ENTRAL 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 30.1.2013

Petitioner : Coastal Gujarat Power Limited

Respondents Gujarat Urja Vikas Nigam Limited and Others

Parties Present
1. Shri Aspi Chenoy, Senior Advocate, CGPL
2. Shri Amit Kapur, Advocate, CGPL
3. Ms Sugandha Somani, Advocate, CGPL
4. Shri Apoorva Mishra, Advocate, CGPL
5. Shri Abhishek Munot, Advocate, CGPL
6. Shri Bijoy Mohanty, CGPL
7. Shri B J Shroff, CGPL
8. Shri R Subramanyam, Tata Power
9. Shri Saurabh Shankar, Tata Power
10. Shri Sandeep Mehta, Tata Power
11. Ms Smera Chawla, Tata Power
12. Shri Arun Srivastava, Tata Power
13. Shri M G Ramachandaran, Advocate, GUVNL
14. Ms Swapna Seshadri, Advocate, GUVNL
15. Shri P J Jani, GUVNL
16. Shri Padamjit Singh,PSPCL
17. Ms Ashwini Chitnis, Prayas Energy Group

RECORD OF PROCEEDINGS

Learned senior counsel for the petitioner rejoined the issues raised on behalf of the respondents at the previous hearing.

2. In reply to the respondents' contention that "Change of Law" as used in Article 13 of the PPA should necessarily be restricted to Indian law since foreign law had not been specifically mentioned in the PPA and the petitioner's own understanding as reflected in letter dated 12.12.2011 was that only Indian law was within contemplation, learned senior counsel submitted as under:

(a) The words "any law" or "all laws" used in the PPA are plenary in nature and it has to be seen whether the context requires it to be read differently. The context militates against such construction as may be seen from the recital that the project would be based on imported coal.

(b) The underlying purpose of Article 13 is to ensure continued operation of the contract when due to change of law the contract becomes inoperable. With the understanding of this basic object, Article 13 is to be construed so as to give it business-efficacy.

(c) The context does not require the expressions "any law" or "all laws" to be interpreted differently. If it was intended to restrict the interpretation to Indian law, then specific language would have been used.

(d) When the contract is based on imported coal which constitutes 60-70 percent of the cost of generation, language used is to cover foreign laws also in order to give full import to the terms used.

(e) If foreign law is excluded from the operation of Article 13, whole economics or continued operation of the plant is affected.

(f) By construing it artificially to mean only Indian law where 70 % of the generation cost comes from foreign supply contract, the purpose of Article 13 will be undermined, it will destroy its business efficacy because then a situation will be created where although because of change of law the costs have gone up, the contract no longer takes cognisance of that, resulting in unworkability of the contract.

(g) The letter dated 12.12.2011 has no impact on the true interpretation of Article 13. The letter is not an admission and does not operate as estoppel against the petitioner as it is based on an incorrect view.

(h) The true interpretation has to come, not from the parties but from the Commission on the basis of the language used.

(i) In case the interpretation as given by the petitioner is accepted, the contract will continue to operate after compensating the petitioner for the additional cost incurred by virtue of change of law which will not amount to either unjust enrichment or any inequitable gain. It only

allows the contract to be continued on the basis it was entered into, otherwise the contract looses viability.

3. Replying to the respondents' plea of inapplicability of the F*orce Majeure* clause under Article 12 of the PPA for the reason that increase in price neither delays nor prevents the performance of obligations under the PPA and that Article 12 is applicable to either seller or procurer but does not impact a third person, learned senior counsel submitted as under:

(a) Article 12.4, specifically includes changes in cost of fuel if change is caused by an act of *force majeure*.

(b) Changes in cost of fuel caused by an act beyond the parties' control are expressly within the ambit of Article 12.

(c) Article 12 contemplates that if due to an event of *force majeure*, price of fuel goes up, that increase in price is an event of *force majeure*.

(d) The purpose of Article 12 is to ensure that the contract retains cogency and viability when the circumstances are outside the control of the parties.

(e) Restricting *Force Majeure* clause will be onerous or costly to parties and negate the object of Article 12.

(f) The purpose of Article 12 was to ensure continuity and operation in the circumstances not envisaged and beyond the control of the parties.

