

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 155/MP/2012

Coram:

Shri V.S.Verma, Member

Shri M. Deena Dayalan, Member

Shri A.K. Singhal, Member

Date of hearing : 15.10.2013

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.

Petitioner : Adani Power Limited, Ahmedabad

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

Parties present : Shri Amit Kapoor, Advocate, APL
Shri Poonam Verma, Advocate, APL
Shri Gaurav Dudeja, Advocate, APL
Shri Jatin Janlundhwala, APL
Shri Malav Deliwala, APL
Shri Kandarp Patel, APL
Shri M.G.Ramachandran, Advocate, Haryana and Gujarat
Ms. Anushree, Advocate, HPPL
Shri Ravi Juneja, HPPL
Shri Sahil Gupta, HPPL
Shri K.P.Jangid, GUVNL
Shri K.P.Jani, GUVNL
Shri Padamjeet singh, PSPCL
Shri Jayant Bhsuhan, Senior Advocate for the Applicant for Impleadment

Record of Proceedings

Learned senior counsel submitted that Shri Pushpendra Surana, a Chartered Accountant by profession and a public spirited person has filed IA No. 36 of 2013 seeking impleadment in the present matter in order to safeguard interest of consumers as the applicant is a consumer of electricity and will be impacted by any order that will be passed in the present matter. Learned senior counsel for the applicant and learned counsel for the petitioner, Adani Power Limited advanced elaborate arguments in favor of and against the impleadment respectively. The Commission after hearing the learned counsel reserved order in the IA which will be issued separately. However, the Commission permitted the applicant to participate in the proceeding of the Commission in this matter and directed the petitioner to supply a copy of the petition within two days. The Commission directed that the applicant is at liberty to verify the records in accordance with Regulation 66 and 67 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 and obtain copy of any other documents filed in the petition to make its submission in the case. The Commission further directed that the applicant would be given an opportunity of hearing if the applicant or its counsel is present during the hearing after completion of the arguments of the petitioner and the respondents.

2. The Commission heard the learned Counsel for petitioner and respondents and the representative of PSPCL on the merit of the petition.

3. Learned Counsel for the petitioner submitted that in pursuance to the order of the Commission dated 2.4.2013, the Committee has given its report and the respondents have filed their replies. Learned Counsel discussed the issues raised by the respondent. On the first issue of date of applicability of compensatory tariff raised by both respondents, namely Gujarat and Haryana, learned counsel for the petitioner submitted that the respondents contention that the date of final order of this Commission should be the date of applicability of compensatory tariff is baseless as this Commission in its order dated 2.4.2013 has sought the Committee's recommendations on the prayer of the petitioner to allow compensation for power supply w.e.f. SCOD. The Committee after taking into account the facts and the relevant documents has recommended the recovery of historical losses from SCOD by prescribing the Fuel Cost Adjustment formula in the form of compensatory tariff. Learned counsel for the petitioner submitted that if the date of applicability of compensatory tariff is taken from the date of final order of the Commission, the purpose of grant of such relief of compensatory tariff will be defeated as the petitioner would not be compensated for the past losses. He further clarified that even if the amount of past losses on account of energy charges is paid as per Committee recommendations, it would not be sufficient to meet the cumulative losses incurred by the petitioner, However, the petitioner agreed in-principle to recover the past losses as recommended by the Committee, within time frame of not more than 3 (three) years, subject to carrying cost at appropriate rate of interest as may be decided by the Commission. Learned counsel submitted that it is a settled position of law that the compensation is to be paid from the date of cause of action and in that connection relied upon the following judgments:

- (i) N. Narasimhaiah & Ors Vs State of Karnataka &Ors [(1996)3SCC 88],
- (ii) Assistant Collector of Customs Vs. Associated Forest Products Ltd. [(2000) 9 SCC 258];
- (iii) Shriram Fertilizers and Chemicals Vs Union of India [IV (2005) BC 287];
- (iv) DCM Shriram Consolidated Ltd. Vs Union of India [II (2005) ACC 371].

