

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.374/MP/2018

Subject :Petition under Section 79 (1)(b) of the Electricity Act, 2003 read with Article 18.1 of the Power Purchase Agreements (PPAs) dated 6.2.2007 and 2.2.2007 under 1000 MW Bid-1 and 1000 MW Bid-2 respectively, executed between Gujarat UrjaV ikas Nigam Limited and Adani Power (Mundra) Limited for approval of amendments to the PPAs by way of Supplemental PPAs.

Date of Hearing : 4/5.2.2018

Coram : Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member
Shri I.S. Jha, Member

Petitioner : Gujarat Urja Vikas Nigam Limited (GUVNL)

Respondents : Adani Power (Mundra) Limited and Others

Parties present : Shri Mukul Rohatgi, Senior Advocate, GUVNL
Shri Hemant Sahai, Advocate, GUVNL
Shri Nitish Gupta, Advocate, GUVNL
Ms. Himangini Mehta, Advocate, GUVNL
Shri Sanjay Mathur, GUVNL
Shri S.K. Nair, GUVNL
Shri Amit Kapoor, Advocate, AP(M)L
Ms. Poonam Verma, Advocate, AP(M)L
Ms. Abiha Zaidi, Advocate, AP(M)L
Shri Harish Pariyani, AP(M)L
Shri Jaginesh Langalia, AP(M)L
Shri Tanmay Vyas, AP(M)L
Shri M.G. Ramachandran, Advocate, Prayas
Ms. Ranjitha Ramachandran, Advocate, Prayas
Ms. Poorva Saigal, Advocate, Prayas
Shri Shubham Arya, Advocate, Prayas
Ms. Tanya Sareen, Advocate, Prayas
Ms. Ashwini Chitnis, Prayas
Shri Anshu, Prayas
Shri Anil Kumar, Energy Watchdog
Shri Pranav Schedava, Advocate, Energy Watchdog

Record of Proceedings

Learned counsel for Prayas continued his arguments and reiterated its submission made in its reply. Learned counsel mainly submitted as under:

(a) PPA, amendment, if any, should be restricted to the impact of Indonesian Regulation and cannot be extended to other aspects as proposed in the draft amendment.

- (b) Tolerance limit of 10% should be removed.
- (c) Relief to be restricted to the increase in imported coal price only to be considered. Cost other than increase in cost of coal at the exchange rate prevalent cannot be considered for relief computation.
- (d) Relief being allowed to the project developer by the proposed amendment is excessive.
- (e) The extension on the term of the PPA by 10 years should be on the same terms and conditions as in the previous period.
- (f) Residual value of the generating station at the end should go to the benefit of the Procurers and thereby to the consumers.
- (g) Quoted energy charges being statutory in nature cannot be amended.
- (h) APMuL after taking the risk of quoting non-escalable energy charges cannot be allowed to convert the Section 63 PPA into hybrid scheme of Section 62 and Section 63 of the Act.
- (i) Any decision on the revision in the tariff should be applied prospectively for energy supplied from the month following the order passed by the Commission, and not retrospectively.

2. Learned counsel for Energy Watchdog adopted the submissions made by the learned counsel of the Prayas and submitted that amendment to the PPA is like entering into fresh PPAs. Learned counsel submitted that since the HPC is not a statutory body, its recommendations are not binding.

3. Learned counsel for the Petitioner argued that the GR being the policy decision of the State Government has to be implemented. In support of his arguments, learned counsel relied on the Hon`ble Supreme Court judgements in the cases of Netai Bag and Other Vs. State of West Bengal and others, Sachidanand Pandey and Another Vs. State of West Bengal and other, Krishnan Kakkanth Vs. Government of Kerala and others, Arun Kumar Agarwal Vs. Union of India and Delhi Science Forum Vs. Union of India and others and submitted that Policy decision should be listed on the touchstones of fairness, lack of arbitrariness and public interest. Learned counsel made detailed submission on the HPC report and contended that the process followed was transparent, well considered by experts and is in public interest. Learned counsel further submitted as under:

(a) The power to amend the PPA flows from Section 63 of the Act through competitive bidding guidelines and Article 18.1 of the PPA. Therefore, the Commission has power to approve the amendment to the PPA/tariff.

