

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 159/MP/2012**

**Sub:** Petition under Sections 61, 63 and 79 of the Electricity Act, 2003 for establishing an appropriate mechanism to offset in tariff the adverse impact of the unforeseen, uncontrollable and unprecedented escalation in the imported coal price due to enactment of new coal pricing Regulation by Indonesian Government and other factors

Coram : Dr. Pramod Deo, Chairperson  
Shri S. Jayaraman, Member  
Shri V. S. Verma, Member  
Shri M. Deena Dayalan, Member  
Shri A. S. Bakshi, Member (EO)

Date of Hearing : 20.12.2012

Petitioner : Coastal Gujarat Power Limited

Respondents : Gujarat Urja Vikas Nigam Limited and Others

**Parties present:**

1. Shri Amit Kapur, Advocate, CGPL
2. Ms Sugandha Somany ,Advocate, CGPL
3. Ms Apoorva Misra, Advocate, CGPL
4. Shri Padamjit Singh, PSPCL
5. Ms Ashwini Chitnis, Prayas Energy Group
6. Shri Kulbhushan Kalia, Tata Power
7. Ms Swapna Seshadri, Advocate, GUVNL & HPPC
8. Ms Swagatika Sahoo, GUVNL

**RECORD OF PROCEEDINGS**

Shri Padamjit Singh, the representative of Punjab State Power Corporation Ltd (PSPCL) made the following submissions:

- (a) The increase in the price of coal by Indonesian Government was a post-tender development which could not alter the terms and conditions under which the bid was submitted by the petitioner.
- (b) Any deviation from the guidelines on competitive bidding was subject to approval by the Appropriate Commission. This provision enabled the

bidders to ask for deviations from the standard terms and conditions during pre-bid conferences and in case the bidders asked for any deviations, those could have been incorporated in the terms and conditions after obtaining approval of the Appropriate Commission. However, Tata Power Ltd which submitted bid for Mundra UMPP did not avail of this opportunity and there was no scope for making any change after submission of bid.

- (c) The documents relating to the pre-bid conference, most crucial for the purpose of the present petition. have not been filed by the petitioner, These documents would reveal whether the issue of change in foreign law was raised at the pre-bid conferences and if so, what was the response. Accordingly, he requested for supply of copies of the documents/ records relating to pre-bid conferences.
- (d) In the letter dated 12.12.2011 by Managing Director, Tata Power Ltd and Chairman of the petitioner company had pointed out that benefit of change of domestic law is available in case of Sasan UMPP which operates on domestic coal, but the benefit of change of foreign law had not been extended to Mundra UMPP which was to operate on imported coal, which was an omission. When the Managing Director of Tata Power Ltd himself admitted that benefit of change of foreign law was not available, there was no scope for extending the benefit at this stage.
- (e) In the letter dated 4.8.2011, available at pages 883-888, addressed to Union Minister of Power, the petitioner requested for intervention and sought direction to the stakeholders to urgently open dialogue and address the issue of imported coal pricing since Mundra UMPP was in the advanced stage of completion. In that letter, the petitioner did not represent whether the benefit of 'change in foreign law' should be allowed or not.
- (f) In response to the petitioner's letter, MoP by its letter at page 889, clarified that PPA was a legally binding document, exclusively between procurers and developer and therefore issue should be taken up with the lead procurer.
- (g) Though it is stated in the petition that representations were made by the petitioner or Tata Power Ltd to the Planning Commission, CEA and other authorities, their response, except that of MoP, has not been made known. He requested to be apprised of the replies of these institutions.
- (h) It was reported in the press that a group of power producers including Tata Power Ltd had a meeting with the Hon'ble Prime Minister who constituted a Special Committee under the Chairmanship of his Principal

Secretary to address the issue. He requested for copy of the representation made and the response or minutes or reply of the Committee.

- (i) The Economic Times dated 12.7.2012 and the Hindu Business Line had reported that the Government had not accepted the demand of the developers of imported coal-based power projects for revision of tariff.
- (j) The Government does not favour revision of tariff as seen from the statement of the Hon'ble Minister of State for Power, and reported in the newspapers..
- (k) Lol issued on 28.12 2006 in favour of Tata Power Ltd provided that contractual relationship with the procurers was governed on the basis of final RFP which does not have any provision for revision of tariff on escalation of coal prices due to change in foreign law.
- (l) The petitioner has exaggerated the issue of escalation in price of coal. Between the bid date and now, cumulative escalation using the bid evaluation escalation rate was 220% as against the actual increase of 153%. The six-monthly escalation rate notified by the Commission, and not the bid evaluation escalation rate is applicable for charging the tariff. The petitioner is liable to charge the tariff to the procurers based on the escalation rates notified by the Commission.
- (m) Because of the lead and lag effect during the lifecycle of 25 years of the PPA, escalation may get neutralised.
- (n) The petitioner should supply the following information for assessing the impact of increase of price of coal on tariff:
  - (i) tariff presently applicable after applying the Commission's escalation index,
  - (ii) price the petitioner is paying presently for supply of coal,
  - (iii) month-wise cost of fuel actually consumed for scheduled generation,
  - (iv) energy charges covered as per PPA after applying the Commission's escalation index, and
  - (v) landed rate and rate applicable with CERC index for each ship load of fuel, so far imported.
- (o) PSPCL had suffered loss of ₹7020 crore during 2011-12, loss at the end of 2012-13 is estimated at ₹9258 crore and at the end of 2013-14 loss will

