price may not be the same as cost price which is based on various subsequent factors.

(d) At page 92 of the Committee Report, certain figures assumed by the technical consultant like SHR and auxiliary consumption etc. have been considered. The figures contained therein should be cross-checked with the figures submitted by the petitioner to the banks/financial institutions at the time of financial closure and whichever is lower should be considered for computation of compensatory tariff.

(e) As per the PPA, the entire power generated by the petitioner is to be supplied to the respondent Utilities. Therefore, no third party sale can be allowed now. The Commission may take a final call on this direction as the order dated 2.4.2013 is an interim order. However, even if third party sale is allowed, then any profit due to such sale has to be passed on to the consumers only.

(f) Government of India is a party. It is essential to have the views of Government of India. The Commission may direct Government of India to clarify their views on the issues raised in the petition.

(g) There is no obligation on the petitioner to source coal from Indonesia. The petitioner is at liberty to source coal from any other cheaper alternative source in the same way Lanco has been procuring coal from Australia. However, the petitioner is not doing the same because it is holding coal mines in Indonesia. Providing compensatory tariff is not going to incentivise the petitioner to minimise the coal cost.

11. Learned senior counsel submitted that the submissions made in this case are also applicable in case of CGPL.

12. In response to the Commission's query whether the Committee Report can be considered in absence of the same being signed by the representatives of the petitioner and respondents, learned counsel for the petitioner submitted that in case of Adani Report and CGPL report, two of the members of the Committee, namely the Chairman and Independent financial analyst have signed the Reports which is evident from page 2 of the Reports. In case of Adani, the petitioner and the respondents have given their in-principle consent to the Report by their respective affidavits. Therefore, there is a consensus by majority.

13. In response to the submissions of learned counsel for respondents and learned senior counsel for the Applicant for impleadment, learned counsel for the petitioner submitted as under:

(a) As regards the objection that the Committee report has not been signed, learned counsel submitted that the report has been signed by two of the

members of the Committee, namely the Chairman and Independent financial analyst, which is evident from page 2 of the Report. The petitioner and the respondents have given their in-principle consent to the Report by their respective affidavits.

(b) As regards the submission that the Commission has delegated its power to the Committee and if there is no agreement, the Commission has no power, learned counsel referred to section 79(1)(b) read with section 79(1)(f) and submitted that the dispute arose regarding the adjustment of tariff under the statutory PPA which was dealt with by the Commission. Learned counsel also referred to section 97 of the Act and submitted that the Commission cannot delegate its power of adjudication. Under section 91(4), the Commission has the power to take assistance of consultants in discharge of its functions. The Committee was constituted by the Commission only to assist and aid the Commission to evolve the compensatory package for implementation of its order dated 2.4.2013. By constitution of the Committee, the Commission did not delegate or abdicate its statutory adjudicatory function.

(c) As regards giving public notice and public hearing, learned counsel referred to Regulations 74, 76 and 77 of the Conduct of Business Regulations and submitted that the said regulations provide for enquiry and investigations and consideration of the reports of the enquiry or investigation by the Commission after giving an opportunity to the parties to the proceedings for filing objections and making submission on such reports. Regulation 77 does not provide for opportunity for filing objections and making submissions to the public. Learned counsel submitted that in the present case, tariff has been adopted under section 63 in exercise of power under section 79(1)(b) read with para 4.7 and 5.17 of the Competitive Bidding Guidelines. Section 64 provides for determination of tariff which is not applicable in case of adoption of tariff. There is no requirement for a public notice or a public hearing in the present case.

(d) The judgment of the Appellate Tribunal in Essar Case relied upon by the senior counsel for the Applicant was passed in different set of facts. In that particular case, the utility sought to consider the quote from a party who had not participated in the bidding process and that too at the stage of adoption of tariff by the Commission. He referred to para 37 of the said judgment and submitted that competitive bidding guidelines issued by the Government of India have been held to be having statutory flavour. He referred to Clauses 12, 13 and 17 of the PPAs read with Clauses 4.7 and 5.17 of competitive bidding guidelines and submitted that the Commission has power to adjust the tariff. He submitted that the present case is adjudication of disputes arising out of the PPAs which does not require any public notice.

(e) Referring to para 88 of the order dated 2.4.2013, learned counsel submitted that the Commission held that compensatory tariff has to be provided to the petitioner to mitigate the hardship arising on account of Indonesian Regulation and also on account of non-availability of adequate fuel linkage from Coal India

Ltd. He further submitted that bid of the petitioner for GUVNL was based on Domestic Coal. However, because of subsequent events, the petitioner was constrained to resort to sourcing coal from Indonesia.

(f) The net profit contained in the para 89 (a) of the order dated 2.4.2013 is not a two way transfer. Only profit after tax and royalty has to be considered to deduct the same from the compensatory tariff and not the loss incurred by the Coal Generating Company.

(g) The order dated 2.4.2013 is like a preliminary decree passed in partition suits or other compensatory suits when first preliminary decree is passed and then only quantification is done. The order dated 2.4.2013 is in the nature of final order and *res judicata* operators even in the same proceedings. The Commission in its order dated 2.4.2013 has already considered that Indonesia is the cheapest source of coal. Lanco has not been able to import a single tonne of coal from Australia.

(h) Government of India is not a party in the present proceeding. He submitted that submission of the Applicant that Committee was constituted by the parties is also incorrect. However, the Committee was appointed by the Commission and the parties only appointed independent analysts.

14. Learned counsel for the petitioner requested for one week time to file detailed written submissions dealing with all the issues raised by the respondents as well as by Applicant seeking impleadment which was allowed by the Commission.

15. The Commission directed the petitioner to furnish the information regarding the coal price, ocean freight, port handling charges, inland transportation cost, FERV etc and operational parameters along with the assumptions considered by the petitioner at the time of bid and considered by the Committee for computing fuel energy charge in the report on compensatory tariff, on or before 29.11.2013.

16. After hearing the learned counsels for the petitioner, respondents and learned senior counsel of Applicant seeking impleadment, the Commission directed the petitioner, respondents and Applicant to file their written submissions by 28.11.2013.

17. Subject to above, the Commission reserved order in the petition.

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