

Rajasthan Electricity Regulatory Commission

I.A. No. 01/2022 in Petition No. RERC/608/2016 & 609/2016

Application seeking directions for listing and hearing petition Nos. 608 & 609 of 2016 along with petition no. 593 of 2016, 966 of 2016, 1285 of 2017, 1510 of 2019, 1473 & 1474 of 2019, 1584 of 2019, 1846 of 2020 and 1965 of 2021.

Coram:

Dr. B. N. Sharma,	Chairman
Sh. Hemant Kumar Jain,	Member
Dr. Rajesh Sharma,	Member

Petitioners : M/s Barmer Lignite Mining Company Limited.

Respondents :

1. Jaipur Vidyut Vitran Nigam Ltd.
2. Ajmer Vidyut Vitran Nigam Ltd.
3. Jodhpur Vidyut Vitran Nigam Ltd.
4. JSW Energy (Barmer) Ltd.

Date of hearings : 11.10.2022, 03.11.2022, 02.12.2022, 20.12.2022, 27.12.2022 and 17.01.2023

Present :

1. Sh. Amit Kapur, Advocate for Petitioner
2. Sh. P.N. Bhandari, Advocate for Respondent Discoms.
3. Sh. Shashikant Modi, Representative of JSW Energy (Barmer) Ltd.
4. Sh. G. L. Sharma, Stakeholder
5. Sh. D. P. Chirania, Stakeholder
6. Sh. B.M. Sanadhya, Stakeholder

Order Date:

24.01.2023

ORDER

1. M/s Barmer Lignite Mining Company Limited has filed this Interlocutory Application (I.A.) seeking directions for listing and hearing petitions bearing no. 608 & 609 of 2016 along with petition no. 593 of 2016, 966 of 2016, 1285 of 2017, 1510 of 2019, 1473 & 1474 of 2019, 1584 of 2019, 1846 of 2020 and 1965 of 2021.
2. Notices were issued to the Respondents to file reply on the I.A. Discoms filed a common reply on 02.11.2022. Rejoinder was filed by the Petitioner RVUN on 30.11.2022. Stakeholder Sh. G. L. Sharma and Sh. D. P. Chirania filed their comments. Petitioner also filed a note on argument for IA for consolidation on 18.01.2023.
3. The matter was heard finally on 17.01.2023. Sh. Amit Kapoor, Advocate appeared for Petitioner Sh. P. N. Bhandari, Advocate appeared for Respondent Discoms. Sh. G. L. Sharma, Sh. D. P. Chirania and Sh. B. M. Sanadhya appeared as stakeholders.
4. Petitioner in its I.A., note on arguments, rejoinder and during hearing has submitted as under:
 - 4.1. Instant Petitions 608-609/2022 have been filed for determination of transfer price of lignite for FY 2011-12 to FY 2013-14 and FY 2014- 15 to FY 2015-16 similarly, Petitions No. 593/2016, 966/2016, 1285/2017, 1510/2019, 1473 & 1474/2019, 1584 of 2019, 1846 of 2020 and 1965 of 2021 have been filed for FY 2016-17 to FY 2022-23 respectively, and as in for FY 2011-12 to FY 2015-16, and the Petitioner was paid an ad-hoc transfer price of lignite for FY 2011-12 to 2022-23, subject to adjustments upon final determination of final transfer price of lignite.

