

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No.24/MP/2014**

- Subject** : Petition under Section 79 of the Electricity Act, 2003 to evolve a mechanism/adjust tariff on account of subsequent events rendering petitioners power plant commercially unviable due to unprecedented, unforeseeable and uncontrollable events including enactment of new coal pricing regulation by Indonesian Government and depreciation of Indian Rupee vis-a-vis US Dollar and levy MAT as per amendment of section 115 JB of Income Tax Act, 1961.
- Date of hearing** : 8.7.2014
- Coram** : Shri Gireesh B. Pradhan, Chairperson  
Shri M. DennaDayalan, Member  
Shri A.K. Singhal, Member
- Petitioner** : Adani Power Ltd.
- Respondent** : Gujarat UrjaVikas Nigam Ltd., Vadodara
- Parties Present** : Shri Amit Kapur, Advocate, APL  
Ms. Poonam Verma, Advocate, APL  
Shri Gaurav Dudeja, Advocate, APL  
Shri Malav Deliwala, APL  
Shri Anand Ganesan, Advocate, GUVNL  
Shri P.J. Jani, GUVNL

**Record of Proceedings**

Learned counsel for the petitioner referred to the list of events in the written note of argument and submitted that the petition has been filed for restitution of Adani Power Ltd. for the adverse financial impact on account of the subsequent events as under:

- (a) Enactment of Regulation of Ministry of Energy and Mineral Resource No. 17 of 2010 dated 23.9.2010 making it obligatory on the coal mining companies to sell the Indonesian Coal only at benchmark price, irrespective of the existing contracts.
- (b) Steep and unprecedented depreciation of Indian Rupee vis-à-vis US Dollar.

(c) Levy of Minimum Alternate Tax as per amendment of Section 115JB of Income Tax Act, 1961 w.e.f. 1.4.2011.

2. Learned counsel submitted that the tariff under the bid was to be quoted in INR only as per the conditions of RfQ and there was no provision for escalation in fuel price.

3. Learned counsel for the petitioner further submitted that this Commission has jurisdiction to adjudicate upon the dispute raised in the present petition under Section 79(1)(b) of the Electricity Act, 2003 (Act) as petitioner has a composite scheme for generation and supply of electricity in more than one State i.e. Haryana and Gujarat which has also been upheld by the Commission in order dated 16.10.2012 in Petition No. 155 of 2012, in which GUVNL was a party.

4. Learned counsel for the petitioner submitted that Review Petition No. 26 of 2012, filed by Haryana Utilities against the Commission's order dated 16.10.2012 was dismissed on 16.1.2013. GUVNL chose not to challenge the orders dated 16.10.2012 and 16.1.2013 and allowed the orders to attain finality.

5. Learned counsel for the petitioner contended that if following ingredients are satisfied, this Commission is empowered to regulate the tariff as mandated by Section 79(1)(b) of the Act or adjudicate the dispute referred under Section 79(1)(f) of the Act:

(a) There must be a generating company which is not owned or controlled by the Central Government.

(b) Such generating company must have either entered into or otherwise have a composite scheme for generation and sale of electricity in more than one State (as opposed to Section 86(1)(a) which is within a State).

(c) Such generating company approaches Central Commission to regulate the tariff or adjudicate upon a dispute involving the generating company.

6. Learned counsel for the petitioner further submitted that that Section 79(1)(b) of the Act covers private generating companies which have a composite scheme for generation and sale of electricity in more than one State at the time of filing of the petition. Since, the expression "or otherwise have" appears in Section 79(1)(b) after the words, "entered into", the same has to be given a meaning beyond "entered into" i.e., where the generating company by any other method or mechanism or arrangement (which includes PPA) comes to have such a composite scheme, even though in the beginning the generating company may have signed PPA(s) for supply to one State or the host State. Such evolution of a composite scheme would occur where generating company at a later stage enters into another PPA for supply of power to some other State(s). Therefore, such generating company can be said to

have a composite scheme for generation and sale of electricity in more than one State when it enters into PPA with the other State.

7. Learned counsel submitted that adoption of tariff under Section 63 of the Act would be subject to compliance with the Section 61 principles and regulation/adjudication under Sections 62, 79(1)(b), 79(1)(f), 86(1)(b) and 86(1)(f) of the Act, as laid down in judgments of the Hon'ble Appellate Tribunal and as also envisaged in para 5.17 of the Competitive Bidding Guidelines.

8. In response to the Commission's query regarding the variation in quoted tariff and accepted tariff, learned counsel for the petitioner clarified that initially the quoted levelised tariff in the bid was ₹3.29 per kWh which was further negotiated by GUVNL and the petitioner agreed to reduce the tariff to ₹2.89 per kWh.

9. Learned counsel for GUVNL submitted as under:

(a) GUVNL is the only beneficiary of the project and the petitioner's Mundra Power Project does not have a composite scheme.