(b) The Commission has power to approve amendment to the PPA even outside the guidelines by exercising regulatory power under Section 79 (1) (b). In support of his argument, learned counsel relied on the judgements of Supreme Court in case of Energy Watchdog and All India Power Engineer Federation & Ors. Vs Sasan Power Ltd. & Ors. [(2017) 1 SCC 487] and submitted that increase in tariff is allowed with the approval of the Commission.

(c) The Commission has already exercised the power as provided under the PPA to approve amendments to various PPAs pursuant to SHAKTI policy in other Petitions including Petition No. 41/MP/2018 (GMR Kamalanga Energy Ltd. Vs GRIDCO & Ors) and Petition No. 21/MP/2018 (KSK Mahanadi Power Co. Ltd vs TANGEDCO & Ors). In the present Petition also the amendment to the PPA is based on a policy directive and identical to the approval granted under SHAKTI policy.

(d) HPC's approach was to ensure sustainable cash flow to the power producer but at the same time ensured that the burden on consumers is reduced to the maximum extent and possible leakages have been arrested.

(e) Learned counsel further made extensive rebuttal of issues raised by Prayas on commercial issues and concluded that the recommendations made by HPC were on the premise of public interest.

4. Learned Senior Counsel, Mr Mukul Rohatgi appearing on behalf of the Petitioner submitted that the Hon'ble Supreme Court has looked into the report of the HPC which is headed by a former judge of the Hon'ble Supreme Court. Learned Senior Counsel submitted that the Hon'ble Supreme Court after analysing the report came to the conclusion that its judgement dated 11.4.2017 does not come in the way and the proposed amendments to the PPA can be approved by the Commission. Learned Senior Counsel further stated that the spirit of the order of the Hon'ble Supreme Court dated 29.10.2018 is that the proposed amendments are necessary and the scope of Article 18 is not meant for amending or correcting clerical mistakes but to address situations in the present case.

5. Learned counsel for APMuL elaborated on the background of the case and hardship faced by the generator since 2012. Learned counsel relied on the three GRs passed by the Government of Gujarat in July 2013, July 2018 and December 2018 and submitted that in all the three GRs, the intention of the Government of Gujarat is to resolve and revive the projects in public interest. Learned counsel submitted that none of these GRs were challenged by any party so far and the Commission is not the appropriate forum to seek any variations in the decisions in GRs. Learned counsel further relied on the decision of the Hon'ble Supreme Court in the case of Southern Petrochemical Industries Co. Ltd. Vs Electrical Inspector and ETIO [(2007) 5 SCC 447] wherein executive decisions were held to constitute policy decisions. Learned counsel also placed its reliance on the judgement of the Hon'ble Supreme Court in AP Electricity Regulatory Commission vs RVK Energy (P) Ltd. [(2008) 17 SCC 769] to contend that the Commission, being a statutory authority, must endeavour to give effect to policy decisions of the State Government. In response to the commercial issues raised by Prayas, learned counsel submitted that since the tariff quoted by APMuL does not have break up, all the coal cost components viz coal cost, ocean freight and port handling charges have been linked to certain benchmarks in the supplemental PPA. Learned counsel submitted that there will be double penalty under the supplemental PPA one below 75% and another below 90% availability. With regards to the amendment of PPA, learned counsel, inter-alia, relied on the Article 18 of the PPA and decision of the Hon'ble Supreme Court in the case of Energy watchdog and All India Power Engineer Federation & Ors. Vs Sasan Power Ltd. & Ors. [(2017) 1 SCC 487].

6. Due to paucity of time, learned counsel for Prayas could not start its argument to rebut the submissions made by the Petitioner and APMuL. The Commission directed to list the Petition for hearing on 8th February, 2019 at 14.30 hrs.

By order of the Commission

**Sd/-
(T. Rout)
Chief (Law)**