- 4.2. Earlier all the above-mentioned Petitions have been listed together and heard together. As the central issue involved in all these Petitions is determination of the final transfer price of lignite, which includes the capital cost determination and determination of MDO Fee / extraction cost.
- 4.3. As per Commission's directions in its order dated 19.10.2006, the MDO Fee/ extraction cost is to be determined through a bidding process. Any other method for determination of the MDO Fee, at the present stage, cannot be adopted as the same would be:
- a. Barred by the doctrine of election: Having chosen the bid-route in the in-principle order dated 19.10.2006, by modifying the scheme (of cost plus) envisaged under the Implementation Agreement, this Commission made a choice between 2 mutually exclusive methods of determination of MDO price. A choice having been made and acted upon for over 9 years cannot be reversed today.
 - b. Contrary to the judgments and orders of the Hon'ble APTEL dated 21.09.2012 and 08.04.2013, passed in Appeals No. 98/2012 & 76/2012 respectively.
 - c. Contrary to the provisions of the Regulation.
 - d. Contrary to the method prescribed by the Central Commission and therefore section 61(a) of the EA, 2003. The Central Commission's Regulations on determination of input price of coal and lignite (Regulation 36) considers the Mining Charge in calculating the ROM cost, as the charge per tonne paid to the MDO. The Central Commissions Regulations do not envisage a cost-plus determination of the Mining Charge. Further, the Rules framed under the Coal Mines (Special Provisions) Act, 2015 and MMDR Act, 1957 provide for selection of an MDO only by way of a

competitive bidding process. In terms of Section 61(a), this Commission is to be guided by the principles and methodologies specified by the Central Commission and cannot act contrary to the same.

- e. Against the preferred route for grant of government contracts/ largesse: It is settled now that government contracts by a public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. These principles are also enshrined in the Rajasthan Transparency in Public Procurement (RTPP) Act and Rules. Selection of MDO by way other than a competitive bid process, will be susceptible to challenge on grounds of arbitrariness and violation of the provisions of the RTPP Act and Rules.
- 4.4. For determining the MDO Fee, Bid process has been conducted by NTPC, with the involvement of the DISCOMS, and the recommendation of the NTPC is being considered by this Commission in Petition No. 593/2016.
 - 4.5. The present Petitions (i.e. 608 & 609/2016), were filed in March of 2016, considering the lowest price discovered in the earlier bid process conducted by Engineers India Limited (EIL), as the benchmark, for MDO Fee. Subsequently, this Commission by order dated 06.04.2017 rejected the EIL bid and directed that a fresh bid for determination of the MDO Fee be carried out.
 - 4.6. Commission's order dated 06.04.2017 was challenged by the Petitioner in APTEL and the said appeal was disposed of by the Hon'ble APTEL on 18.02.2020, in view of the fact that the results of the NTPC Bid were now being considered by this Commission.
 - 4.7. The benchmark considered in the instant Petitions (i.e. EIL bid price) is no longer valid and available, and has been substituted by the MDO Fee

discovered in the NTPC bid. Therefore, it is just, fit and proper that Petition No. 593/2016, where under the NTPC bid results are being considered by this Commission, be taken up and heard together with the present Petitions. This would save the precious time of this Commission and would avoid multiplicity / repetition of the same arguments.

- 4.8. As the extraction cost of lignite is the central issue, therefore, all the petitions should be heard together. Petitioner further submitted as mandated in all the past orders, the extraction cost, discovered by way of a bid process, will be approved first. After the approval of the bid, prudence check of the capital cost of the mining entity will be undertaken. The final transfer price so determined will be applicable for the future years. Basis the final transfer price so determined, the de-escalated transfer price shall be determined for the past years.
- 4.9. Decision to consolidate is a legal and not administrative decision. Higher courts have interfered with decisions of subordinate courts where consolidation was denied for no justifiable reason. Petitioner has referred to Hon'ble Supreme Court Judgement *Chitivalasa jute mills vs Jaypee Rewa* (2004) 3 SCC 85.
- 4.10. In light of these facts, the Commission cannot now, after 16 years of passing of the In- Principal Order, change the methodology for determination of Transfer Price of lignite from price discovered via bidding route back to cost plus methodology. This is contrary to established principles of law. It is well established that an authority exercising quasi-judicial power cannot review its decision unless the relevant statute or rules permits such review. A judge, when he has decided a question brought before him, is *functus officio*, and cannot review his own decision. Petitioner referred to Hon'ble Supreme Court Judgement *State Bank of India & Ors. vs. S.N. Goyal* (2008) 8 SCC 92.

