

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 275/MP/2019 with I.A No.9/2020

Subject : Petition pursuant to the directions of the Supreme Court vide its Order dated 2.7.2019 in Civil Appeal No. 11133 of 2011 and applicable provisions of the Electricity Act, 2003 including Sections 62 and 79(1)(b)

Petitioner : Adani Power (Mundra) Limited

Respondent : Gujarat Urja Vikas Nigam Limited

Date of hearing : **20.7.2020**

Coram : Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member

Parties present : Shri Amit Kapur, Advocate, AP(M)L
Ms. Poonam Verma, Advocate, AP(M)L
Ms. Adishree Chakraborty, Advocate, AP(M)L
Shri M.G. Ramachandran, Senior Advocate, GUVNL
Ms. Ranjitha Ramachandran, Advocate, GUVNL
Shri Shubham Arya, Advocate, GUVNL

Record of Proceedings

The matter was heard through video conferencing.

2. During the hearing, the learned counsel for the Petitioner circulated note of arguments and submitted the following:

(a) The Petitioner has filed this petition for implementation of the directions of the Hon'ble Supreme Court judgment dated 2.7.2019 which held that the Petitioner's notice of termination dated 2.2.2007 was legal and the PPA stood terminated with effect from 4.1.2020. The Hon'ble Supreme Court has held that the Petitioner is entitled to compensation with respect to (i) adjustment of cost of project; (ii) expenditure towards operating the project after obtaining coal from open market; and (iii) carrying cost/Interest on delay of payments;

(b) The Hon'ble SC has directed this Commission to determine the compensatory tariff within three months of the Petitioner approaching the Commission. It has also directed the Respondent GUVNL to pay compensatory tariff so determined, to the Petitioner, after adjusting the amounts already paid within three months from the date of determination;

(c) This petition is a limited and time bound remand pursuant to the judgment of the Hon'ble Supreme Court. In case of a limited remand, the remanded court



ought to act upon the strict directions of the remand order (SC judgments in K.P.Dwivedi vs State of UP and GUVNL V CERC & ors relied upon);

(d) The Commission is required to determine the tariff in terms of the SC judgment read with Section 62 of the Electricity Act, 2003 and the 2009 Tariff Regulations, while applying the principles of prudence check. The Petitioner has furnished the Auditor Certificates supporting its claims for verification of the Commission. The Respondent GUVNL cannot delay the adjudication and cast aspersions on the veracity of the Auditor Certificates without any cogent reasoning (SC Judgments in WBERC V CESC Ltd, Sukumar v Secretary ICAI relied upon);

(e) The Petitioner has furnished all necessary details required for determination of compensatory tariff including the tariff filing forms in terms of the 2009 Tariff Regulations. It has complied with the directions contained in ROPs of this Commission dated 18.12.2019 and 12.2.2020 and filed all relevant documents. The Commission as a sectoral regulator is best placed to determine what information /document is required to be filed for tariff determination and the Respondent GUVNL ought not to dictate terms regarding the documents/information required to be filed by the Petitioner;

(f) The Respondent GUVNL cannot negate the findings of the Hon'ble SC in its judgments in Energy Watchdog case and UHBVNL v APL case. The Commission is bound to follow the said judgments in view of the settled principle of judicial discipline;

(g) The Commission is not empowered to convert the tariff determination process pursuant to remand by the Hon'ble SC into an inquisitorial proceedings as the scope of the present proceedings is confined to be boundaries created by the SC judgment. The inquisitorial role of this Commission is limited to circumstances envisaged under Sections 128 to 130 of the 2003 Act. Also, the Commission is a regulator and is not dealing with criminal proceedings;

(h) The DRI (Directorate of Revenue Intelligence) issue cannot be re-agitated as the Hon'ble SC in Energy Watchdog case and the Commission in its order dated 6.12.2016 in Petition No. 155/MP/2012 and order dated 12.4.2019 in Petition No. 374/MP/2019 had held that the DRI issue is not relevant for these proceedings. The Respondents GUVNL's attempt to re-agitate this issue is barred by the principles of *res judicata*;

(i) The allegations of Respondent GUVNL based on surmises and conjectures, without any material evidence being adduced, ought to be construed as baseless and hence discarded. Newspaper is not one of the documents referred to in Section 78(2) of the Evidence Act, 1872 by which an allegation of fact can be proved. It is only hearsay evidence and courts cannot take judicial notice of material facts on the basis of newspaper report (SC judgments in Raj Shetty v State of TN and Manmohan Kalia v Yash relied upon);

(j) The Petitioner has furnished the details for computation of fuel cost for the period from 2009-14 to 2019-24. The Respondent GUVNL cannot now reopen the issue of the Petitioner's entitlement to compensation due to termination of Bid-2