4. In response to the submission of the respondents that the requirement of 5.85 MMTA of coal had been tied up prior to the Indonesian Regulation came into force and the requirement of 3.51 MMTA was tied up post-Regulation, learned senior counsel clarified that the entire requirement was tied up prior to Indonesian Regulation. He stated that Tata Power entered into Coal Sales Agreement with IndoCoal for total supply of 10.11 MMTA which included 5.85 MMTA for Mundra Power Project and on 9.8.2008, an agreement was signed between Tata Power and the petitioner for balance coal requirement of 6.15 MMTA to meet the total requirement of 12 MMTA of coal under the PPA. Learned senior counsel submitted that on 20.3.2011, a direct agreement was entered into under which supply of 3.51 MMTA of coal was assigned to the petitioner. He argued that it was not correct that the Indonesian Regulation did not affect supply of 3.51 MMTA.

5. Replying to various observations of the Commission, learned senior counsel stated that

(a) The petitioner had informed the procurers when the Regulation came and the first communication was sent to Ministry of Power on 4.8.2011.

(b) Coal was not available anywhere at lesser price and import of coal from Indonesia was still the cheapest option. In December 2006, rates per tonne for coal in Indonesia, Australia and South Africa were $34, $50 and $50 respectively which increased to $64.2, $88 and $86 in November 2012.

(c) After promulgation of Indonesian Regulation, the petitioner took advice of the local lawyer who informed that there was little chance of success and the judicial process could take a long time.

(d) The issue was discussed at bilateral joint committee, representations were made to the Government and the Embassy through Association of Power Producers and the dialogue held, but in August 2011 it was realised that no relief was possible.

(e) In December 2011, the letters were written to the Planning Commission, Ministry of Power, and the two State Governments.

(f) The issue could not be referred to arbitration under the Singaporean law since it was not a commercial dispute under the agreement but the issue was promulgation of law by a Indonesian Government. Singapore court cannot over rule Indonesian law.

(g) Under the Coal Supply Agreement the governing law is law of Indonesia and it provides for arbitration. The arbitral court cannot strike down a decree of Indonesia, and it cannot award any damages since the seller is acting as per the law of Indonesia. Therefore there cannot be a dispute with the seller.

(h) There is no provision under the contract to deal with such a situation as no one contemplated regulation by Indonesian Government.

(i) The entire liability has been passed on to the petitioner because of the operation of Indonesian law which says that coal cannot be sold at a lower rate.

(j) The boiler design of the generating station is of 4900 GCV and agreement has been signed for supply of coal with 5350 GCV; the petitioner is experimenting on lower grades of coal, lower than the boiler design to bring down the cost. [At this stage learned counsel for

the respondents pointed out that appropriate coal that can be used is of 5000 GCV and price of this quality of coal was $54 in January 2010 and $56 in November 2010 as per the information available on Indonesian Government's website].

(k) There will be no change in effective cost for using lower grade of coal as at low level the moisture content is very high.

(l) If the price comes down, the pass-through also comes down.

(m) When bids were submitted the price of coal was not finalised. It was quoted based on the likely price of $32/MT and not on market price. The petitioner was able to manage coal at $34/MT against the market price of $42/MT.

5. Learned senior counsel made the following additional submissions:

(a) If the increase in price of Indonesian coal is offset, the tariff will be within ₹3/unit against ₹4-5/unit which is the ruling tariff being currently discovered through the competitive bidding and it will still be the cheapest and lower than L-2.

(b) The supply of electricity has to be in a viable commercial manner, but the petitioner is making loss of ₹1900 crore every year under these circumstances. The contract is incapable of performance and the company will close down.

(c) Section 56 of the Indian Contract Act, 1897 which deals with frustration and impossibility operates to put a contract to an end where there is impossible performance. However, Section 56 operates when a contract does not make a provision.

(d) Increase in cost of fuel by virtue of Indonesian Regulation is covered under the contract and the remedies are available under the contract.

(e) In case there was no contractual clause like Article 12 of the PPA then the recourse would be to Section 56 and to bring in the principle of supervening impossibility not as physically or humanly impossible but is commercially impracticable as being useless with regard to the object.

(f) Article 12 precludes that position by making specific provision and allowing compensation etc through the doctrine of *Force Majeure* to be claimed allowing the contract to keep working.

(g) The judgment of the Appellate Tribunal in Patkari's case support the petitioner's contention that the Commission can revisit the PPA under its power to regulate under section 79(1)(b) of the Electricity Act, 2003 because the change in circumstances which is beyond the control of the petitioner has endangered the very survival of the project.