4.11. The Doctrine of Election bars the Commission from recanting its decision to employ the bidding route for determination of transfer price of lignite in favor of the cost plus methodology, having chosen the former methodology vide its In-Principal Order. If such a departure is permitted, it would render the orders dated 19.10.2006, 17.08.2011, 30.09.2011 and 06.04.2017 nugatory. In this regard, the Hon'ble APTEL has held that in a bidding process for power procurement under Section 63, negotiation with a third party on principles of Section 62, after completion of the bidding process, cannot be permitted. The same principal has been reiterated by the Hon'ble Supreme Court, *Essar Power Ltd. vs. UPERC* (Appeal No. 82/2011, decided on 16/12/2011) & *Tata Power Company Limited Transmission v MERC & Ors* (2022) SCC Online SC 1615.

4.12. Various interim orders have been passed granting adhoc transfer price of lignite contingent on adjustments to be paid at the time of final determination of tariff upon completion of the bidding process for selection of the MDO. Since Res-Judicata applies to different stages of the proceedings, departing from findings of past orders is impermissible in law. Therefore, the Commission cannot pass orders requiring that bidding be conducted for price discovery and then do a volte face and require that transfer price be determined using cost plus methodology. Petitioner referred to *Satyadhan Ghosal vs Deorajin Debi & Ors*. 1960 (3) SCR 590.

4.13. Hon'ble Tribunal, on 07.10.2022 in EP 2/2022 filed by the Petitioner has directed that the final transfer price of lignite for the past period be determined expeditiously by this Commission. Therefore, it is in the fitness of things that all the Petitions be listed and heard together.

4.14. In view of above Petitioner has prayed to list and hear Petitions No. 608 & 609/2016, 593 of 2016, 966 of 2016, 1285 of 2017, 1510 of 2019, 1473 & 1474 of 2019, 1584 of 2019, 1846 of 2020 and 1965 of 2021, together as a batch.

5. Respondent Discoms in their common reply and during the hearing submitted as under:
 - 5.1. Respondent Discoms have submitted that determination of transfer price has to be done necessarily for each year separately since the figures of every year are different.
 - 5.2. Tagging or clubbing all the petitions together is a well established practice of Courts & Commissions where a common issue is involved & decision can be taken without looking into the facts of each petition separately but in the matter of petitions pending before the Commission no common question is to be decided. Being a cost plus project, the Commission has to pass a separate order for each year regarding transfer price, depending exclusively on the figures of that particular year. Clubbing or not clubbing is basically an administrative decision of any court, which cannot be pressed as a legal issue.
 - 5.3. Internationally bidding methodology is a well-accepted methodology for discovering a reasonable price for any product, but the Rajwest group (now JSW Group) delayed bidding for years together, on one pretext or the other.
 - 5.4. The hidden agenda of Rajwest group in resisting the bidding was the perpetuation of SWML as the MDO. After the first International Competitive Bidding (ICB), ignoring the claims of the lowest bidder. SWML (a related company) was appointed MDO by the Rajwest Power even though SWML was neither financially nor technically qualified in the ICB. In fact it had not even participated in the bidding. Both in the first and second International Competitive Bidding, large scale irregularities were committed by this group and therefore the Commission was compelled to quash those biddings.

- 5.5. Subsequently a third bidding was organized for 2019-20 & onwards, which is under the consideration of the Commission. If the Rajwest group had conducted the bidding without undue delay and without large scale irregularities, the first bidding itself would have avoided most of the present-day complications.
- 5.6. The major complication is that bidding was done for the year 2019-20 onwards. The price emerging in this bidding cannot be applied retrospectively. Therefore for the pre-bidding period(2011-12 to 2019-20) necessarily, the Commission has to determine the transfer price based on the other authentic & reliable documentary evidence.
- 5.7. As per the Implementation Agreement, this is a cost plus project and therefore the Commission was supposed to discover actual cost and determine the transfer- price accordingly.
- 5.8. As per Section 62 of the act, the determination of tariff, which includes transfer price also, is exclusively within the jurisdiction of the Commission and it has all the tools at its disposal to discover the Actual Cost of mining.
- 5.9. It is only under Section 63 that the Commission has to adopt the tariff, if it has been determined through a transparent process of bidding in accordance with the guidelines by the Central Commission. The present case is not covered by Section 63 and hence the Commission has to determine the tariff under Section 62. Under the doctrine of election, it cannot be said that Section 62(1) or Section 86(1)(b) have been diluted or are not applicable.
- 5.10. For a faster decision on this issue, the petitioner should have cooperated in obtaining relevant information about the mining expenses from the MDO, SWML appointed by it. But instead of sharing that information, the petitioner

