

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.24/MP/2014

Coram:

**Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member**

Date of Order: 9.10.2015

In the matter of

Petition under section 79 of the Electricity Act, 2003 to evolve a mechanism/adjust tariff on account of subsequent events rendering petitioners power plant commercially unviable due to unprecedented, unforeseeable and uncontrollable events including enactment of new coal pricing regulation by Indonesian Government and depreciation of Indian Rupee vis-a-vis US Dollar and levy MAT as per amendment of section 115 JB of I.T Act, 1961.

And

In the matter of

Adani Power Limited
Shikhar, Near Mithakhali Circle,
Navrangpura, Ahmedabad-380 009

....Petitioner

Vs

Gujarat Urja Vikas Nigam Ltd.
Sardar Patel Vidyut Bhawan,
Race Course circle, Vadodara-390 007

....Respondent

Parties Present:

Shri Amit Kapur, Advocate, APL
Ms. Poonam Verma, Advocate, APL
Shri Gaurav Dudeja, Advocate, APL
Shri Malav Deliwala, APL
Shri Anand Ganesan, Advocate, GUVNL
Shri P.J. Jani, GUVNL

ORDER

The present petition has been filed by Adani Power Limited under Sections 61 and 79 of the Electricity Act, 2003 (Act) read with the provisions of Article 12 and 13 of the

PPA dated 6.2.2007, and Clauses 4.7 and 5.17 of the “Guidelines for determination of tariff by bidding process for procurement of power by Distribution licensees” seeking the following reliefs:

- (a) Appropriate Adjustment to the tariff under the PPA dated 6.2.2007 to reconstitute the petitioner for the adverse financial impact of the subsequent events such as enactment of Indonesian Regulations from 1.9.2011 and depreciation of in value of Indian Rupee vis-a-vis the US Dollar and directing respondent to pay the revised tariff;
- (b) To consider levy of Minimum Alternate Tax by way of Finance Act, 2011 amending Section 115JB of the Income Tax Act, 1961 since 1.4.2011 as Change in Law under the PPA and allow compensation for the same.

2. The petitioner has submitted that it has set up a 4620 MW coal fired power plant in Mundra, District Kutch, Gujarat consisting of 4 units of 330 MW (sub-critical) and 5 units of 660 MW (supercritical technology). The petitioner has submitted that in response to the Request for Qualification and Request for Proposal invited by Gujarat Urja Vikas Nigam Limited, the petitioner submitted its bid offering a total contracted capacity of 1000 MW from the Mundra Power Project. The petitioner has submitted that the bid was premised on the basis of imported coal from Indonesia as Adani Enterprises Limited, the holding company of the petitioner, was importing coal from Indonesia. At the time of submission of bids, foreign exchange rate of INR vis-a-vis USD was Rs. 44.65/USD. The petitioner has submitted that on 18.12.2006, GUVNL issued Letter of Intent (LoI) in favour of the petitioner being the successful bidder for supply of 1000 MW

of power at the levelised tariff of Rs. 3.2483/kWh. Subsequently, after negotiation, the tariff was revised to Rs.2.890/kWh considering the prevailing taxes and levies applicable to the petitioner. GUVNL issued a revised Lol on 12.1.2007. Consequently, PPA dated 6.2.2007 was executed between the petitioner and GUVNL for supply of 1000 MW from the first four units of 330 MW each of Mundra Power Project at a levelised tariff of Rs.2.89 per kWh which included levelised capacity charge of Rs.1.154 per kWh and levelised Energy Charge of Rs.1.7386 per kWh. The petitioner has submitted that a Supplementary PPA was entered into between the petitioner and GUVNL on 18.4.2007 to change the Delivery Point from 220 kV Nani Khakhar sub-station to bus bar of Mundra Power Project. The petitioner has submitted that Unit 1 to 4 of the Mundra Power Project were commissioned on 4.8.2009, 23.3.2010, 4.8.2010 and 21.12.2010 respectively.

3. The petitioner has submitted that the petitioner entered into an arrangement with Adani Enterprises Limited for supply of coal to the Mundra Power Project. Adani Enterprises Limited through its wholly owned subsidiary PT Adani Global had entered into agreements with holders of long term exploitation licence to exclusively mine coal from Bunyu Island, Indonesia. As the quality and quantity of coal was not matching the terms as agreed in the Coal Supply Agreement, Adani Enterprises Limited through its another subsidiary entered into a long term contract dated 14.12.2009 with one of the leading suppliers of coal in Indonesia, namely, M/s PTE Dua Samudra Perkasa. The petitioner has submitted that on 26.7.2010, Adani Enterprises Ltd. entered into a Consolidated Coal Supply Agreement with Adani Power Ltd. wherein the coal was agreed to be supplied at USD 36 per tonne having aggregate GCV of 5,200 kCal/kg.

