
**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 159/MP/2012

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)

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

Date of Hearing: 4.12.2012

Petitioner : Coastal Gujarat Power Limited
Respondents: Gujarat Urja Vikas Nigam Limited and Others

Parties present: Shri Aspi Chinoy, Senior Advocate, CGPL
Shri Amit Kapur, Advocate, CGPL
Shri Mansoor Ali Shoket, Advocate, CGPL
Shri Nitin Kala, Advocate, CGPL
Ms. Divya Chaturvedi, Advocate, CGPL
Shri Ramesh Subramanyam, CGPL
Shri Arun Srivasatva, CGPL
Shri Bomi J. Shroff, Tata Power
Shri Amulya Charan, Tata Power
Shri M.G. Ramachandran Advocate for GUVNL
Shri Padamjeet Singh, PSPCL
Ms. Ashwini Chitnis, Prayas
Shri Shantanu Dixit, Prayas

Record of Proceedings

Ld. Senior counsel appearing for the Petitioner placed the chronology of facts in the matter to demonstrate the stages at which relevant developments took place. Ld. Senior Counsel referred to relevant provisions of the PPA focussing on the definitions of fuel, fuel supply agreement, law, change in law and force majeure, Article 3 (Condition Subsequent), Article 12 (Force Majeure), Article 13 (Change in Law) and Articles 17.1 and Article 17.3 (Dispute Resolution).

2. Ld. Senior Counsel for the Petitioner submitted that the issues for consideration before the Commission are whether in the facts and circumstances of the present case, the Petitioner could claim relief under provisions of the PPA governing change in law or alternatively the provisions of force majeure, and if neither of the two apply, then whether this Commission has the power to revisit the tariff under the PPA in exercise of

its power to 'regulate' under Section 79(1)(b) of the Electricity Act, 2003 (the Act). Accordingly, the claim of the Petitioner is premised on three independent foundations:-

- (a) Article 13 of the PPA due to Change in Law;
- (b) Article 12 of the PPA, pertaining to Force Majeure; and
- (c) In exercise of powers of the Commission to "regulate" tariff under Section 79(1)(b) of the Act.

3. With regard to the submission on change in law, Ld. Senior counsel submitted that the definition of law under the PPA is an inclusive (and not exhaustive) definition. It was further submitted that the definition of law covers 'any law' and is not restricted to Indian law. The term 'law' is required to be interpreted in a contextual basis with a view to give business efficacy to the PPA since the project is based on imported coal and the fuel supply arrangements are a part of the Project Documents. The definition of Law must be given a plenary meaning and cannot be read down by confining it to Indian laws. The promulgation and enforcement of 'Regulation of Ministry of Energy and Mineral Resources No. 17 of 2010 regard procedure for Setting Mineral and Coal Benchmark Selling Price' dated 23.09.2010 by Government of Indonesia ("Indonesian Regulations") led to an unprecedented, uncontrollable and unforeseeable rise in coal prices which constitutes a 'Change in Law' under the PPA. In this view of the matter, the intent of providing a restitutionary mechanism to put the Affected Party to the same position as if such Change in Law had not occurred in terms of Article 13.4 of the PPA must be duly honoured by granting relief.

4. Ld. Senior Counsel for the Petitioner submitted that the correct way of interpreting any commercial agreement like the PPA is to interpret it as per the intention of the parties at the time of signing the contract and to give the contract business efficacy. The present PPA must not be interpreted by a technical and pedantic manner since the same would entail curtailing the meaning of the provisions under the PPA by wrongly reading words into it. The intention of the parties while entering into the PPA was to make the PPA work and to ensure that the 4000 megawatt capacity of the generating station is utilized to secure supply to the procurers. This must be understood in context of the legislative intent of the Act and the needs of the economy reeling under shortage of power.

5. Ld. Senior Counsel for the Petitioner submitted that in case the Commission is of the view that Article 13 pertaining to Change in Law does not apply, then in the alternative, Article 12 pertaining to "Force Majeure" shall apply. The definition of Force Majeure under Article 12.3 of the PPA covers "any event or circumstance or combination of events or circumstances that wholly or partly prevents or unavoidably delays an Affected Party in performing its obligations under the PPA to the extent such events or circumstances are not within the reasonable control, directly or indirectly of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care". It was submitted that the definition of Force Majeure under Article 12.3 of the PPA is couched in wide inclusive terms and is not limited to the situations envisaged thereunder which are only illustrative. Ld. Senior Counsel submitted that the promulgation of the Indonesian Regulation is an event which is beyond the control of the Petitioner and has resulted in making it impossible for the Petitioner to perform its obligations as per the contracted price. Therefore, coming into force of Indonesian Regulations is clearly covered as a Force Majeure event under Article 12.3 of the PPA.