is vehemently obstructing the discovery of actual mining expenses, on one pretext or the others.

5.11. MDO SWML, has most authentic information about the actual payments received by it from the petitioner BLMCL & the actual expenses incurred by the MDO every month towards mining expenses.

5.12. The petitioner's contention that it is a "choice between two mutually exclusive methods" is legally unsustainable. While exercising its power under Section 62(1) the Commission has unfettered discretion to seek authentic and reliable information from any source and no restriction can be put on this function & power of the Commission.

5.13. This dispute of bidding versus actual figures has never been raised before the Hon'ble APTEL and the Hon'ble APTEL has never directed for any particular mode for determination of tariff /Transfer Price.

5.14. It is wrong to say that the choice is either bidding or the actual figures. Rather both the methods have their own relevance from time to time. In the beginning of the project, bidding was one of the preferred options but bidding has totally lost its relevance, at least for the previous years of 2011-12 to 2019-20 as the latest bidding was for 2019-20 & onwards only.

5.15. Since bidding has always been one of the inputs for determination of Transfer Price. Therefore the petitioner should not be unduly alarmed if the Commission seeks authentic and reliable information from the relevant sources.

5.16. Earlier on the application filed by the Discoms for impleading SWML (MDO) as a necessary party, the Commission vide its order dated 9.7.2020 had disallowed the application on the ground of the petition being premature. Now, it is high time that the Commission directs for impleadment of SWML

which has the entire information about the mining expenses such as the monthly payments received by it towards the mining operations etc. from BLMCL. Besides the monthly expenditure on mining by SWML can also be sought.

5.17. Final determination of transfer price has implications running into hundreds of crores and hence there is no scope for ignoring this key source of authentic information.

5.18. In view of above Respondents have prayed that the undue emphasis for clubbing all the petitions together is misplaced. Instead of faster disposal it may create greater confusion.

6. Stakeholders Sh. G. L. Sharma and Sh. D.P. Chirania in their written submissions and during the hearing submitted as under:

6.1. Sh. G. L. Sharma submitted that in regard to the NTPC bid, any decision taken by the Commission will be applicable for future as any selected bidder will commence the work only after the approval of the Commission and as such past period is not covered.

6.2. Till any bidder is selected / approved by the Commission the work of extraction of lignite has been awarded to M/S SWML who in turn has been sub-contract to 2 parties is M/s H. D. Enterprises, Vadodara and M/S P. C. Patel & Co. Vadodara who are virtually undertaking the entire lignite extraction work in different allocated areas by each of them.

6.3. Further as per Clause 3.5 of IA dated 29.05.2006, Joint Venture Agreement dated 27.12.2006 and as per Clause 5.2 of Fuel Supply Agreement (FSA) dated 16.02.2008, it is very clear that the transfer price of the lignite to be supplied to the Project would be on the basis of a Cost plus formula (cost of extraction plus royalty) and as a part of tariff determination process, the

Commission shall assess the transfer price of lignite. And in case of Commission revises the transfer price, the cost of extraction shall be revised accordingly to adjust the transfer price to a level acceptable to the Regulatory authority. Since transfer price is being determined as a part of the tariff determination for supply of lignite to a power plant. Commission has to assess and decide the transfer price of lignite to a level acceptable.

