

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 614/MP/2020 and IA No. 64/2020

Subject : Petition under Section 79(1)(f) of the Electricity Act, 2003 read with Article 3.2.4 of the Supplementary Power Purchase Agreement dated 5.12.2018 and Article 17.3 of the Power Purchase Agreement dated 6.2.2007 seeking adjudication of disputes qua unilateral amendment of the approved PPA/SPPA provisions and non-payment of actual cost incurred by Adani Power (Mundra) Limited to supply power to Gujarat Urja Vikas Nigam Limited.

Date of Hearing : 21.5.2021

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

Petitioner : Adani Power (Mundra) Limited (APMuL)

Respondent : Gujarat Urja Vikas Nigam Limited (GUVNL)

Parties Present : Shri Amit Kapur, Advocate, APMuL
Ms. Poonam Verma, Advocate, APMuL
Shri Saunak Rajguru, Advocate, APMuL
Shri Ankitesh Ojha, Advocate, APMuL
Shri M. G. Ramachandran, Sr. Advocate, GUVNL
Shri Shubham Arya, Advocate, GUVNL
Ms. Srishti Khindaria, Advocate, GUVNL
Ms. Ranjitha Ramachandran, Advocate, GUVNL
Shri M. R. Krishna Rao, APMuL
Shri Tanmay Vyas, APMuL
Shri Mehul Rupera, APMuL
Shri Sameer Ganju, APMuL
Shri Malav Deliwala, APMuL
Shri Kumar Gaurav, APMuL
Shri Hitesh Modi, APMuL
Shri Rahul Panwar, APMuL
Shri Sanjay Mathur, GUVNL
Shri Kripal Chudasama, GUVNL
Shri S. K. Nair, GUVNL

Record of Proceedings

Case was called out for virtual hearing.

2. Learned counsel for the Petitioner submitted that the present Petition has been filed, *inter alia*, seeking adjudication of disputes qua unilateral amendment of the approved Power Purchase Agreement dated 6.2.2007 ('the PPA') and Supplementary Power Purchase Agreement dated 5.12.2018 ('the SPPA') provisions and non-payment of actual cost incurred by the Petitioner for supply of power to the Respondent, GUVNL. Learned counsel mainly submitted the following:

(a) On 27.1.2020, after raising the dispute qua premium/ tolerance over Indonesian HBA indexed price for the first time, GUVNL started making unilateral deductions from the Petitioner's monthly invoices of December, 2019 onwards. Thereafter, vide its letter dated 15.4.2020, GUVNL also decided to unilaterally withdraw the applicable tolerance over HBA price and proceeded with consequential unilateral deductions of payment with retrospective effect since October, 2018.

(b) The aforesaid conduct of GUVNL is in complete violation of the provisions of the PPA and SPPA. Article 3.2.4 of the SPPA specifically allows the tolerance limit of 10% over HBA price derived for a quality of coal. Pursuant to said Article of the SPPA, GUVNL had in fact released the payment of energy charges for a period of one year from October, 2018 to November, 2019 without any dispute qua tolerance limit over HBA price.

(c) Further, as per Article 11.6.1 of the PPA, if the disputes pertaining to monthly/ supplementary bill are not raised within 90 days from the date of presentation, the bill shall be taken as conclusive. Moreover, as per Article 11.6.9 of the PPA, the procurer is liable to pay 100% of the undisputed amount along with 85% of the disputed amount within due date. These have also not been adhered to by GUVNL.

(d) In addition to making unilateral deduction for tolerance limit of HBA price, GUVNL is also making unilateral deductions towards (i) Station Heat Rate, (ii) disallowance of 3% CIF value towards other charges, (iii) disallowance of actual FoB cost (by comparing with Argus/Coalindo and S&P Global Platts indices while the SPPA stipulates comparison only with HBA Index), and (iv) transit loss, etc. for all invoices issued for the month of April, 2020 onwards.

