

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 155/MP/2012

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.

Coram : Dr. Pramod Deo, Chairperson
Shri S.Jayaraman, Member
Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member

Date of Hearing: 28.8.2012

Petitioner : Adani Power Limited

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

Parties present: Shri C.A.Sundaram, Senior Advocate for the petitioner
Shri Vikram Nankani, Advocate for the petitioner
Shri Amit Kapur, Advocate for the petitioner
Miss Poonam Verma, Advocate for the petitioner
Ms. Apoorva Mishra, Advocate for the petitioner
Shri Neil Hildreth, Advocate for the petitioner.
Shri Malav Deliwala, APL
Shri Kandrap Patel, APL
Shri Harish Priyari, APL
Shri M.G Ramchandra, Advocate for GUVNL
Ms Swapna Seshadri, Advocate for GUVNL
Miss Ambica Garg, HPPC
Shri Venkatesh, Advocate for HPPC
Shri Vikrant Saini, HPCC
Shri Vivek Jain

Record of Proceedings

Learned senior counsel for the petitioner initiated his arguments by pointing out that the matter was kept for hearing on the issue of maintainability pursuant to the hearing held on 19.7.2012.

2. Learned senior counsel in his submissions extensively relied upon the opinion tendered by learned Attorney General for India on a reference made to him by the Forum of Regulators, opinion available on the website of the Forum, wherein learned Attorney General had examined the scope of clause (b) of sub-section (1) of Section 79 of the Electricity Act and deliberated on the question of jurisdiction of the CERC. In response to a query by the Commission, learned senior counsel submitted that the opinion of learned Attorney General was a general opinion but covered the present case as well since the similar question of jurisdiction had arisen in the case.

3. Learned senior counsel submitted that in view of the opinion of learned Attorney General, the CERC had jurisdiction to adjudicate the dispute raised in the present petition as the generating station of the petitioner had the composite scheme for generation and sale of electricity in more than one State, the necessary condition for applying clause (b) of sub-section (1) of Section 79 of the Electricity Act. Learned senior counsel, relying upon the opinion of learned Attorney General, argued that the composite scheme did not necessarily mean that the power project had to be conceived with the intention to supply power to more than one State at the inception stage itself, but the generating station could have the composite scheme at any later stage also. Learned senior counsel submitted that what was to be seen was the nature of the scheme on the day the petitioner approached the CERC. Learned senior counsel submitted that the words "or otherwise have" used in clause (b) of sub-section (1) of Section 79 were very important as they spoke of the status *in praesenti*. Explaining the meaning of the composite scheme, learned senior counsel pointed out that the emphasis was on the words "for generation and sale of electricity in more than one State". Learned senior counsel urged that the sale of electricity was also relevant along with generation to decide existence of the composite scheme. According to learned senior counsel, since the petitioner had entered into PPAs with Gujarat Urja Vikas Nigam Limited and the distribution companies in the State of Haryana for supply of power and the generating station was supplying or intended to supply power to more than one State when the petition was filed before the CERC, it was squarely covered within the scope of composite scheme, enabling the CERC to entertain the petition. Learned senior counsel referred to para 8 of the reply filed by the distribution companies in Haryana that the PPA could not be revised because the tariff when adopted under Section 63 could not be subjected to redetermination under Section 62, he argued that it had nothing to do with the issue of jurisdiction but concerned the maintainability of prayer before the CERC.

4. Learned senior counsel submitted that Section 86 of the Electricity Act was applicable when there was any issue pertaining to supply of power within the State. He pointed out that the tariff was adopted by the State Commissions of two States as the distribution companies were required to approach their respective State Commission under Section 86 of the Electricity Act. However, if such generating station wanted its tariff to be regulated, clause (b) of sub-section (1) of Section 79 was the only option, which the petitioner had exercised by approaching the CERC. He further submitted that the PPA could be changed and for that purpose the powers were vested with the CERC. In this regard, learned senior counsel also referred to the portion of the reply filed by the Haryana distribution companies, to the effect that “...*this Hon’ble Commission has jurisdiction on matters which concerns the Petitioner qua it’s multiple PPAs.*”

5. In response to the Commission`s query as regards the date from which the petitioner’s generating station could be considered to be having the composite scheme, learned senior counsel submitted that the CERC could exercise jurisdiction under the following situations:

- (a) From the date signing of PPAs with more than State;
- (b) From the date when the actual supply commenced in more than one State from the single generating station;
- (c) From the date when the steps were taken to supply i.e. when the PPAs were acted upon.

6. When further enquired about the specific date on which the CERC acquired jurisdiction, learned senior counsel informed that the PPA was entered into with Haryana on 7.8.2008 and therefore, the jurisdiction with CERC started from that date though power supply to Haryana started in July/August.

7. In response to the Commission's further query as to why the petitioner did not approach the CERC under Section 63 of the Electricity Act for adoption of tariff, learned senior counsel submitted that the petitioner being the generating company did not approach any Commission under Section 63 and it was the prerogative of the distribution companies to approach the Appropriate Commission seeking adoption of tariff. Learned senior counsel clarified that though at the relevant point of time the State Commissions were approached by the concerned distribution companies for adoption of tariff, once the generating company had the composite scheme whosoever wanted to seek the revision of the tariff he had to approach the CERC as powers to regulate the tariff were thereafter vested with the CERC. Learned senior counsel argued that the date of approaching the CERC was relevant for invoking the jurisdiction.