be ₹12053 crore, as shown in ARR filing by PSPCL before PERC. Therefore, PSPCL will not be able to bear the additional burden on account of increase in tariff.

- (p) The correctness of the figures of loss of ₹1900 crore per year for 25 years and total loss of ₹47500 crore is incorrect since after applying the Commission's escalation index, the losses will reduce.
- (q) The financial impact of the project is not to be seen as restricted to Mundra UMPP alone. It is to be seen on a holistic basis for Tata Power Ltd as a company. The 93rd Annual Report of Tata Power Ltd for 2011-12 shows that it is in a comfortable financial position and is poised to improve over a period of time and therefore, there is no need for asking for revision in tariff.
- (r) Referring to the report of the India Equity Research, the representative of PSPCL submitted that as per the report, even after loss in Mundra, after 2014, the company will bounce back with 8.6% to 12%. Therefore, it cannot be accepted that the project would be commercially impossible and will be stranded.

2. The representative of Prayas Energy Group, a consumer organisation registered with the Commission, made submission on following four areas:

- (a) Legal issues raised by the petitioner, mostly regarding interpretation of some clauses of the PPA,
- (b) Difficulty or limitations in estimating the real impact of coal price increase on the financial viability of the project,
- (c) Implications of revision of tariff for the sector and competition in general, and
- (d) Admissibility of revision of tariff under the PPA.

3. The representative of Prayas pointed out that the petitioner had raised the legal claims on three grounds, on the ground of change in law, then under force majeure clause and lastly under Section 79 of the Electricity Act.

4. The representative of Prayas argued that the plea of change in law clause in the PPA was not tenable because

- (a) Clause 17.1 of the PPA made it clear that the governing law was the Indian law.
- (b) To read the change in price of coal on account of change of Indonesian law under the 'change in law' clause would be misleading.
- (c) The petitioner was trying to construe the definition of 'change in law' not intended under the PPA.
- (d) The aspect that the change in foreign law is not covered under the definition of 'change in law' would become clear if the Commission directed the petitioner to submit all the minutes of the pre-bid conferences with PFC where the issue would have been raised and clarified.
- (e) The increase in price of coal was on account of market dynamics based on the demand and supply and was not a phenomenon covered under the 'change in law' clause.
- (f) Coal is being imported exclusively from Indonesia for a long period of time and in the last 2 years, the imports had substantially increased which by operation of the market dynamics led to price increase.
- (g) If the base benchmark price comes down to \$ 30 dollars, the petitioner would have made windfall profits because in that case it would not have come for making any petition under change of law.
- (h) In July 2011, PFC had considered at a conference the comments on modification of the bid documents when Association of Power Producers of India (APPI) of which Tata Power is a member, strongly made a claim to modify the bid documents so that the 'change in law' clause could apply to foreign laws. This plea of APPI was categorically rejected by PFC on the ground that it would encourage bidders to take undue fuel risks beyond the control of the procurers. The deliberations at the conferences are duly minuted by PFC and the Commission should call for the minutes from PFC/petitioner to satisfy itself that change in foreign law was not contemplated within the definition of 'change in law'.

5. On the petitioner's plea of application of the force majeure clause, the representative of Prayas argued that the plea was not legally tenable for the following reasons:

- (a) The bidding guidelines made it clear that the risk regarding fuel price was of the bidder.

- (b) The fuel price and choice of sourcing of fuel are completely at the bidder's discretion.
- (c) The force majeure clause in the PPA made it categorically clear that only an unforeseen, uncontrollable event which materially and significantly affects the project is covered under the force majeure clause.
- (d) The force majeure clause expressly excludes fuel price change and fuel availability.
- (e) The unavailability of project on account of variation of fuel price by interaction of market forces of demand and supply is not envisaged to be a force majeure under any circumstances.