(e) GUVNL is taking a plea that the above deductions are on the basis of Government of Gujarat Resolution ('GR') dated 12.6.2020 and as per order of the Gujarat Electricity Regulatory Commission dated 27.4.2020, approving the SPPA with Essar Power Gujarat Limited. However, on the basis of GR alone, neither the Government of Gujarat ('GoG') nor GUVNL can amend any provisions of the PPA and SPPA unilaterally without placing the said GR before this Commission for appropriate directions/relief. GUVNL has proceeded to make unilateral deductions in complete defiance to the provisions of the PPA and SPPA.

(f) Since August 2020, GUVNL has also proceeded to unilaterally withhold legitimate payments towards ocean freight charges allegedly on the basis of non-submission of separate ocean freight invoices.

(g) GUVNL cannot renege from the binding terms of the PPA read with the SPPA. In this regard, the reliance is placed on the decision of Hon'ble Supreme Court in the case of All India Power Engineer Federation & Ors. v. Sasan Power Limited and Ors., [(2017) 1 SCC 487].

(h) In the SPPA, GUVNL itself had proposed for the tolerance over HBA price in the proceedings of Petition No. 374/MP/2018 before this Commission and had specifically defended the Article 3.2.4 of the SPPA. By signing the SPPA, GUVNL specifically assumed the risks associated with the provisions and cannot now reprobate from its earlier stand.

(i) It is a settled position of law that the PPA ought to be read strictly by its language since the explicit terms of a contract are always the final words with regard to the intention of the parties. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Nabha Power Ltd. v. PSPCL[(2018) 11 SCC 508].

(j) The conduct of GUVNL is also contrary to Section 50 of the Indian Contract Act, 1872 as there is no provision in the PPA and SPPA, which permits unilateral deductions. GUVNL is treating the Government of Gujarat's Resolution (GR) dated 12.6.2020 as justification to violate a statutory contract by making unilateral deductions in the name of the said resolution. The said GR cannot override the provisions of the PPA and SPPA, as approved by the Commission vide order dated 12.4.2019 in Petition No. 374/MP/2018 pursuant to the Hon'ble Supreme Court's order dated 29.10.2018 in Civil Appeal No. 5399-5400 of 2016. This Commission has approved the SPPA while exercising its statutory powers conferred under Section 63 of the Electricity Act, 2003 ('the Act') and the regulatory powers under Section 79(1)(b) of the Act.

(k) The role of Government of Gujarat under the Scheme of the Act is limited and it is not empowered to adversely affect or interfere with the functions and powers of the Regulatory Commission. Reliance is placed on the decision of Hon'ble Supreme Court in the case of A. P. Transco v. Sai Renewable Power (P) Ltd. [(2011) 11 SCC 34].

(l) It is a settled position of law that the corporate veil may be lifted to see the real face behind the corporate structure. Once the orders of the Hon'ble Supreme Court and this Commission have resulted in the SPPA to fructify, Government of Gujarat through its GR cannot make inroads into the process and seek to override the SPPA. Reliance is placed on the decision of Appellate Tribunal for Electricity in SEIL v. SERC [2006 SCC On Line APTEL 49], which was upheld by the Hon'ble Supreme Court in the case of Punjab State Power Corp. Ltd. v. SERC [(2015) 7 SCC 387].

(m) As on date, GUNVL has unilaterally deducted a total amount of approximately Rs. 476 crore.

(n) On one hand, GUVNL is not paying the full energy charges in terms of the monthly invoices raised by the Petitioner, on the other hand, GUVNL continues to consider the energy charge claimed in the monthly invoice to determine the merit order despatch.

(o) The Petitioner has also filed IA No. 64/2020, *inter alia*, for interim reliefs of (i) grant of injunction restraining GUVNL from unilaterally deducting the energy charges contrary to SPPA; (ii) direction to GUVNL to pay the entire energy charges owed for actual cost of coal incurred on account of spot procurement of coal without any deduction or adjustment along with late payment surcharge; (iii) in alternative to (ii), direction to GUVNL to pay full undisputed energy charges and 85% of the disputed energy charges in terms of Article 11.6.9 of the PPA including for the past period during the pendency of the Petition; and (iv) direction to consider per unit energy charges paid by GUVNL in the previous month for determining the merit order despatch.