6. Ld. Senior Counsel for the Petitioner submitted that Article 12.4 of the PPA will have to be read with Article 12.3 of the PPA. It was submitted that the heading of Article 12.4 'Force Majeure Exclusion' is a misnomer since it not only stipulates events not amounting to force majeure but also provides certain events which will not be excluded from force majeure events if the same are consequences of force majeure. Accordingly, it was submitted that though, change in cost of fuel is excluded from the definition of Force Majeure under the PPA, since in the present case hike in price of fuel is a consequence of a Force Majeure event (Indonesian Regulation), exclusion under Article 12.4 will not apply.

7. Ld. Senior Counsel for the Petitioner submitted that as per Article 12.7 of the PPA, the relief available to a party in case of a force majeure event was not limited to those specified under Article 4.5 of the PPA pertaining to extension of time since the relief stipulated under Article 12.7 was an inclusive one. It was submitted that Central Commission is free to exercise its powers to fashion a just and fair "relief".

8. Ld. Senior Counsel for the Petitioner submitted that without prejudice to the reliefs available under the PPA, if a project has lost its viability and it has become commercially impossible for a party to perform its obligations under the contract, it can approach this Hon'ble Commission under Section 79(1)(b) of the Act requesting the Commission to revisit/restructure the tariff in a manner which makes the project viable in view of its wide powers to 'regulate' under Section 79(1)(b) of the Act. Ld. Senior counsel submitted that Hon'ble Supreme Court in a catena of judgments has given a broad and wide interpretation to the term 'regulate' to mean to control, adjust, govern, or direct by rule or regulation, to subject to guidance or restrictions, to adapt to circumstances or surroundings including ensuring payment and fixation of fair price. In this regard, reliance was placed on following judgments:-

- a) Bennett Coleman & Co. vs. Union of India, (1972) 2 SCC 788 (5J) at para 100;
- b) V.S.Rice and Oil Mills vs. State of A.P., (1964) 7 SCR 456, AIR 1964 SC 1781 (5J) at para 20;
- c) U.P. Cooperative Cane Unions Federation vs. West of U.P.Sugar Mills Association, (2004) 5 SCC 430 (5J) at para 20;
- d) D.K.Trivedi & Sons vs. State of Gujarat, 1986 Supp SCC 20 at para 30.

9. In context of the powers of the Commission to regulate tariff under Section 79(1)(b) of the Act, Ld. Senior Counsel for the Petitioner submitted that whether tariff is adopted under Section 63 of the Act or determined under Section 62 of the Act, the principles enshrined under Section 61 of the Act will apply in both the cases. In this regard, reliance was placed upon judgment dated 31.05.2012 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 29 of 2011 titled as Tarini Infrastructure Ltd. vs. Gujarat Urja Vikas Nigam Ltd and judgment passed in Essar Power Limited v. UPERC [2012 ELR (APTEL) 0182 at Paras 36, 37, 39, 49, 76 – 78, 135].

10. The Commission desired to know how the sanctity of competitive bidding would be maintained if the tariff is revised subsequently. Ld. Senior counsel replied that sanctity of competitive bidding is a part of the process of arriving at the tariff and cannot be the purpose of ensuring supply of electricity when the project becomes unviable on account of subsequent developments beyond the control of the petitioner. In reply to another query of the Commission whether the Petitioner would have approached under change in law, if the prices of imported coal come down, Ld. Senior counsel submitted that change in law would operate both ways.

11. The Commission observed that CGPL has acquired 30% stake in Indo-Coal Company and after the Indonesian Regulations came into effect, the price of coal has gone up and CGPL would have benefited on account of this event. The Commission enquired whether this gain has been taken into account while making the claim in the present petition for revision of tariff on account of Indonesian Regulations. The Commission also desired to know about the specific actions taken by CGPL against the coal supplier with reference to the provisions in the Fuel Supply Agreement related to price variation and change in law. Ld. senior counsel submitted that the required information would be furnished.