6. Learned counsel for GUVNL made the following submissions:

(a) Article 12.2 talks about impossibility of performance or delay in performance and if a mater does not fall within Article 12.2, Article 12.4 cannot be looked into as it is not an independent provision of *Force Majeure.*

(b) It needs to be examined by the Commission whether the dispute falls within the scope of *Force Majeure* or Change in Law. If the dispute is not within the scope of *Force Majeure* or Change in Law, the petitioner is not entitled to any relief.

(c) The submission that the petitioner may be compensated for the loss does not have the legal basis since in that case the remedy is available under Section 3 of the Electricity Act, 2003. If the Central Government perceives that this problem has become universal in India and a solution is to be found, it has to form part of policy under Section 3 and the Commission cannot go into the matter. If the Central Government comes to the conclusion that all these PPAs have to be re-opened in the larger public interest, the Central Commission may frame the policy under section 3 of the Act to address the situation.

(d) Patikari's judgement relied upon by the petitioner had the distinguishing features as under:

(i) The judgement is not under Section 63, but is under Sections 61 and 62 of the Electricity Act, 2003.

(ii) It is about non-conventional energy and Section 86 (1) (e) provides for power of the State Commission to promote it.

(iii) The data given by Himachal SEB in that case was not correct.

(iv) Relief was limited to the quantum of waterflow.

(v) The tariff quoted by the petitioner in the present case was all inclusive and no exclusion could be allowed as the bidder was forewarned to take into account all costs including capital and operating, statutory taxes, duties, etc.

(e) The bid submitted by the petitioner was not a conditional bid.

(f) Grant of relief will make the entire process under Section 63 redundant. Section 63 is a special provision, where the Commission does not get into the elements of the cost or the tariff but adopts it. The Commission after adopting the tariff under Section 63 cannot exercise power under Sections 61 and 62 for scrutiny.

(g) Sanctity of the basic contract must be upheld. Operator should be held accountable for its submitted bid. The financial equation set by the winning bid should always be preference point and financial equilibrium behind that bid should be resorted to in the event of renegotiation or adjustment. Renegotiation should not be used to correct the mistakes in bidding or overly risky or aggressive bids.

(h) There was no Coal Supply Agreement when bid was submitted on 7.12.2006. Only on 9.9.2008 Tata entered into an agreement with the petitioner for supplying 6.15 MMTA.

(i) It is the obligation of Tata power to supply 3.51 MMTA of coal to the petitioner based on an agreement between the two. It is not the obligation of the petitioner to go to IndoCoal for supply of coal.

(j) If the petitioner is losing money on procurement it cannot be *Force* Majeure because *Force* Majeure deals with impossibility of performance or delay in performance and not rise in price. Indonesian Regulation does not make the performance impossible or delay in performance.

(k) Benefit of Indonesian Regulation is going to the selling company, IndoCoal in which Tata has 30% stake.

7. The representative of PSPCL submitted as under:

(a) Indonesian Regulation or any other factors pleaded by the petitioner do not in any manner prevent or delay the petitioner's performance or its obligations under the PPA. Increase in price or terms and conditions making the performance onerous or difficult cannot be said to be an event making procurement of fuel impossible within the meaning of Article 12.

(b) When the bid was submitted and acceptance was given it was accepted unconditionally and irrevocably and the petitioner agreed and accepted that the decision made by the authorised procurers regarding any matter arising on RfP was binding on it.

(c) The bid process carried out by PFC in which the project was awarded to the petitioner cannot be opened under any clause of PPA.

(d) The petitioner's plea that it sent the letters to the State Governments and Central Government are not applicable to the parties in this petition is not tenable since the parties are the distribution companies whose owners are the State Governments. Any letter sent to the Chief Secretary of the State Government is to be considered as sent to the distribution companies.

8. The representative of Prayas Energy Group reiterated that the petitioner's own understanding was that Indonesian Regulation was not covered under Change of Law or *Force* Majeure based on the letter written by the petitioner to various Governmental agencies. If the understanding of the petitioner at the time of bidding and at the point of time of signing the PPA was that Change of Law is Indian law, it took risk to source fuel from Indonesia or anywhere in the world knowingly and willingly. The risk taken knowingly and willingly cannot be said to be unforeseen and is therefore not a *Force Majeure.*

9. The Commission granted liberty to the parties to file their written submissions within two weeks.

10. Subject to above, the Commission reserved its order on the petition.

By order of the Commission

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Jt. Chief (Law)