

**CENTRAL 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

Date of Hearing 11.12.2012

Petitioner : Coastal Gujarat Power Limited

Respondents Gujarat Urja Vikas Nigam Limited and Others

Parties present:

Shri Amit Kapur, Advocate, CGPL
Shri Apoorva Mishra, Advocate, CGPL
Ms. Sugandha Somany, Advocate, CGPL
Shri Ankush Bajorio, CGPL
Shri Arun Srivastav, Tata Power
Shri Kapil Aggarwal, CGPL
Shri K. K. Sharma, Tata Power
Shri B.J. Shroff, Tata Power
Shri R. Saburamanyam, Tata Power
Shri B. Mohanty, Tata Power
Shri A. Charan, Tata Power
Shri S. Dasgupta, Tata Power
Shri M.G.Ramachandran, Advocate, GUVNL & Haryana
Ms Swapna Seshadri, Advocate, Haryana
Shri H.G. Modi, GUVNL
Shri Padamjit Singh, PSPCL

RECORD OF PROCEEDING

In continuation of his submission during the last hearing, Ld. Counsel for GUVNL referred to the list of dates filed by the Petitioner and submitted that significant additions are required to be made in the list for the sake of clarity as per the details given below:

(a) Item 16: Coal Sales Agreement dated 31.10.2008 was entered into between Tata Power Company Limited (TPCL) with IndoCoal with reference to Coastal Maharashtra Power Limited which is different from the Mundra Project of Coastal Gujarat Private Limited, the subject matter of the present petition. The said agreement specifically defines 'Coastal Facilities' as meaning 2400 MW at Dehrand near Mumbai (Page 718 of Vol III). The Agreement dated 31.10. 2008 cannot be considered as related to Coastal Gujarat Private Limited.

(b) Item 14: This is an agreement dated 9.9.2008 between TPCL and CGPL for supply of 6.15 Million MT per annum. The copy of the agreement is not on record and therefore, it is not known under what terms and conditions TPCL has agreed to supply 6.15 MT per annum to CGPL.

(b) Item 15: As per the Coal Sales Agreement dated 31.10.2008 between CGPL and IndoCoal, 5.85 Million MT would come from IndoCoal.

(c) Item No.20: The Coal Sales Agreement dated 31.10.2008 seems to have been assigned through "Assignment and Restatement Agreement" dated 28.3.2011 by which Tata Power Company Limited assigned to CGPL about 3.51 MMTA of coal. This is subsequent to the Indonesian Regulation dated 23.9.2010. It is not known from where the balance quantity of would come.

(d) Item No.14: 6.15 million MT was to be provided by TPCL of which they are giving 3.15 million MT. It is not known what are their obligations of TPCL to arrange coal and why TPCL is not able to arrange the balance 6.15 as per the commitment and agreement of 9.9.2008. TPCL being an intermediary to arrange coal, it is the responsibility of TPCL to arrange the coal from whatever source. It is none of the concern of beneficiaries.

(e) Item No. 6: TPCL entered into a Coal Sales Agreement dated 30.3.2007 with Indo Coal Resources Ltd. whereby Indo Coal agreed to sell and deliver to TPCL a total of 10.11 million MT per annum. Whether this 5.85 Million MT is in addition to 10.11 million MT is not clearly mentioned. The details are also required to be provided.

(f) Item No.15: For the purpose of the Coal Supply Agreement dated 31.10.2008 between indocoal and CGPL, the impact of Indonesian Regulation is restricted to 5.85 million MT per annum and will not apply to 6.15 million MT which TPCL is to supply to CGPL.

2. The learned counsel submitted that the Indonesian Regulation is only aligning the fuel price with international price. The Indonesian Regulation is not prohibitive and there is absolutely no restriction on IndoCoal to sell coal to CGPL or TPCL. Learned counsel submitted that as per Item 15, the impact of Indonesian Regulation is only restricted to 5.85 Million MT per annum and the balance coal of 6.15 Million MT has to be supplied by TPCL to CGPL.

3. The learned counsel referring to the definition of “affected party” in Article 12.2 of the PPA submitted that the force majeure cannot be extended to sub-contractor or supplier’s contractor but shall be restricted to either CGPL or TPTCL with regard to 6.15 Million MTA. Since none of them have been affected in the performance of the contract on account of Indonesian Regulation, force majeure will not apply.

4. Learned counsel relied upon the following judgments in support of his contention that change in the price of Indonesian coal cannot be treated as force majeure:

- (a) Judgment dated 18.10.2002 of United States court of Appeals in Seaboard Lumber Company and Capital Development Company Vs United States{308 F.3d 1283}
- (b) Court of Appeal judgment dated 21.11.1963 in Ocean Tramp Tankers Corporation V s V/O Sovfracht
- (c) Supreme Court of India Judgment dated 7.3.1988 in Continental Construction Co. Ltd Vs State of Madhya Pradesh {(1988) 3 SCC 82}.
- (d) Supreme Court of India judgment dated 5.3.2003 in Travancore Devaswom Board Vs Thanath International{(2004) 13 SCC 44}
- (e) Delhi High Court judgment dated 6.5.1998 in Eacom's Control India Ltd. Vs Bailey Control Co.& Others {AIR 1998 DELHI 365}

Learned counsel also submitted compilation of the extracts of the judgments on the subject.