PPA, as it had admitted in the Review Petition filed before the Hon'ble SC, that the Petitioner is required to be compensated for loss suffered in energy charges;

(k) Respondent GUVNL contention that the coal export from Indonesia can be at a price less than the HBA index price is contrary to Indonesian law. The Respondent had consistently contended in proceedings before this Commission in Petition No. 155/MP/2012 that mining companies in Indonesia are required to not sell coal below the Bench mark prices and hence the Respondent cannot be allowed to reprobate from this position and is an afterthought;

(l) The present petition has been filed in accordance with the Hon'ble SC judgment dated 2.7.2019 and the Respondent GUVNL cannot be permitted to deviate from the directions contained in the said judgment.

3. The learned Senior Counsel for the Respondent GUVNL clarified that the Respondent GUVNL has neither attempted to deviate from the directions of the Hon'ble SC in the judgment dated 2.7.2019 nor has delayed the proceedings before this Commission. He circulated note of arguments in the matter and made the following submissions:

(a) The Petitioner's submission that GUVNL is bound by the recommendations of the Deepak Parekh Committee and that the consideration of the Indonesian Regulations in the earlier proceedings will bind this Commission in the present proceedings are not sustainable. The Commission will have to determine the compensatory tariff afresh as per the decision of the Hon'ble SC dated 2.7.2019 for the period from SCOD to 9.7.2019 in accordance with law and settled principles;

(b) There is no breach, failure or factors attributable to GUVNL which led to the termination of the PPA as the Hon'ble SC in paragraph 55 of the said judgment has directed the payment of liquidated damages by the Petitioner to GUVNL for termination of the PPA;

(c) The orders passed by Gujarat Electricity Regulatory Commission (GERC) and the Appellate Tribunal for Electricity (APTEL) were reversed by the Hon'ble SC vide its judgment dated 2.7.2019. Hence, compensatory tariff is required to be determined on the 'restitution principles' in terms of Section 144 of the Civil Procedure Code (CPC) for the resultant loss caused to the Petitioner on account of the Court proceedings and act of Court and not as damage for breach or failure on the part of GUVNL (SC judgments in Citi Bank N.A v Hiten P Dalal, KSEB v MRF Ltd, SECL v State of MP relied upon);

(d) The restitution principle for act of Court cannot be to the extent of the Petitioner getting full tariff with all elements including Return on Equity, etc., but has to be limited for compensating the Petitioner for loss or otherwise in line with the specific directions given by the Hon'ble SC in paragraphs 53 and 54 of the said judgment;

(e) The elements to be considered for compensatory tariff in terms of paragraph 53 of the judgment dated 2.7.2019 are (i) the expenditure incurred by Petitioner for supplying power in accordance with the decision of the GERC and APTEL after commissioning the project; (ii) the Petitioners entitlement for adjustment of the cost of the project; (iii) the interest on the expenditure incurred by Petitioner for



completion of project; (iv) the expenditure incurred by Petitioner towards operating the project after obtaining coal from open market; and (v) carrying cost.

(f) The scope of restitution in regard to the aforesaid elements in paragraph 53 and the manner of such determination (in terms of paragraph 54 of the said judgment) can be as per the guidelines contained in the applicable Tariff Regulations. In short, the restitution shall be restricted to the re-determination of alternative coal price (difference between the landed cost of alternative coal price *vis-a-vis* the landed cost of GMDC coal price, if GMDC coal had been made available) and additional operating cost on account of use of alternative coal/imported coal in place of GMDC coal;

(g) If the additional expenditure has no nexus to the use of alternative coal and such expenditure was to be incurred by the Petitioner even if GMDC coal was available and used, the same cannot be covered within the scope of restitution in terms of paragraph 53 of the judgment;

(h) The capacity charges relevant to the generation and supply of electricity during the period from SCOD till 9.7.2019 is required to be accounted for as per the quoted tariff (Re.1) in the competitive bid process. It is not open for the Petitioner to seek the determination of capacity charges afresh under Section 62 of the 2003 Act on grounds of restitution.

(i) Regulation 7(2) and Regulation 37 of the 2009 Tariff Regulations relating to Capital cost and other norms respectively, stipulate that the parties can agree to the ceiling in place of norms or manner of determination of tariff provided in the tariff regulations.

4. Due to paucity of time, the learned Senior counsel for the Respondent GUVNL could not complete his arguments. Accordingly, the Commission adjourned the matter.

5. Matter Part-heard. Petition along with IA shall be listed for hearing on 14.8.2020.

By order of the Commission

Sd/-
(B. Sreekumar)
Deputy Chief (Law)