(p) In view of the foregoing submissions, the Petitioner has a strong *prima facie* case and also has the balance of convenience in its favour.

(q) Due to the unilateral and indiscriminate deductions by GUVNL, the Petitioner will suffer severe financial stress and will not be able to sustain its operation, which will resultantly cause irreparable harm and loss to the Petitioner.

(r) It is well settled position of law that a party which is in violation of a Court's order ought not to be heard on merits. Thus, in the present case, GUVNL ought to rectify the unilateral breach of the provisions of the PPA and SPPA before its objections are considered by the Commission. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of Prestige Lights Ltd. v. SBI, [(2007) 8 SCC 449].

3. Learned senior counsel for the Respondent, GUVNL accepted the notice and submitted that the Respondent has submitted preliminary objections to the grant of any interim orders/reliefs to the Petitioner. Learned senior counsel mainly submitted the following:

(a) SPPA was entered into in the background of the Petitioner's claim for a compensatory tariff for increase in imported coal price in pursuance to the promulgation of Indonesian Regulations providing for benchmark prices for export of coal from Indonesia being rejected by the Hon'ble Supreme Court in Energy Watchdog v. Central Electricity Regulatory Commission [(2017) 14 SCC 80]. There was no legal or contractual obligation on part of GUVNL to provide for any increase in the tariff.

(b) The SPPA was proposed and entered into in pursuance to the Resolution of the Government of Gujarat dated 1.12.2018. The SPPA was approved by this Commission vide order dated 12.4.2019 in Petition No. 374/MP/2018, wherein the Commission had proceeded to base its decision and approval on the policy resolution of Government of Gujarat dated 1.12.2018.

(c) One of the important elements of the Article 3.2 of the SPPA, which *inter alia* provides for the energy charges/ coal prices to be allowed, is the FOB price of imported coal which is expressly provided as the *lower of actual price or the HBA price*. The price to be paid for the procurement of coal components is not *ipso facto* the HBA price but the actual price of coal to be incurred on prudent basis.

(d) The SPPA providing for the lower of actual price or the HBA price clearly establish that it is not open to the Petitioner to claim the HBA price for 6322 kCal/kg GCV coal notified with proportionate price for the relevant GCV of imported coal as the normative price *de hors* the actual price which is to be incurred on prudent basis. The Petitioner has purported to take the wrongful advantage of tolerance limit of 10% contrary to the intent and purposes under the SPPA.

(e) The FOB price clearly refers to the free on board price, namely excluding the insurance freight, etc. and, therefore, the price at the point of loading in Indonesia. This refers to the price at which Indonesian coal mining company delivers coal in Indonesia and not the price charged by intermediary purchaser or trader.

(f) The Petitioner is required to give the break-up of imported coal purchased from the related parties including the details and supporting documents of related party transactions such as the invoices raised by Indonesian coal mine company on the sale of coal to the first intermediary company for eventually

making available the imported coal to the Petitioner, etc. In absence of the relevant details, the claim of the Petitioner for energy charges cannot be considered only on the basis of Auditor certificate and bills raised by the Petitioner on GUVNL. The certificate furnished by the Petitioner are bereft of the requisite details.

(g) GUVNL has repeatedly requested the Petitioner to provide the relevant particulars and to adopt the prudent procurement through its various letters starting from 25.4.2019. However, the Petitioner has not been providing the documents along with its monthly bills raised in support of the actual FOB price at which the coal was exported from Indonesia. Further, the Petitioner has not been procuring coal in a transparent manner and/or through competitive bid process.

(h) The average price of coal export from Indonesia of specific GCV and quality are published by the reputed agencies such as Argus/ Coalindo Indonesian Coal Price Index and S&P Global Platts, which clearly indicates that the average prices are significantly lower than the HBA index price.

(i) For a similar GCV of coal imported from Indonesia during the same period, the cost paid by Coastal Gujarat Power Co. Ltd. is significantly lower than the price claimed by the Petitioner for the period from October, 2018 to December, 2020.