4. The petitioner has submitted that on 23.9.2010 Government of Indonesia enacted a new Regulation, 'Regulation of Ministry of Energy and Mineral Resources No. 17 of 2010' ("Indonesian Regulation") under which the coal producers and exporters in Indonesia are required to sell coal at the prices notified by the Indonesian Government which is based on international prices of coal of equivalent Calorific Value, irrespective of contract prices committed by the coal suppliers under the long-term contracts with Indian generating company. Consequently, all Coal Supply Agreements for supply of coal from Indonesia have been rendered null and void unless they conform to the Indonesian Regulations. The petitioner has submitted that in the circumstances, performance of obligations under the PPA has become impossible at the PPA tariff. The petitioner has submitted that the promulgation of Indonesian Regulations vis-a-vis supply of coal qualifies as force majeure event under Article 12 and Change in Law under Article 13 of the PPA.

5. The petitioner has submitted that the petitioner procures coal from Indonesia for which it pays in USD and recovers energy charges from GUVNL in INR. The petitioner has submitted that at the time of submission of bid, the exchange rate was around Rs. 44.65 per USD (as on 20.1.2007) which has subsequently risen to Rs.61.63/USD as on 20.1.2014. The petitioner has submitted that this has resulted into steep increase in cost of generation of electricity and it has become commercially impracticable and unviable to supply power at the PPA rate from the Mundra Power Project.

6. The petitioner has submitted that at the time of bid, it enjoyed exemption from payment of Minimum Alternative Tax (MAT) under Section 115 JB (6) of the Income Tax

Act, 1961. However, Government of India under Finance Act, 2011 imposed MAT on the units and developer operating in SEZ which provides that Developer of SEZ is liable for payment of 18.5% MAT relevant to the assessment years commencing on or after 1.4.2012. The petitioner has submitted that the amendment or modification of section 115JB (6) by insertion of a proviso thereto amounts to amendment/modification within the meaning of Article 13.1.1(i) of the PPA and has the effect of imposing additional tax burden resulting in change of the cost and revenue from the business of selling electricity by the petitioner and accordingly, the petitioner is entitled to relief under Article 13 of the PPA.

7. The Commission after hearing the learned counsel for the petitioner issued notice to the respondent Gujarat Urja Vikash Nigam Limited on the issue of maintainability. The respondent has accordingly filed its reply vide affidavit dated 21.5.2014. The petitioner has filed its rejoinder vide affidavit dated 30.6.2014.

8. The matter was heard on the question of maintainability. Learned counsel for the respondent submitted the following:

(a) The dispute and issues raised by the petitioner relate to the PPA dated 6.2.2007 entered into by the petitioner for supply of power to GUVNL from Unit 1 to 4 of the Mundra Power Project. There is no composite scheme for generation and sale of power from Units 1 to 4 as the said units constitute one power station and GUVNL is receiving power from these units.

- (b) The PPA dated 6.2.2007 between the petitioner and GUVNL which is statutory in nature provides that the Appropriate Commission is the Gujarat Electricity Regulatory Commission (Gujarat Commission). Gujarat Commission has already at the instance of the petitioner exercised jurisdiction over the PPA in question including on the coal cost in the petitions filed by the petitioner.
- (c) PPAs dated 2.2.2007, 6.2.2007 and 7.8.2008 were executed pursuant to separate and independent competitive bidding processes in terms of section 63 of the Act and therefore, there is no composite scheme for supply of electricity in the present case.
- (d) Section 79 (1) (b) of the Act has been interpreted by the Appellate Tribunal for Electricity in judgement dated 23.11.2006 in Appeal Nos. 228 & 230 of 2006 (M/s PTC India Limited Vs CERC & Others) and judgement dated 4.9.2012 in Appeal No.94 of 2012 (BSES Rajdhani Power Limited Vs. DERC) to hold that there has to be uniform price and terms being common for a composite scheme of generation and sale of electricity in more than two States for invoking the jurisdiction of the Central Commission under section 79(1)(b) of the Act.
- (e) The Competitive Bidding Guidelines which are in the nature of delegated legislation clearly lay down that the Central Commission has jurisdiction only when there is combined procurement by more than one Distribution Licensee and uniformity of price.