5. The learned counsel submitted that merely because a contract has become onerous or difficult to perform is not sufficient to claim frustration. In this case, Indonesia

has not prohibited export of coal. Coal is available in international market. The international market prices are the basis on which the petitioner had submitted its bid. The Indonesian Regulation merely provides that export price should be aligned to international market prices. Learned counsel submitted that on account of Indonesian Regulations, It may become onerous or difficult to perform. But it is not an impossibility to perform, particularly in the context of section 56 of Indian Contract Act which provides for frustration or impossibility of performance or within the meaning of force majeure under Article 12 of the PPA which categorically recognizes that only if somebody is prevented from performance of the contract. Learned counsel submitted that the event of increase in price of Indonesian coal cannot be said to be an event of force majeure affecting the CGPL within the meaning of Article 12.2.

6. Learned counsel further submitted that the provision of Article 13 read with the definition of the terms 'law' and 'Change in Law' relate to Indian Law and not to any law outside India. The Petitioner's contention that the qualification 'in India' in the definition of law applies only to Electricity Law and not to all Laws is not correct. The term 'Electricity Law' is a defined term. The Electricity Law includes not only the statutes but also various other aspects namely, Rules, Regulations and any other Law pertaining to electricity including Regulations framed by the Appropriate Commission. The Electricity Laws can also be replaced from time to time. It is in that context that the term 'Electricity Laws' has been incorporated specifically. Learned counsel submitted that law as defined in the PPA applies to all Laws in force in India including Electricity Laws. Learned counsel further submitted that Article 13.1.1 of the PPA deals with the changes in the interpretation of any law by a competent court of law, Tribunal or Indian Government instrumentality. All these refer to India only. The scheme of both the definition of law and Article 13 clearly is with reference to India only. Learned counsel submitted that the laws of Indonesia cannot be part of the definition of Law. The bidding documents cannot be possibly concerned with that laws all over the world. It would lead to impossibility of implementation.

7. Learned counsel refuted the argument on behalf of the petitioner that the relief in the present petition can be given under the 'regulatory power' of the Commission under section 79(1)(b) of the Act. Learned counsel submitted that the regulatory power under Section 79 has to be read consistent with Sections 61, 62, 63, 64 and other provisions of the Act relating to determination of tariff. Power of the Commission under Section 79 cannot be exercised contrary to Section 63 which is an alternative to tariff determination process under Sections 61, 62 etc. Under Section 63, the Commission only adopts the tariff and does not deal with the determination of tariff. A tariff to be adopted under Section 63 is a quoted tariff. It is not necessary for the bidder to specify various components such as Return on Equity, Interest on Loan, O & M Expenses, Depreciation etc. as tariff elements like in the case of capital cost based determination of tariff. Learned counsel further submitted that tariff once adopted cannot be interfered with by converting the proceedings to be under Section 61, 62 etc. It is not correct on the part of the Petitioner to seek determination of variable cost under Section 61 and 62 after

having participated in the Competitive Bidding and selected for the supply of power at the quoted tariff. Learned counsel submitted that the Petitioner has to take the risk as well as the reward of the quoted tariff as per its decision made. The Petitioner has arranged its affairs on the basis of tariff discovered through competitive bidding process. The only two exceptions are provided under Force Majeure and Change in Law which are not applicable in so far as increase in Indonesian coal price is concerned. The learned counsel submitted that the regulatory power under Section 79 cannot be invoked to change the tariff discovered through competitive bidding.

8. Learned counsel submitted that without change in the tariff in any manner, if there are issues affecting the Petitioner's finances, the Petitioner can approach the Procurers and place difficulties for appropriate course of events where the tariff remaining the same, a scheme can be worked out to deal with the issues of the Petitioner. Learned counsel submitted that the regulatory power of the Commission under Section 79 can be exercised to sort out such issues, without reopening the adopted tariff.

9. Learned counsel submitted that the decision of the Appellate Tribunal in Essar Power case relied on by the Petitioner is totally misconceived. Learned counsel submitted that in the said judgement, the Appellate Tribunal has clarified that the Commission has no jurisdiction to revise the tariff discovered under Section 63 once the tariff petition has been filed based on the recommendation of the Evaluation Committee for adoption of tariff. The role of the concerned Commission is to see whether the bidding process as per the standard Guidelines has been conducted. Learned counsel further submitted that the reliance placed on Tarini judgment and other judgments on the exercise of regulatory power are all in the context of the tariff determined under Sections 61 and 62 and more importantly, in the context of renewable energy sources where the section provides for fixation of promotional tariff. Learned counsel submitted that these have no application to the tariff adopted under Section 63 of the Electricity Act, 2003.

10. The Commission referring to Article 17 of the PPA observed that the said provision vests the right in the parties to approach the Commission for revision of tariff and enquired about the scope of the said provision in the context of the prayer of the petitioner. Learned counsel submitted that the said provision relates to the adjudicatory power of the Commission arising out of the provisions of the PPA. Learned counsel submitted that all disputes arising out of change in law and force majeure events are covered under this provision.

11. The Commission referred to para 20 of the Coal Sales Agreement dated 31.10.2008 between TPCL and CGPL which provides that "all present and future taxes, charges, tariff, duties, imposts or fees of any kind charged, imposed or levied, directly or indirectly, by any Government Authority in Indonesiaon this agreement, or the coal ,

on the purchase and/or sale of the coal.....shall be for the sole and exclusive account of the supplier" and enquired whether the supplier should be made liable to bear the impact of increase of coal prices on account of Indonesian Regulations under this provision. Learned counsel clarified that there is a distinction between the change of coal prices on account of change in taxes imposed by the Indonesian Government and the increase in benchmark price due to Indonesian Regulations. Learned counsel submitted that while any change in tariff of coal due to change in taxes or duties will be covered under this provision to be borne by the supplier, the increase in benchmark price due to Indonesian Regulation may not be covered under this clause.

12. The Commission directed that the petition would be listed for hearing on 20.12.2012 for submission by PSPCL and Prayas Energy Group.

By Order of the Commission

Sd/-
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Jt Chief(Law)