(j) Since the defaults and breaches are on the part of the Petitioner, GUVNL has right to reject the monthly bills being not in accordance with the terms of the SPPA and contrary to the basis of the payment of energy charges, namely, it should be the actual charges prudently incurred and cannot be the amount which the Petitioner unilaterally and arbitrarily claim without providing any supporting documents and materials.

(k) GR dated 12.6.2020 has been issued by the Government of Gujarat keeping in view the various subsequent developments including the actions of the Petitioner in claiming excessive amount towards coal not consistent with the objective sought to be achieved vide earlier GR dated 1.12.2018. Accordingly, vide GR dated 12.6.2020, Government of Gujarat decided to revoke the earlier Resolution dated 1.12.2018 for all intent and purposes. Further, the Government of Gujarat has also provided the guidelines specifying the conditions for procurement of coal and other parameters so as to ensure that the generator purchases coal at minimum price and without putting any additional burden on consumer of the State and that it is in terms thereof, the adoption of certain parameters as per the decision of the GERC order dated 27.4.2020 in Essar Case is provided for by the Government of Gujarat.

(l) The aforesaid GR of the Government of Gujarat dated 12.6.2020 has been placed on record before the Commission by the Government of Gujarat as well as by GUVNL in Petition No. 250/MP/2019 filed by GUVNL for cancellation of the SPPA, which is pending for adjudication. The present Petition may be taken up along with the aforesaid Petition.

(m) Liberty is sought to file reply to the Petition as well as the IA.

4. In response to the specific query of the Commission regarding the allegation of the Petitioner that GUVNL is not following the provisions of the PPA relating to the disputed bills (Article 11.6.9), learned senior counsel for the Respondent submitted that if the generating company fails to provide the primary

details/ documents for the purpose of claiming the fuel/ energy charges, the procurer is entitled to reject the bill and consequently, it cannot enforce the payment towards such amounts. Further, learned senior counsel for the Respondent highlighted the overriding nature of the Article 3.2.1 of the SPPA and referred to Articles 3.2.3 and 3.2.4 to contend that the Petitioner has failed to indicate the actual FOB price of the imported coal as per the requirement therein.

5. In response to the observation of the Commission that while GUVNL had approached the Commission seeking approval for amendment of the PPA dated 6.2.2007 vide Petition No 374/MP/2018 based on the GR dated 1.12.2018 of Government of Gujarat, in the instant case it has unilaterally implemented the GR dated 12.6.2020 of Government of Gujarat without incorporating them suitably in the SPPA and without seeking the approval of the Commission for amendment of the SPPA, the learned senior counsel for the Respondent GUVNL submitted that there is a difference between the PPA dated 6.2.2007 and SPPA dated 5.12.2018. The SPPA dated 5.12.2018 has been approved by this Commission on the basis of Government of Gujarat GR dated 1.12.2018, recognizing that the said GR is in the consumer interest and further that parties have themselves proposed the amendments. The learned senior counsel for the Respondent GUVNL further clarified that the parameters such as Station Heat Rate is being considered as per this Commission's order relating to the Petitioner, wherein the Station Heat Rate has been considered as per bid parameters.

6. After hearing the learned counsel for the Petitioner and learned senior counsel the Respondent, GUVNL, the Commission ordered as:

(a) Admit the Petition.

(b) Serve the copy of the Petition on the Respondent immediately, if not already served. The Respondent is directed to file its reply, if any, by 16.7.2021 with advance copy to the Petitioner, who may file its rejoinder, if any, by 30.7.2021.

7. As regards the IA No. 64/2020, considering the request of the learned senior counsel for the Respondent, GUVNL, the Commission directed the Respondent, GUVNL to file its reply by 4.6.2021 with advance copy to the Petitioner, who may file its response thereon, if any, by 9.6.2020. Subject to the above, the Commission reserved the order in IA No. 64/2020.

8. The Petition shall be listed for hearing in due course for which separate notice will be issued.

By order of the Commission

**Sd/-
(T.D. Pant)
Joint Chief (Law)**