4. Learned counsel for the petitioner submitted that in the present case, the cause of action has arisen from the SCOD as mentioned in the present petition i.e., the date when the petitioner commenced supply on commercial basis to the respondents.

5. In respect of the second issue of pricing of coal/rate of imported coal raised by both Gujarat and Haryana, learned counsel for the petitioner submitted that coal from Indonesia can be sourced at a price not less than the benchmark/HBA prices as acknowledged by CERC and the Committee Report. In the present case, coal is being procured from Indonesia. Harga Batubara Acuan (“HBA”), Indonesia Coal Price Reference is the appropriate index. Presently, CERC formula for imported coal escalation rate does not take into account the HBA price index. Therefore, for the purposes of pricing of coal, HBA should be considered.

6. On the third issue raised only by the Haryana Utilities regarding the Foreign Exchange Rate Variation (FERV), learned counsel for the petitioner submitted that the committee in its Report has observed that Forex component being an integral part of fuel, has to be factored in to evaluate the actual hardship faced by the petitioner. The same is also in line with the mandate given to the Committee by CERC to derive a variable compensation package which should commensurate with the hardship that the Company is suffering on account of the unforeseen events. Forex rates have been volatile since the last 6 years as can be seen from the graph at page 46 of the Committee Report. The compensation package would also take into account favorable/adverse Forex movements in the formulation of Compensatory Tariff and once exchange rate is reduced the benefit of the same will also be passed on to the consumers. Haryana suggested before the Committee that Forex variation should not be considered for determination of compensatory tariff. It was explained to Haryana Utilities in the proceeding before the Committee that no FERV compensation is being considered by the Committee in capacity charges, despite the fact that its impact is significant. It was further explained in the Committee that cushion available to absorb Forex fluctuation has been consumed by change in coal prices and change in source of coal to the extent of shortfall of domestic coal.

7. Learned counsel for the petitioner further submitted that both the bids were predominately premised on domestic coal (GMDC Morga–domestic coal for Gujarat and 70% linkage coal for Haryana). Even bid conditions did not allow to quote in the USD and the tariff was quoted in INR. Without addressing the foreign exchange fluctuation effect which is an integral part of energy charges, the compensatory tariff will not reflect

the true hardship being faced since the Petitioner never submitted its bid on the basis of the imported coal and foreign exchange risk was never envisaged. Due to change in circumstances post bidding, initially the petitioner was forced to shift from domestic to imported coal and later the escalation in price of imported coal coupled with depreciation of rupee has worsened the situation.

8. Learned counsel for the petitioner submitted that the Quoted Energy Charge in both the cases do not have any break up (unlike case-2 bids based on imported coal) of element wise tariff component for FOB, Ocean Freight, Port Handling Charges, Forex, transmission charges (applicable in case of Haryana) etc. The recent decisions of CCEA/MoP/ CERC has allowed pass through of the cost of imported coal including implication of Forex variation of energy charges being used, due to shortage in supply of domestic coal with linkage. This decision is applicable for already concluded PPA. Learned counsel referred to Ministry of Power letter dated 31.7.2013 addressed to Regulatory Commissions.

9. Learned counsel further submitted that current draft SBD for Case I and Case 2 projects provides that foreign exchange risk would be borne by procurers as Developer has no means to hedge such risk on long-term basis. The Committee has considered all these factors.

10. The Commission sought clarification from the petitioner whether the petitioner would have still filed the petition before this Commission, if the price of imported coal from Indonesia had remained unchanged i.e. at USD 36 per MT as was agreed by the petitioner and the rupee-dollar fluctuation/depreciation had occurred. Learned counsel on instructions clarified that Forex fluctuation would have led to filing of a Petition of a different nature to set out Petitioner's case and difficulties. Due to paucity of time, the Commission directed the petitioner to advance its arguments on the next date of hearing.

11. The Petition is listed for further hearing on 30.10.2013 at 2.30 P.M.

By order of the Commission

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