- 6.4. Further it is stated that since any contractor to be selected through any bid would commence the work only in future from the date after the approval of the Commission. Such future contractor's bid rate will also be applicable for future work and not for past work completed, as well. Hence in order to decide the transfer price of lignite extracted so far the only way is to have the actual payments made to the contractors who have carried out the work. Therefore the Commission may direct the Petitioner to provide the actual payment made to contractors named as M/s H. D. Enterprises and M/S P. C. Patel & Co. for each financial year. And the quantum of lignite extracted and GCV of lignite for each financial year will be required for deciding the final transfer price of lignite.
- 6.5. As regards NTPC bid it is submitted that the same has not been put in public domain so far nor these have been supplied to the stakeholders. Therefore necessary comments / suggestions could not be given in this regard.
- 6.6. Sh. D.P. Chirania submitted that there is huge availability of valuable minerals (clay and Bentonite) in the overburden. Any mineral found in the overburden is the property of the State Government. Further, extra lignite in the Jalipa and Kapurdi mines may be used in Giral Lignite Power Plant which has become inoperative due to high sulfur content in Giral Mines.

6.7. The concept of bidding has meaning when the work of a project has to be started on the competitive bidding and that order is awarded to technically acceptable and economically lowest cost bid. Here in the case when the extraction of lignite is being carried out for more than a decade. Every cost data and the calorific value of the extracted lignite is well known to the existing excavator and power-plant authorities. In this regard, he has supported the Discoms' stand as far as making South West Mining Limited (SWML) as the party, obtaining excavation etc. data from it and based on the actual data, deciding of the transfer price of the lignite.

Commission's view

7. Commission has considered the submissions, reply and oral arguments made on behalf of the Petitioner, Respondents and stakeholders.
8. Petitioner, BLMCL has filed this IA seeking directions for listing and hearing petitions no. 608-609/2016 along with petitions No. 593/2016, 966/2016, 1285/2017, 1510/2019, 1473-1474/2019, 1584/2019, 1846/2020 and 1965/2021.
9. Petitioner further submitted that earlier all the above-mentioned petitions have been listed together and heard together, as the central issue involved in all these Petitions is determination of the final transfer price of lignite, which includes the capital cost determination and determination of MDO Fee / extraction cost. This would save the precious time of this Commission and would avoid multiplicity / repetition of the same arguments.
10. Per Contra Respondents have contended that being a cost plus project, the Commission has to pass a separate order for each year regarding transfer price, depending exclusively on the figures of that particular year.

Clubbing or not clubbing is basically an administrative decision of any court, which cannot be pressed as a legal issue. Therefore determination of transfer price has to be done necessarily for each year separately since the figures of every year are different.

11. Stakeholders submitted that with regard to NTPC bid, any decision taken by the Commission will be applicable for future as any selected bidder will commence the work only after the approval of the Commission and as such past period is not covered.
12. Stakeholders also submitted that in order to decide the transfer price of lignite extracted so far the only way is to have the actual payments made to the contractors who have carried out the work and the quantum of lignite extracted and GCV of lignite for each financial year will also be required for deciding the final transfer price of lignite.
13. It is observed that the Petitioner has filed these petitions for determination of transfer price of lignite for different financial year based on the data of respective year. Since the figures in these petitions are different for each year accordingly, the transfer price for each year will be different based on the input data. Hence listing the petitions separately or as a batch matter has no bearing on the outcome of the transfer price of lignite.
14. Further, in this regard it is observed that clubbing and tagging of any petition/petitions could be best decided by the appropriate Commission depending upon the facts, circumstances, nature and stage of the matter under consideration.
15. In the above matter, the Commission is of the considered view that Commission at this stage is not inclined to club these petitions together. However, Commission may hear the different set of petitions together

based on the nature and requirement of the case at that time. The Commission will take appropriate decision as the matter progresses.

16. The interlocutory application is disposed of accordingly.

(Dr. Rajesh Sharma)
Member

(Sh. Hemant Kumar Jain)
Member

(Dr. B. N. Sharma)
Chairman