(f) There being no two States involved at all, the question of exercising jurisdiction under section 79(1)(b) of the Act does not arise. Even if two States are involved, there being no uniform price or uniform terms and conditions, the jurisdiction of the Commission cannot be invoked.

9. Learned counsel for the petitioner refuted the contention of the learned counsel for GUVNL and submitted the following:

(a) GUVNL is re-agitating the issue of maintainability which has already been decided by the Commission in the order dated 16.10.2012 in Petition No.155/MP/2012 wherein GUVNL was a party. Therefore, the issue of jurisdiction of the Commission over Mundra Power Project cannot be re-agitated by GUVNL as the same is barred by the principle of res judicata.

(b) The order dated 16.10.2012 was reaffirmed by the Commission in order dated 16.1.2013 in Review Petition No.26 of 2012. GUVNL never challenged the orders dated 16.10.2012 and 16.1.2013 and allowed these orders to attain finality. GUVNL is now estopped from raising any objection with regard to jurisdiction of the Commission with regard to the petitioner's Mundra Power Project.

(c) The validity of the earlier orders passed by Gujarat Commission is irrelevant for adjudication of the present petition as the orders passed by the Gujarat Commission and issues involved in the present petition are based on separate cause of action. Moreover, orders passed by the Gujarat Commission were

orders passed by a judicial authority on merits and are final subject to outcome of the appeal.

(d) On execution of the PPA dated 7.8.2008 with Haryana Utilities, the petitioner is said to have a composite scheme for generation and sale of electricity in more than one State and the Central Commission has the jurisdiction over Mundra Power Project from the time the petitioner has got a composite scheme.

(e) Section 79 (1) (b) of Electricity Act covers such private generating companies which, at the time of filing the Petition/adjudication, have a composite scheme for generation and sale of electricity in more than one State. The word “or” is disjunctive. Since the expression “or otherwise have” appears in Section 79 (1) (b) after the words, “entered into”, the same is required to be given a meaning beyond “entered into” i.e., where a generating company by any other method or mechanism or arrangement (which includes PPA) comes to have such a composite scheme even though in the beginning, the generating company may have signed PPA(s) for supply in one State or the host State. Such evolution of a composite scheme would occur when the generating company enters into PPA(s) for supply of power in other State(s). At that juncture, such generating company can be said to “have a composite scheme” for generation and sale of electricity in more than one State. In such a situation, where PPA is entered into with another State at a later stage, the tariff at which the electricity is contracted to be supplied in different States will differ on various factors.

- (f) The contention of GUVNL that Units 1 to 4 of Mundra power plant constitute a separate project, is not correct. The 'generating station' as defined under Section 2 (30) of the Act is not limited to particular units but covers all the units of a generating station. Units 1 to 9 of the Mundra Power Project form one generating station and Units 1 to 4 cannot be classified as separate project or generating station.
- (g) The judgment of Appellate Tribunal for Electricity in Appeal Nos. 228 & 230 of 2006 (M/s PTC India Limited Vs CERC & Others) and judgement dated 4.9.2012 in Appeal No.94 of 2012 (BSES Rajdhani Power Limited Vs. DERC) relied upon by GUVNL are not applicable to the facts of present case.
- (h) As regards the Appropriate Commission being defined as Gujarat Commission in the PPA dated 6.2.2007, learned counsel submitted that Article 17.3 of the PPA provides for adjudication of dispute by Appropriate Commission as provided under Section 79 or 86 of the Electricity Act. Therefore, the intent of the PPA is clear to provide jurisdiction to this Commission.
- (i) Clause 2.4 of Competitive Bidding Guidelines refers to combined bidding process and does not refer to a composite scheme and therefore, cannot restrict the scope of Section 79 of the Act.
- (j) Learned counsel urged that in the light of the Commission's order dated 16.10.2012 which has attained finality, the Commission has jurisdiction to

adjudicate the disputes raised in the present petition between the petitioner and the respondent.

Analysis and Decision

10. At this stage, the Commission is considering the maintainability of the petition before the Commission. The petitioner has argued that Units 1 to 4 are not a separate generating station but part of the 4620 MW Mundra Power Project which supplies power to Gujarat and Haryana. According to the petitioner, the Mundra Power Project is a composite scheme for generation and sale of electricity in more than one State which has been decided by the Commission in its order dated 16.10.2012 and reaffirmed in the order dated 16.1.2013 in Review Petition No. 16/2012. Therefore, the matter has attained finality and the respondent cannot re-agitate this matter in the present petition. On the other hand, GUVNL has argued that there is no composite scheme for the reasons that there was no combined procurement process as envisaged in Clause 2.4 of Bidding Guidelines and there is no uniformity of tariff. GUVNL has further submitted that the units of the Mundra Power Project have been developed in phases and as in case of phases of NTPC, they should be treated as separate generating stations.