12. Ld. Counsel appearing on behalf of GUVNL made detailed submissions in response to the submissions of the Petitioner. Ld. Counsel suggested certain amendments as under to the list of dates handed over by the Petitioner:

(a) The Indonesian Regulations dated 23.9.2010 does not provide for anything except that the price was required to be aligned as per market prices. There was no provision with regard to prohibiting/restricting the supply under the PPA.

(b) On 28.3.2011, nine months after the promulgation of Indonesian Regulations, an agreement was executed assigning the Coal Sales Agreement dated 31.10.2008 to CGPL for supply of 3.51 MMTA of coal from Indonesia.

(c) On 12.2.2011, the Petitioner issued a communication to all procurers admitting that the Indonesian Regulations was not envisaged as a Change in Law at the time of signing of the PPA. The argument of 'Change in Law' is an afterthought and not contemporaneous with what the parties had intended at the time of signing the PPA in 2007.

13. Ld. Counsel for GUVNL further submitted that the definitions of Law and Change in Law under the PPA unambiguously cover only laws in India. This was the understanding between the parties even at the time of bidding. He relied upon Tata Power's letter dated 12.12.2011 to demonstrate this. Ld. Counsel further submitted that as per Article 17.1 of the PPA, the Governing Law will be laws of India and the same has to be read consistently with Article 13 of the PPA. Had the parties agreed to include within the definition of 'law' the law of the country from which coal would be sourced, the

same would have been provided in the PPA. In the absence of reference to foreign law, the interpretation of definition of law being proposed by the Petitioner cannot be accepted. Ld. Counsel submitted that only the Indian law will apply, as agreed by the parties.

14. Ld. Counsel for GUVNL agreed that the definition of force majeure under the PPA was an inclusive provision and not limited to the events stipulated thereunder. However, it was submitted that force majeure covered only such events that 'prevents or delays an affected party in performing its obligations under the PPA'. The Petitioner in order to make out a case under Article 12 of the PPA is required to establish that it is prevented from performing the PPA. He emphasised that merely because the PPA has become onerous and costly to perform will not attract Article 12 of the PPA.

15. Ld. Counsel for GUVNL further submitted that power of the Commission under section 79(1)(b) read with sections 61 and 62 of the Act to determine the tariff should not be confused with the power of the Commission to adopt tariff under section 63 of the Act. Ld. Counsel submitted that when tariff under Section 63 is adopted, the Commission is not concerned with the components of the tariff quoted by the bidder. The Commission's role under Section 63 is limited to adopting the tariff only if it has been discovered through a transparent process of competitive bidding. The Petitioner in the present case cannot convert the adoption process under Section 63 to a tariff determination process under Section 62 of the Act. The tariff discovered through competitive bidding process under Section 63 is sacrosanct and if the sanctity of Section 63 is given a go-bye, it can be used for any and every kind of eventuality which makes it onerous for a party to perform the contract.

16. The submissions of Ld. Counsel for GUVNL remained inconclusive. The Commission directed that the matter be taken up on **11.12.2012 at 02:30 PM** for further submissions by Ld. Counsel for GUVNL and other respondents and the representative of the consumer group Prayas and rejoinder by the Ld. Counsel for the petitioner.

17. The Commission directed the petitioner to submit the following information:-

- (a) At the time of bidding what was the price of coal in the global market from different sources? At present what is the price of coal from different sources?
- (b) The details of revenue being earned by Tata Power on account of promulgation of Indonesian Regulations?
- (c) Specifications of the coal quality including the price of coal being used at present to operate the Mundra power plant. CGPL to clarify whether the same quality of coal presently being used is specified in the CSA and also whether it falls within the range of coal quality specified for design of boilers.
- (d) Details of the technical specifications including range of coal quality specified for design of boilers design. The capital cost of the plant and equipments assumed at the time of bidding and the actual cost of equipments ordered shall be furnished with break-up.

(e) Details of action taken by the petitioner against the coal supplier in terms of the provisions relating to price variation and change in law in the Fuel Supply Agreement consequent to promulgation of Indonesian Regulations.

(f) Details of gain accrued to CGPL on account of its 30% stake in Indo Coal Company Limited consequent to promulgation of Indonesian Regulations.

18. The above information shall be filed within one week after serving copies on the respondents and the consumer group Prayas.

(By order of the Commission)

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Jt Chief(Law)