(b) The PPA entered into between the petitioner and GUVNL is only limited to 4x330 MW and there is no reference to any other beneficiary in the PPA. The composite scheme can only be said to exist when there is combined purchase of power by more than one State at the same tariff.

(c) As per the PPA dated 6.2.2007, Adani Power Ltd. is required to supply 1000 MW power from 4 units of 330 MW each. These 4 units constitute one power station. GUVNL is the only beneficiary for supply of power from these 4 units. Therefore, the present petition raises State specific issues which can be maintainable only before the State Commission.

(d) The petitioner does not have a composite scheme for generation and supply of electricity in more than one State. PPAs of Adani Power with GUVNL and Haryana Utilities were on the basis of separate and independent competitive bidding processes and were not entered through a combined bid process envisaged under clause 2.4 of Competitive Bidding Guidelines.

(e) Learned counsel for GUVNL relied upon the following judgements of Appellate Tribunal for Electricity and submitted that there has to be uniformity in tariffs at which electricity is being supplied to the two states to qualify for composite scheme:

- (i) PTC India Limited Vs. Central Electricity Regulatory Commission (dated 23.11.2006 in Appeal No. 228 of 2006 and 230 of 2006); and
- (ii) BSES Rajdhani Power Limited vs. Delhi Electricity Regulatory Commission (dated 4.9.2012 in Appeal No. 94 of 2012).

(f) The PPA defines Appropriate Commission as Gujarat Electricity Regulatory Commission ("GERC"). Number of petitions were filed before GERC by the petitioner and GUVNL for adjudication of the disputes arising between the parties. GUVNL had also filed Petition No. 1000 of 2010 before GERC in regard to alleged termination of the PPA dated 2.2.2007 on account of non-fulfilment of the condition precedents of the execution of the Fuel Supply Agreement. Therefore, jurisdiction of GERC has been invoked by the parties in regard to disputes, differences and issues relating to the PPAs dated 2.2.2007 and 6.2.2007 entered between the petitioner and GUVNL apart from adoption of tariff. Since, various matters have been decided or are pending before Appellate Tribunal arising out of the orders of GERC, the same cannot be the subject matter of adjudication before the Commission in the present proceedings.

(g) Mere existence of a scheme for generation and sale of electricity by the petitioner to Gujarat and another scheme for generation and sale of electricity to Haryana and that too, from separate generating units does not become a composite scheme for the purpose of Section 79 (1) (b) of the Act.

10. Learned counsel for the petitioner in rebuttal submitted as under:

(a) The Commission in its order dated 16.10.2012 has held that the petitioner is currently selling electricity generated at Mundra Power Project to more than one State, namely, the States of Gujarat and Haryana.

(b) The petitioner has not filed any petition before GERC pursuant to order dated 16.10.2012. In fact, in the order dated 16.10.2012, the Commission not only held that it had jurisdiction over the petitioner's Mundra Power plant but also reprimanded the petitioner for filing petitions before GERC. Therefore, present petition is in consonance with the Commission's order.

(c) The condition of sale of electricity in more than one State is duly met in this case. All the three conditions of clause (b) of Section 79 (1) are duly satisfied. Therefore, at present the petitioner has entered into or otherwise has the 'composite scheme' for generation and sale of electricity in more than one State.

(d) The definition of generating station as per the Act is not limited to particular units but the generating station as a whole. GUVNL is re-arguing the entire case which has already been decided by the Commission in the earlier two orders dated 16.10.2012 and 16.1.2013 in a separate matter relating to same power project.

(e) Article 17.3 of the PPA provides for adjudication of dispute by the Appropriate Commission as provided under Sections 79 or 86 of the Act. If GERC was the only Appropriate Commission, then there was no requirement of mentioning Section 79 of the Act in Article 17.3.

(f) Judgments being relied upon by learned counsel for GUVNL does not support its case as they have been passed under separate fact situations. All the arguments raised by GUVNL were considered by the Commission while passing orders dated 16.10.2012 and 16.1.2012 in Petition No. 155/MP/2013.

(g) Clause 2.4 of Competitive Bidding Guidelines refer to combined bidding process and does not refer to composite scheme. If a generating company fulfils the ingredients of Section 79(1)(b), the Commission is empowered to regulate its tariff. Further, Competitive Bidding Guidelines cannot restrict the scope of Section 79. Therefore, the Commission has jurisdiction to adjudicate the disputes raised in the present petition.

11. After hearing the learned counsels for the petitioner and respondent, the Commission directed the petitioner and respondent to file their written submissions by 23.7.2014 with copy to each other. If the written submissions are not filed by due date, the Commission shall be at liberty to issue order without taking into consideration the submission made after the due date.

12. Subject to above, the Commission reserved order in the petition on the issue of maintainability.

By order of the Commission

Sd/-  
(T Rout)  
Chief (Law)