6. Refuting the petitioner's plea to invoke Section 79 of the Electricity Act, 2003, the representative of Prayas submitted that:

- (a) The point was not raised in the petition but was raised only at the hearing for the first time.
- (b) The letter and spirit of the Electricity Act, 2003 is to move towards competitive regime, away from the cost plus tariff regime.
- (c) The Electricity Act, 2003 does not envisage that tariff being discovered through a transparent competitive process is to be re-determined on account of financial issues raised by project developer.

7. The representative of Prayas pointed to the following difficulties and challenges in evaluation of the financial impact of the market fuel dynamics on the financial viability of the project:

- (a) It would be very difficult to estimate the real impact of increase in price on the petitioner's cash flows.
- (b) Indonesian coal is not a homogenous commodity and the prices may vary significantly for a slightly lower grade of coal as the prices are not in proportion with the quality of coal. Monitoring of quality of coal and prices in such cases is not possible.
- (c) The financial viability of the project is to be evaluated based on the cheapest source of coal available at any point of time world over, and identification of such source in itself is a difficult task.

- (d) Indocoal with whom the petitioner has executed FSA is only a trader but petitioner has stake in the companies which actually own the mines. For this reason it will not be possible to work out profitability of the petitioner and this is a very complicated process.
- (e) Another aspect that may be necessary to consider for evaluation of the financial viability apart from the fuels cost is to look at operational parameters such as the station heat rate, auxiliary consumption, PLF of the power plant. This will involve micromanaging the project at many levels.
- (f) At operational level, at financial level and because of the information asymmetries there is always uncertainty regarding considering the real costs.

8. Elaborating upon the implications of revision of tariff, the representative of Prayas made the following submissions:

- (a) The impact of increase in price of Indonesian coal on the project could be a transient and short-term phenomenon because of the market variations in fuel price but the Commission's order will have a long-term impact on the sector, policy and governance.
- (b) In future Indonesian coal may become viable or cheaper or the petitioner might start importing from some other country like America or Africa so the whole dynamics can change, but the Commission's order will continue to apply.
- (c) If the tariff is permitted to be re-determined or reconsidered because of the financial issues faced by one particular project, there may be similar demands from other project developers.
- (d) In future a bidder may take undue risks to eliminate other bidders who might be more conservative in their strategy and later on, pass on all these costs to consumers.
- (e) There is presently a trend where project developers have quoted fixed tariff for 25 years and have sought revision of tariffs on ground of non-viability. These developers did not have any compulsions to do so as they could have quoted variable costs also. Accommodating such requests would be detrimental for competition and governance in the sector.

9. Based on the above submissions, the representative of Prayas argued that there was no possibility of relief under the PPA. It was submitted that the procurers

do not have any responsibility to make it financially easy for the project developer. The financial risk taken by the project developer at the time of bidding has to be entirely to its account.

10. The representative of Prayas requested for a week's time to file the submissions made at the hearing, in writing which was allowed by the Commission.

11. Learned counsel for the petitioner submitted that in terms of the directions already issued after the previous hearing, the petitioner was required to file some documents which could not be filed. He submitted that the petitioner was in the process of compiling the information and wanted to place on record the price analysis very well in advance of the next date of hearing. In addition, learned counsel for the petitioner pointed out that the representative of PSPCL had also sought production of some more documents for which time would be needed. In response to a query by the Commission regarding not making PFC a party, learned counsel submitted that the petitioner could not have impleaded PFC because the dispute was under the PPA and matter was between the petitioner and the procurers. He added that the Commission can call upon PFC to produce any documents on affidavit, without being impleaded as a party or may direct impleadment of PFC in which case PFC may be asked to file its reply.

12. The Commission directed the representative of PSPCL to submit in writing the list of documents required by it within one week, indicating the authority/organisation in whose custody the documents are held for issue of appropriate directions to the concerned authorities/organisations in this regard.

13. The petitioner was directed to file information as per the directions at the previous hearing within a period of two weeks. The Commission further directed the petitioner to file within two weeks the documents/information demanded by the representatives of PSPCL and Prayas at the hearing and taken note of in the preceding paras of this ROP, to the extent possible or else file an affidavit explaining the reasons for non-filing of any documents/information.

14. The Commission also directed to issue notice to Power Finance Corporation (PFC) which acted as the Bid Process Coordinator for selection of the successful bidder for Mundra UMPP and directed the petitioner to serve a copy of the petition and the replies etc. on PFC. The Commission directed PFC to file the documents



concerning pre-bid conference and whether any clarification was sought and was given during pre-bid conference regarding the scope of 'law' and 'change in law'.

15. The petition shall be listed for hearing on 30.1.2013.

By Order of the Commission

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Jt Chief(Law)