8. In response to another query by the Commission whether the petitioner approached the GERC on various issues and whether the petitioner was invoking jurisdiction of different Commissions for different purposes, learned senior counsel submitted that when the petitioner approached the GERC, the power was being supplied only to the State of Gujarat and the matter concerned the single State, not the multiple States. He further submitted that the supply of power to State of Haryana had not commenced by the time the petitioner approached the GERC, whereas at present the petitioner was supplying or intended to supply power to both the States. On the date of filing of the petition, the composite scheme existed, learned senior counsel argued. He further argued that even assuming that in the past the petitioner approached the GERC wrongly, it did not mean that the petitioner must perpetually invoke the wrong jurisdiction. Learned senior counsel stated that its approaching the GERC could not be the determining factor to decide the question of jurisdiction today. Learned counsel submitted that at present power to adjudicate any dispute falling within clauses (a) to (d) of sub-section (1) of Section 79 of the Electricity Act was with the CERC as the petitioner was supplying power to two States. He submitted that the moment the units identified for Haryana were synchronized; the petitioner approached the CERC as it came within the composite scheme.

9. In response to yet another query by the Commission as to why the petitioner did not object to the jurisdiction of the Haryana State Commission as the power plant came under the composite scheme after signing of the PPA, learned senior counsel submitted that the petitioner neither approached the Haryana State Commission nor did it receive any notice of the proceedings. In any case, learned senior counsel submitted, HPPC approached the Haryana State Commission under Section 86 as there was the question of procurement of power within the State whereas for the petitioner, it was the question of regulating tariff when the power was being sold to more than one State. He again clarified that once the supply was made to more than one State, the power to regulate the tariff was vested with the CERC only despite the fact that the tariff was adopted by two different State Commissions.

10. In response to the Commission's query whether the CERC had jurisdiction if a generating company was having two different power projects in two different States, learned senior counsel submitted that the CERC would not be the right Commission to approach in such case. However, learned senior counsel added in the case on hand the petitioner had single location project supplying power to more than one State. Therefore, the CERC had the jurisdiction to entertain the present petition.

11. The Commission enquired whether in every case a company whose tariff was adopted through the process under Section 86, was within the jurisdiction of the CERC, learned senior counsel submitted that there were very few such companies supplying power to more than one State and as such, the CERC had jurisdiction to regulate tariff of such companies. He further submitted that clause (b) of sub-section (1) of Section 86 was limited to the process and beyond that when it came to regulation of the tariff, the

CERC had the powers. Learned senior counsel further submitted that function of the SERC in case of power projects having composite scheme was merely to bless the process and beyond that it was in the hands of the CERC.

12. Learned counsel for Gujarat Urja Vikas Nigam Limited (GUVNL) submitted that every generating station was within a particular State. However, what was to be seen was where it supplied power. If it supplied power within the State then the SERC concerned had the jurisdiction. However, if it supplied power to more than one State, the CERC would have the jurisdiction. It was further pointed out by learned counsel that in case of Haryana, the petitioner was supplying power from a State other than the host State and in such case, under Section 64(5) of the Electricity Act the petitioner had to approach State Commission of the State where the power was being supplied.

13. Learned counsel for GUVNL further submitted that clause (b) of sub-section (1) of Section 79 was to be read with clauses (a) and (b) of sub-section (1) of Section 86. He referred to para 21 of learned Attorney General's opinion and submitted that once there was a matter concerning more than one State, the CERC had jurisdiction as it involved the issue of common approach. He further submitted that Gujarat was getting power from Unit Nos. 1 to 6 of Mundra Power Project, whereas from Unit Nos. 7 to 9 the power was being supplied to Haryana without in any manner affecting Gujarat and not the single unit of power was being supplied to Gujarat from those units.

14. Learned counsel further submitted that although the PPA with GUVNL had been adopted by the GERC and the PPA with Haryana distribution companies had been approved by the HERC, the CERC had jurisdiction under clause (b) of sub-section (1) of Section 79 and could entertain the petition on the issues which were outside the scope of the PPAs and were not affecting the rights and obligations of the parties under the PPAs. Learned counsel pointed out that with regard to PPAs dated 2.2.2007 and 6.2.2007, the petitioner and GUVNL had clearly proceeded on the basis that the GERC was the Appropriate Commission and filed proceedings before the GERC for adjudication of disputes between them. Learned counsel concluded that jurisdiction was to be decided based on identification of the subject matter and did not shift time to time.

15. Learned counsel for Haryana distribution companies while adopting the arguments of learned counsel for GUVNL submitted that under the Electricity Act Sections 62 and 63 were independent as Section 62 related to determination of tariff and Section 63 concerned adoption of tariff. Learned counsel urged that once the PPA was executed it was sacrosanct there could not be any departure except those allowed by the express provisions of the PPA.

16. The Commission directed to petitioner and respondents to file their written submissions on the issue of jurisdiction, latest by 10.9.2012.

17. Subject to the direction to file the written submissions, order on the question of jurisdiction was reserved.

By order of the Commission
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Jt Chief(Law)