11. Section 79 (1) (b) of the Act vests power in the Commission to regulate the tariff of generating companies other than those owned or controlled by the Central Government if such generating companies enter into or otherwise have a scheme for generation and sale of electricity in more than one State. The question whether Mundra Power Project of the petitioner fulfilled the conditions of section 79(1) (b) of the Act was examined by this Commission in order dated 16.10.2012 in Petition No.155/MP/2012 and the Commission came to the conclusion that the project has indeed got a

composite scheme the moment the petitioner entered into PPAs with Haryana Utilities.

Relevant paragraph of the said order is extracted as under:

“23.... The generating company can be said to have entered into the composite scheme of generation and sale of electricity in more than one State once it commits sale of electricity in more than one State. Such a stage is reached when the generating company makes the binding commercial arrangement for supply of electricity to more than one State, that is, when it executes the PPAs in more than one State or enters into any other similar arrangement. To say that the composite scheme should be only at the inception stage will amount to frustrating the legislative intent of the Act. Such a course is not open while interpreting a statutory provision. Further, such an interpretation will defeat the legislative mandate since in that case jurisdiction of this Commission can be ousted at the whims of the generating company. To illustrate this point, the generating company may initially sell electricity to one State and later on it may supply power to another State. Another situation is that the generating station may be commissioned as captive power plant but at subsequent stage the generating company may enter into the arrangement for sale of power to more than one State. If it is held that the composite scheme should be at the inception stage, such like cases would be taken out of the jurisdiction of this Commission. This could never be the intention of enacting clause (b) of sub-section (1) of Section 79. Therefore, it is our considered opinion that a generating company may enter into the composite scheme for generation and sale of electricity in more than one State at any time during the life of the generating station(s) owned by it. Any other interpretation will also impinge on the policy of common approach on the matters of tariff of the generating companies supplying electricity to more than one State enshrined in clause (b) of subsection 1) of Section 79. In this view of the matter, it is concluded that Adani entered into composite scheme for generation and sale of electricity in more than one State on 7.8.2008 when it signed PPAs with the distribution companies in the State of Haryana. Adani has also stated that it is in the process of establishing generating stations in different States. For this reason also, Adani as a generating company, has the composite scheme for generation and sale of electricity in more than one State. Therefore, regulation of tariff of Adani as a generating company is within the jurisdiction of this Commission.”

12. Further in order dated 16.1.2013 in Review Petition No. 26/2012, the Commission dismissed the Review Petition and reiterated the decision in order dated 16.10.2012. The above two orders of the Commission have not been challenged by either GUVNL or Haryana Utilities. In fact, both participated in the subsequent proceedings before the Commission which led to passing of the orders dated 2.4.2013 and 21.2.2014 in Petition No.155/MP/2012. Though the Haryana Utilities and GUVNL have raised the issue of jurisdiction in collateral proceedings in appeals filed against the

orders dated 2.4.2013 and 21.2.2014, the matter is still under consideration of the Appellate Tribunal. The Commission is of the view that the Commission cannot revisit its own decision in order dated 16.10.2012 with regard to its jurisdiction to regulate the tariff and adjudicate the dispute in respect of Mundra Power Project based on the pleadings in the present petition as the same is barred by res-judicata. Accordingly, it is held that the Commission has jurisdiction to regulate under section 79(1)(b) of the Act the tariff of Mundra Power Project which includes Units 1 to 4 from which power is supplied to GUVNL in terms of the PPA dated 6.2.2007. Consequently, the Commission has the jurisdiction to adjudicate the dispute between the petitioner and respondent under section 79(1) (f) of the Act which is subject matter of the proceedings in the present petition. The Commission is conscious that Haryana Utilities and GUVNL while challenging the orders dated 2.4.2013 and 21.2.2014 in Petition No.155/MP/2012 before the Appellate Tribunal have agitated the issue of composite scheme in respect of Mundra Power Project of the petitioner. Therefore, the decision in this order shall be subject to the decision in the said appeals with regard to composite scheme.

13. In the light of the above, we admit the petition for adjudication of the dispute on merit. The respondent may file its reply latest by 30.10.2015 with an advance copies to the petitioner who may file its rejoinder, if any, by 15.11.2015.

14. The petition shall be listed for hearing on 24.11.2015.

sd/-
(A. K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson