Case No. 98/2014

Petroleum and Natural Gas Regulatory Board

In the matter of
United Phosphorus Ltd ...Complainant

-Vs-

Gujarat Gas Company Ltd ... Respondent

Date : 20.10.2014

ORDER

M/s United Phosphorous Ltd. (hereinafter referred to as ‘UPL’) is engaged in the business of manufacturing pesticides and chemicals and has a captive power plant at Jhagadia (Bharuch), State of Gujarat. It has lodged a complaint under Section 25 read with 11 (a), 11 (e), 11 (f) (iii), 12 (1) (a), 12 (1) (b), 12 (2) and Section 48 & 50 of the Petroleum & Natural Gas Regulatory Board Act, 2006 (hereinafter referred to as the ‘Act’) against the Gujarat Gas Co. Ltd. (hereinafter referred to as the ‘GGCL’) alleging the violations of various statutory provisions and Regulations framed thereunder by imposing arbitrary, exorbitant and unjustified transportation charges by the GGCL. It requested the Board to issue a direction to GGCL to charge Rs. 4.92 / MMBTU for transportation of natural gas as has been fixed by the Board for HAPI pipeline and AMJH pipeline. It also requested for conducting an enquiry regarding the status of AMJH pipeline and to determine the extent of excess amount of transportation charges which has been collected / recovered by GGCL from various consumers under the pretext of commercial arrangements. UPL further requested to issue a direction to
GGCL for the refund of amount along-with 12% interest thereon from Dec., 2008 that has been recovered from it in excess.

Both the parties / companies have been incorporated under the Companies Act, 1956 and GGCL is engaged in the business of transmission, distribution, marketing of natural gas and also CGD Network and laid a 73.2 km. Natural Gas pipeline besides others, from Hazira to Ankleshwar, which was commissioned on 10.5.1999 and is commonly known as HAPI pipeline and gas can be fed at its both ends i.e. at Hazira or at Ankleshwar.

UPL is said to have entered into an agreement with GGCL in the year 2001 for supply and transportation of natural gas from the year 2002 to 2008 for its power plant for which a 23 km. long dedicated pipeline from Amboli to Jhagadia (hereinafter referred to as ‘AMJH pipeline’) was laid to connect UPL’s Jhagadia unit to HAPI pipeline.

In the meantime, Regulations pertaining to authorization of CGD Network and Natural Gas Pipeline and Tariff were enacted by the Board and notified in the Gazette on 19.3.2008, 6.5.2008 and 20.11.2008 respectively.

It is contended by UPL that by the year 2005 GGCL started catering to the need of other consumers, namely, Birla Centuary, Lanxess, DCM Shriram, Oberoi Chemical and Jhagadia Copper etc. and the number of consumers was increased during the continuation of agreement with UPL and thus, original nature of the pipeline had ceased...
and has now become a common / contract carrier. Moreover, GGCL had itself declined to observe the statutory compliances as required under the Act for the ‘dedicated pipeline’.

It is stated by UPL that GGCL, by Dec., 2008, due to shortage of natural gas found difficult to supply gas and UPL therefore, entered into an agreement with GAIL India Ltd. (GAIL) on 27.11.2008 for supply of 0.2 MMSCMD. However, for transmission of the gas, it had executed an agreement with GGCL on 4.12.2008.

It is alleged by UPL that no other transmission entity like GAIL, GSPL, Shell etc. had any pipeline between Amboli and Jhagadia, so GGCL, by using its monopolistic position, imposed exorbitant tariff charges while executing Gas Transmission Agreement and disregarded the legal mandate relating to the common carrier.

It is also alleged that GGCL, by using its dominant position, forced UPL to enter into short duration contracts during Dec., 2008 to April, 2009 and unlawfully charged excessive tariff for transportation of gas to its Jhagadia power plant which was manifestly contrary to the relevant Regulations. After the GTA dated 6.3.2009, UPL was required to enter into City Gas Network Distribution Agreement for taking supply of gas for its power plant without furnishing any evidence to suggest that HAPI pipeline or AMJH pipeline was ever authorized as CGD Network under the relevant Authorizing Regulations, 2008.
UPL pointed out that its requirement has admittedly been more than 1,00,000 SCMD which could have not been catered through CGD network in view of Regulation 3 (2) (c) of the CGD Authorization Regulations. GGCL thus, again used its dominant position and compelled UPL to agree to enter into City Gas Distribution Network Agreement on 3.4.2009 and the capacity charge, to be paid of UPL, was also revised and fixed at Rs. 67.69 per MMBTU.

UPL further contended that the tariff for HAPI pipeline and AMJH pipeline was to be charged as determined by the Board as HAPI pipeline is admittedly a common carrier natural gas pipeline. UPL with a view to substantiate its contention of imposing unlawful and arbitrary tariff charges by GGCL furnished the details of agreements containing the amount of tariff as was paid by it and the amount which according to Tariff Regulations could have been charged.

Various presentation and protests are said to have been made by UPL to GGCL and the Board but GGCL justified its action by stating that the tariff charges have been levied on the basis of mutually agreed terms and conditions.

It is also stated by UPL that the authorization was granted to GGCL by the Board on 5.7.2012 for HAPI pipeline and the GGCL in its tariff application for this pipeline had proposed the tariff rate of Rs. 7.01 per MMBTU w.e.f. 1.1.2009 and Rs. 7.20 per MMBTU w.e.f. 5.7.2012. But it charged the tariff from UPL @ US$ 2.00 per MMBTU for the period 4.12.2008 to 31.3.2009 and Rs. 67.69 per MMBTU for the period 1.4.2009 to
31.6.2013 which is more than what GGCL itself had proposed to the Board for the said period.

More significantly, GGCL, instead of refunding the excess amount to UPL and to decrease the tariff rate, revised and enhanced it to Rs. 81 per MMBTU from Aug., 2013. Whereupon UPL again approached the Board and expressed its grievance. The Board required GGCL to examine the contentions of UPL and GGCL, vide its letter dated 11.11.2013 admitted that UPL is not its CGD customer and is a natural gas pipeline customer but tried to justify it by stating that it is being charged HAPI tariff along-with charges for the dedicated facilities of the compressor and other allied infrastructure.

UPL also stated that the provisional initial unit tariff for HAPI pipeline has been determined by the Board as Rs. 4.92 per MMBTU w.e.f. 20.11.2008 but GGCL is still imposing about 20 times more on UPL.

It is further stated by UPL that AMJH pipeline is only 23 km. long and thus falls within the tariff zone of 300 km. length and as such UPL will be obliged to pay at the same rate as is applicable to HAPI pipeline i.e. Rs. 4.92 per MMBTU. Moreover, this Board, while passing Tariff Order dated 4.9.2013 had clearly held that the length of HAPI pipeline of GGCL does not exceed 300 km., so separate apportionment of the levelised tariff over all above tariff zone is not required.
UPL lastly stated that the transportation tariff for AMJH pipeline can, in no circumstances, be equal to Rs. 81 per MMBTU as what is currently being charged by the CCCL. It added that AMJH pipeline along with compressors was laid by the GGCL at the cost of Rs. 25-30 crores in 2002 whereas, UPL had so far paid Rs. 159 crores towards transportation charges since June, 2002 and the conduct of GGCL of forcibly entering into bilateral commercial arrangements and unilaterally imposing higher tariff without any force of law amounts to manipulation of prices and imposition of unjustified costs or restriction which falls within the ambit of the term ‘restrictive trade practice’ as defined under Section 2 (zi) of the Act.

GGCL by filing a written reply denied the truthfulness of averments made by the UPL in its petition but admitted the following facts :-

(i) GGCL owns and operates city gas distribution network in the State of Gujara.
(ii) It had laid various pipelines including 73.2 km. natural gas pipeline from Hazira to Ankleshwar (HAPI) and the same was commissioned on 10.5.1999.
(iii) It had entered into a Gas Supply Agreement with UPL in the year 2001 to supply natural gas to UPL’s power plant at Jhagadia from the year 2002 to 2008 and had laid 23 km. long pipeline from Amboli to Jhagadia (AMJH) to connect this power plant to HAPI pipeline at Amboli.
(iv) UPL had sourced natural gas from GAIL and then GGCL had entered into Gas Transmission Agreement with UPL on 4.12.2008, and thereafter, some more agreements for short period were executed for availing the GGCL's transmission, distribution and compression facilities which were required to be used for the re-delivery of the gas obtained from GAIL to UPL's plant.

(v) On 3.4.2009 GGCL and UPL had entered into a City Gas Distribution Network Agreement at fixed charge for re-delivery of gas obtained from GAIL to UPL's power plant at Jhagadia.

(vi) Authorization for HAPI pipeline was granted by the Board on 5.7.2012 and authorization for CGD Network of Surat – Bharuch – Ankleshwar Geographical Area was granted in favour of GGCL on 8.11.2012 and thereafter, UPL and GGCL had executed City Gas Distribution Network Agreement on 24.7.2013 having validity till 31.12.2014 by providing the transportation charges @ Rs. 81 per MMBTU.

(vii) The provisional initial unit tariff for natural gas pipeline (HAPI) has been fixed by the Board @ Rs. 4.92 per MMBTU vide Order dated 4.9.2013;

It is, however, stated on behalf of GGCL that Ministry of Petroleum & Natural Gas had reduced the Panna-Mukta-Tapti (PMT) supply to GGCL in the year 2008 from 3.05 MMSCMD to 2.13 MMSCMD with a mandate to supply PMT to CNG, PNG, commercial and SME's consuming less than 50,000 SCMD and as a consequence GGCL could not make supply to the power plant of UPL at Jhagadia. Then, the complainant itself had approached GGCL on its volition and extended the request for transmission of gas at its
power plant which was to be sourced from GAIL and GGCL, due to its long standing relationship with UPL had ensured un-interrupted gas supply to the power plant at Jhagadia.

GGCL denied of exercising any coercive or monopolistic attitude and added that various meetings were convened in the Ministry and the Board, at the behest of UPL, and the Board, in a meeting on 19.2.2010 had opined that the arrangement between UPL and the GGCL was of commercial natural and both the parties were advised to settle their dispute mutually and amicably. Thereafter, meetings were again held and mails / letters were exchanged amongst the parties and in the meantime, the facilitation arrangements under City Gas Distribution Network Agreement remained operative for re-delivery of gas to the UPL's power plant.

On 2.2.2012 UPL had mailed a significant communication to GGCL conveying that the proceedings in respect of its complaint will not be pursued. This communication made GGCL to believe that the controversy was set at rest. But UPL, after entering into CGD Network Agreement on 24.7.2013, again lodged a complaint before the Board on 28.8.2013.

GGCL by narrating the dates of various events, contended that the cause of action has neither arisen nor any date of accruing the cause to lodge this complaint has been disclosed by UPL and whatever has been made the basis by UPL to lodge the complaint is apparently beyond the time limit of 60 days. It added that if 4.9.2013 is
considered as a sacrosanct date when the tariff order was passed by the Board even then the complaint remains time barred.

GGCL also pleaded that the dispute between the parties is of contractual nature which, in terms of clause 16 of the Agreement, can be resolved by way of arbitration only. **GGCL laid emphasis that merely charging the contractual rate instead of regulated tariff does not amount to restrictive trade practice.** It reiterated that the Board itself had opined that this dispute was of commercial nature but UPL suppressed this fact in its complaint. It stated that subsequent agreements between them were the result of willful and consensual acts and as such the allegation of UPL of indulging GGCL into restrictive trade practice is a blatant lie.

GGCL specifically pointed out that the gas obtained by UPL from GAIL is delivered at the city gas station of GGCL located at Surat, Ankleshwar / Bharuch which forms an integral part of the CGD network of GGCL and it is not delivered into the HAPI pipeline.

GGCL admitted the fact that the AMJH pipeline had started catering supply to other small and medium scale industries in the area but added that it had happened due to intervention of Gujarat Industrial Development Corpn. for the development of an industrial township at Jhagadia which led to the laying down of a network of pipeline and was later authorized by the Board on 8.11.2012 as city gas distribution network.
It is also stated that in the year 2001, UPL was procuring gas on sale and transportation basis from GGCL but since Dec., 2008, when UPL started sourcing gas from GAIL, the infrastructure of GGCL, i.e., C.G.D network provider in Jhagadia area was used by UPL and then it had entered into a City Gas Distribution Network Agreement with the GGCL. **GGCL thus claimed that this agreement is in the nature of a facilitation arrangement for re-delivery of gas for which the components of transmission, distribution and compression were also put to use.**

GGCL also contended that it has always extended its co-operation to UPL even at the time when PMT supply was reduced by the Ministry of Petroleum & Natural Gas from 3.05 MMSCMD to 2.13 MMSCMD. It had made alternate arrangement for UPL's plant at market-determined price from April, 2008 onwards by entering into short term agreements and maintained supply of gas from its city gas distribution network.

GGCL denied of obtaining authorization from the Board for AMJH pipeline as part of the HAPI pipeline and stated that its CGD network including the AMJH pipeline has been authorized by the Board under CGD Authorization Regulations and as such, no separate authorization for AMJH pipeline under the Natural Gas Pipeline Authorizing Regulations was required or obtained.

GGCL also asserted that all the agreements described by UPL in its petition were finalized and executed by mutual consent and no fraud or coercion was ever exercised by GGCL. It added that UPL had itself approached GGCL on 13.11.2008 for re-delivery
of gas obtained from GAIL through its CGD network and at that point of time or even today, no regulations exist to regulate a contract for transmission of gas through CGD network. Moreover, there was no precedent for a similar sort of contract anywhere in the country and so, there could not have any other view but to proceed with a negotiated tariff which GGCL did in the instant case.

It is also stated that UPL was not a customer of CGD network of GGCL, therefore, the restriction of refraining from supply of more than 1,00,000 SCMD of natural gas through CGD network was not applicable. It further added that the CGD network agreement executed between the parties has a provision for vacation of the capacity in case of any requirement for CGD demand, therefore, the supply of gas by GGCL to UPL is in consonance with the relevant Regulations.

GGCL reiterated that AMJH pipeline along with its city gas stations is being utilized for the UPL plant to deliver gas as one of the component of special arrangement which includes transmission, distribution and other additional facilities including compressors at the UPL’s unique specification, therefore, the tariff determined by the Board cannot be the sole tariff to be charged from the UPL.

GGCL also disclosed that in 2013 it had initially offered a capacity charge of Rs. 95 per MMBTU which, after negotiations with UPL, was reduced to Rs. 81 per MMBTU which clearly reveals that the transportation charge was not unilaterally imposed by GGCL.
Had it not been so, the UPL would have been obliged to pay sum of the tariff approved for HAPI pipeline along with the tariff for CGD network plus the facilitation charges for re-delivery of gas at the UPL’s unique specification and the total would have been higher than the negotiated tariff.

GGCL further reiterated that the arrangement, providing the functions of transmission, distribution and compression with unique specification is not regulated by any Regulation whereas under the proviso to Regulation 11 (4) of the Pipeline Authorizing Regulation, an authorized entity is permitted to charge additional compression charge towards compression, the extent whereof has not been specified and that leads to an assumption that commercially negotiated rate would be charged.

GGCL also stated that it receives gas intended for UPL at the same point where it receives APM gas as well. In spite of repeated insistence to the UPL for support in terms of access to the delivery meters of GAIL, GGCL has not received any support till date. Therefore, managing offtake from GAIL requires dedicated resource to co-ordinate with the UPL and GAIL on a daily basis to ensure system discipline.

GGCL lastly stated that had there been coercion or involvement into restrictive trade practice by GGCL, the UPL was at liberty to build or get built a dedicated pipeline from GAIL’s network to its plant at Jhagadia and then, there would have been no requirement for UPL to use GGCL’s network.
The UPL, by filing rejoinder affidavit, reiterated the averments as were made in its complaint and denied all those contentions which were contrary thereto and made by GGCL in its counter reply.

On the issue of limitation, it is stated on behalf of UPL that the cause of action in the instant matter is of continuous nature because GGCL has been charging tariff arbitrarily and excessively since Dec., 2008 and the findings of the Board expressed in “GAIL India Ltd. Vs. Shyam Industries” and upheld by the APTEL have been relied upon in support of this contention.

Likewise, on the issue of estoppel, it is stated that UPL wanted additional low pressure natural gas on supply-cum-transportation basis for its new project at the location at which Jagadia power plant exists but GGCL, in the meeting held on 19.1.2012 refused to enter into any discussion until an email is issued by the UPL to GGCL to the effect of withdrawing its complaints. Since, the “AMJH pipeline” of GGCL was the sole pipeline in the area for supply of gas and UPL could not be in any bargaining position and had no other option but to issue the desired email. Only after doing so, a separate agreement was signed at spot market price on 23.4.2012 which is operative till 31.12.2014. It added that the email dated 2.2.2012 was without prejudice to the rights and remedies available to the UPL from seeking relief which can be availed under the law notwithstanding of making such statement.
Besides, the determination of network tariff is the exclusive jurisdiction of the Board, even then, in the questioned contracts, tariff was unilaterally fixed by the GGCL in utter dis-regard of the provisions of Section 22 of the Act and the Regulations framed thereunder. Moreover, no agreement can supersede the laws enacted by the legislature and no one has the authority to usher the jurisdiction of the Board and to charge transportation tariff and compression charges at its whim and fancy. It further stated that the issue of fixation of tariff for transportation of gas i.e. the real dispute of this case, is the exclusive prerogative of the Board and such an issue cannot be treated as an “arbitrable issue”.

UPL specifically narrated the provisions of Regulation 3 (2) of the CGD Authorizing Regulations and Regulation 8 of the CGNDA Tariff Regulations to suggest that the customer having requirement of natural gas of more than 1,00,000 SCMD shall be supplied through a pipeline not forming part of the CGD network but GGCL, despite admitting the fact of supplying about 1,71,000 SCMD, compelled UPL to enter into CGNDA agreement and charged exorbitant rate of tariff in violation of Regulation 8 (2) and (3) of the CGNDA Tariff Regulations. These Regulations also reveal that the compression charge for CNG in the CGD network shall be fixed as per the compression charge for CNG bid and the compression charge for CGNDA shall be recovered separately through an invoice without any premium or discount on a non-discriminatory basis but GGCL never provided any break-up of the capacity charge or the maintenance charge despite repeated requests.
It has also been submitted on behalf of UPL that it is against the provisions of the Act and Regulations that any entity utilizes the City Gas Network Pipeline for facilitating the re-delivery of gas beyond its prescribed limits for any unique specifications otherwise not allowed in law. It is also not permitted in law that the entity provides access on its CGD Network to the shipper and not charge the approved network tariff and the compression charges.

As an alternate submission, it stated that even for the sake of argument if it is assumed that the threshold limit of 1,00,000 SCMD under Regulation 3 (2) of the CGNDA Authorizing Regulations will not apply to the UPL, then the GGCL should have not entered into CGNDA Agreement unless it had logical justification behind converting a GTA into CGNDA.

It is also added on behalf of the UPL that GGCL on the one hand intends to take benefit of Regulation 11 (4) of the Natural Gas Pipeline Tariff Regulations which allows the entities to impose an additional compression charge, the extent whereof has not been specified in the Pipeline Tariff, but on the other hand, it contends in Para 15 & 19 of its counter reply that the Tariff determined under Natural Gas Pipeline Tariff Regulations would not be applicable to the UPL. Not only this, GGCL claims that ‘AMJH pipeline’ is a part of its CGD network then the question arises, how can it be treated as a Natural Gas Pipeline and how the benefit of imposing additional compression charge under Regulation 11 (4) of the Natural Gas Pipeline Tariff Regulation can be justified. Moreover, if the AMJH pipeline is a part of the CGD Network and the Natural Gas Tariff
Regulations will not have application on such AMJH pipeline, then GGCL will have no authority to charge HAPI Pipeline tariff as is admittedly being doing in the present case under the pretext of facilitation charges whereas the term ‘facilitation charges’ has nowhere been used or defined in the Act, or the Regulations, and it appears that with a view to escape from the relevant regulatory and statutory provisions, it has been invented by the GGCL to create illusory distinction between the transportation charges and so-called facilitation charges.

At last, it has been stated that AMJH pipeline was initially a dedicated pipeline for the supply of gas to its Jagadia power plant and was subsequently used to cater to the need of other entities and its cost and maintenance charges too have already been recovered from UPL in multiple of the actual expenses but even then, arbitrary and excessive tariff charges are being levied on UPL by the GGCL because there was no scope of laying or building another dedicated pipeline from GAIL’s network for Jagadia power plant as it would have caused huge financial burden and also could lead to complete shutdown of the UPL power plant for a period of about one year and GGCL was fully aware of this situation.

We have heard Ld. Counsel for both the parties and also perused the record including the written submissions and Addendum to the written submissions dated 18.9.2014 furnished on behalf of GGCL whereby para 1.3 and 1.4 of the original submissions were substituted.
The issue of limitation, arbitration and estoppel were raised as preliminary issues by the Ld. Counsel for GGCL and as such, these are being considered before probing the other issues of this case.

Ld. Counsel for GGCL submitted that the dispute amongst the parties is purely of contractual nature and clause 16 of the agreement provides remedy of arbitration for dispute resolution. The correct forum for adjudication of this dispute would thus be arbitration and mere allegation of UPL of involvement of the GGCL in restrictive trade practices can neither confer nor restrict the jurisdiction of a particular forum.

It added that the charging of a contractual rate from UPL under the circumstance which are not covered in any Regulation cannot be treated as restrictive trade practice and so, the adjudication of a contractual dispute by this Board is barred under Section 12 (1) (a) of the Act.

Ld. Counsel for GGCL also submitted that Section 24 and 25 of the Act provide procedure for the Board to settle dispute between entities or between an entity and any other person whereas the jurisdiction for filing the complaint in respect of the specified matters lies under Section 12 of this Act.

Our attention was drawn by the Ld. Counsel on pronouncements of the Apex Court delivered in Saiyad Mohammad Bakar El-Edroos V. Abdulhabin Hasan Arab reported in (1998) 4 SSC 343 and Kode Kutumab Rao V. Kode Sesharatnamamba
reported in AIR 1967 AP 323, and submitted that a procedural law is always subservient to the substantive law and nothing can be taken away by the procedural law what is given by the substantive law.

Ld. Counsel further submitted that the UPL has consciously invoked the provisions of Section 25 of the Act, in order to avoid the exclusion provided to arbitral disputes under Section 12 (1) (a) and Section 24 of the Act. However, the Hon’ble Supreme Court has held in a catena of cases including Zahira Habibullah Sheikh and Anr. V. State of Gujarat & Ors. Reported in (2004) 5 SSC 353 that mere nomenclature or description of a petition / complaint or the invocation of certain provisions would not confer or restrict the jurisdiction of a particular forum.

The submissions of the Ld. Counsel for GGCL appear to be contrary to the very object and idea of the Act.

The provisions of Section 12 (1) (a) correspond to Section 24 whereas the provisions of 12 (1) (b) substantially correspond to Section 25 of the Act and a harmonious construction of all these provisions makes it clear that any complaint connected with the activities relating to petroleum, petroleum products and natural gas, falls under Section 25 of the Act on contravention of:-

(i) Retail services obligations;
(ii) Marketing service obligations;
(iii) Display of retail price at retail outlets;
(iv) Terms and conditions subject to which a pipeline has been declared as common carrier or contract carrier or access for other entities was allowed to a city or local natural gas distribution network, or authorization has been granted to an entity for laying, building, expanding or operating a pipeline as common carrier or contract carrier or authorization has been granted to an entity for laying, building, expanding or operating a city or local natural gas distribution network;

(v) Any other provision of this Act or the rules or the regulations or orders made thereunder.

Any involvement of the entity into restrictive trade practice and violation of the Terms and Conditions of Authorization attract the provision of Section 11(a) read with Section 12 (1) (b) (v) and Section 12 (1) (b) (iv) of the Act respectively.

It is also relevant to state that the dispute relating to refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas would be maintainable under Section 24 of the Act and the Board will have no jurisdiction to adjudicate upon and decide such dispute if the parties have agreed for arbitration.

The Board, at the very inception of the proceedings i.e. at the stage of admission of this complaint, vide order dated 25.6.2014 had found it a prima-facie case under Section 25 of the Act and later, during the course of final hearing, both the parties, in response to
the query made by us had conceded the correctness of maintainability of the complaint under this provision.

Ld. Counsel for UPL controverted the above views and submitted that GGCL is trying to regulate the transportation tariff under the pretext of contractual agreement and has made inconsistent assertions in its counter-reply. The gas is being transported to UPL by using AMJH pipeline which according to UPL is the part of HAPI and according to GGCL itself, it is a part of its CGD network. However, in both the situations, GGCL is obliged either to charge the tariff of HAPI pipeline or to charge of its CGD network as determined by the Board, but GGCL has invented a new concept of facilitation charges which does not find recognition under any Regulation or the statutory provision. Moreover, no clause of any agreement can be allowed to sustain which is violative or does not conform to the legal provisions or any clause which tends to violate the law shall be inoperative and the dispute of that nature will have to be adjudicated under the relevant legal provisions leaving no scope for any person to claim any right or liability on the basis of such unlawful clause and thus, the dispute involving the arbitrariness of tariff charges cannot be an arbitral issue.

Ld. Counsel drew our attention on the findings of APTEL arrived at in "GAIL India Ltd. Vs. Shyam Industries" (Appeal No. 86 of 2011) to strengthen his submission that the Legislature intended to provide a remedy in addition to the consentient arbitration which could be enforced under the Arbitration Act but, it does not confer an automatic right nor create an automatic embargo on the exercise of power by the Judicial Authority under
the Act and the Board, for the purpose of the Act, is a Judicial Authority and it would be appropriate for the Board created under the Act, to proceed with the matter in accordance with the provisions of the Act rather than relegating the parties to an arbitration proceeding. Moreover, the provisions of the Act over-rides the stipulation contained in the aforesaid condition and the Act would prevail over the general law of arbitration.

Besides, during the course of hearing the Counsel for both the parties, in response to the query made by a Member of the Board had conceded that on the basis of the contents of complaint, this case falls under Section 25 of the Act and therefore, the arbitration clause does not operate as a barrier in these proceedings because the issue of arbitration deserves attention in those complaints only which are heard under Section 24 of the Act.

On perusal of record and in the light of the submissions made on behalf of both the parties, it transpires that GGCL is not charging the tariff as determined by the Board for HAPI or for its CGD network. It is rather charging facilitation charges which does not find recognition under any legal provision and which purportedly includes the charges for tariff, compression and other facilities and such a dispute cannot be adjudicated upon by an arbitrator and so, the contentions of GGCL in this regard are not acceptable.

Likewise, on the issue of estoppel, Ld. Counsel for GGCL drew our attention on the correspondence as were made by UPL to GGCL on 2.2.2012 whereby UPL had
assured GGCL that the proceedings in respect of its complaint will not be pursued. Ld. Counsel added that this communication had made GGCL to believe that the controversy was set at rest forever, but, UPL, after entering into an agreement on 24.7.2013 of CGD network again lodged complaint before the Board on 28.8.2013.

However, the response of UPL discloses a different story that UPL wanted additional low pressure natural gas on supply-cum-transportation basis for its new project at the location where Jagadia power plant exists but GGCL, in the meeting held on 19.1.2012 refused to enter into any discussion until an email is issued by the UPL to GGCL to the effect of withdrawing all its complaints. Since, the “AMJH pipeline” of GGCL was the sole pipeline in the area for supply of gas and UPL could not be in any bargaining position and had no other option but to issue the desired email. Only after doing so by UPL, a separate agreement was signed by GGCL at spot market price on 23.4.2012 which is operative till 31.12.2014. It stated that the email dated 2.2.2012 was without prejudice to the rights and remedies available to the UPL for seeking relief which can be availed under the law notwithstanding of making such statement.

If we go by the meaning of estoppel, it would transpire that the estoppel is an admission or something which the law treats as equivalent to admission of so high and conclusive nature that anyone who is affected by it is not permitted to contradict it. In other words, estoppel means that the party is prevented by his own acts from claiming the right to the detriment of other party who was entitled to rely on such conduct and acted accordingly. But we should not forget that estoppel is an equitable relief and where it is the result of
using monopolistic attitude or coercion by the other on its rightful claim and the admission, act or conduct tends to waiver of any constitutional or statutory right or it is violative of any law it would then not be effective or operative at all.

The issue of estoppel is thus co-related with the issue of involvement of GGCL into restrictive trade practice. If the contentions of UPL are found legally acceptable with regard to involvement of GGCL into restrictive trade practice, the issue of estoppel will not carry any weightage whereas in contrary situation, this issue will bear significant relevance and our verdict on this issue will have to be viewed accordingly.

On the issue of limitation, it has been submitted on behalf of the GGCL that UPL failed to disclose any date or specific event, in its complaint, about accrual of the cause of action. Attention has been drawn on UPL’s communication whereby it had categorically conveyed to GGCL on 6/7.12.2011 that the capacity charges of Rs. 67.69 per MMBTU is exorbitant by any norms and that does not have approval of the Regulator. It was also admonished by UPL that in case of non-receipt of satisfactorily reply within 20 days, UPL will be constrained to approach the Regulator for redressal. Thus, 6/7.12.2011 is sacrosanct when the UPL came forward with a specific cause of action but no complaint was lodged by it under Section 24 or 25 of the Act within the prescribed period of 60 days. On the other hand hand, UPL issued an email about a year thereafter on 2.2.2012 conveying its decision of not pursuing any matter or complaint any further and thereafter, both the parties had entered into fresh agreement regarding transmission of gas for UPL’s power plant at Jagadia.
Ld. Counsel also submitted that the provisions of Section 25 (2) of the Act reveals that such a complaint could have been filed within 60 days from the date, on which any act or conduct constituting contravention of statutory or regulatory provision had occurred. However, the complaint could also be entertained by the Board after the expiry of statutory period of 60 days on being satisfied that there was sufficient cause for not filing a complaint within the said period of 60 days. But UPL neither extended any request for condonation delay nor the Board anywhere expressed its views suo-moto in this regard.

Ld. Counsel summarized his arguments that the date of accrual of cause of action, if any, was 6/7.12.2011 or on expiry of 20 days from this date, whereas the complaint has been lodged before the Board on 5.6.2014, which is apparently time-barred.

Ld. Counsel for UPL refuted the GGCL contentions and submitted that since the year 2008 GGCL has been coercing UPL for entering into GTAs and CGNDAs and has also been charging unilaterally the excessive transportation rate without seeking approval from the Board whereas, the UPL remained in continuous process of agitating the issue before the Board and the Ministry for getting redressal.

UPL also quoted the dates when GTAs were executed within the year of 2008-09 and from April, 2009 CGNDAs were executed to transmit the quantity of 171,000 SCMD per day and such transmission tariff was levied by GGCL which was extremely excessive as...
compared to the tariff determined by the Board. Ld. Counsel also added that the last Agreement dated 23.4.2012, which is still operative and will remain in operation till 31.12.2014 reflects the same state-of-affairs and also shows the continuity of the cause of action.

Ld. Counsel specifically pointed out the findings of APTEL made in Appeal No. 87 of 2011 “GAIL India Ltd. Vs. Shyam Industries” to corroborate this contention that in the matter of levying excessive transportation charges, the cause of action runs in continuity. The pronouncement of the Apex Court made in “N Balakrishnan Vs. M. Krinamurthy”; (1998) 7 SCC 123 has also been cited to suggest that the time limit fixed for approaching the court in different situation docs not mean that on expiry of such time, a trouble-some cause would transform into a good cause, as the rules of limitation are not meant to destroy the rights of the parties.

Ld. Counsel lastly submitted that the complaint was not admitted by the Board in a mechanical manner. The complainant was rather directed to appear and to satisfy the Board that the prima-facie grounds exists to proceed and the Board, consisting of the Chairperson and all the four Members, after hearing the counsel for UPL, had unanimously found the existence of a prima-facie case and a speaking order was passed by the Board to this effect on 25.6.2014 and this itself leads to an assumption that the Board was conscious about the accrual of the cause of action and also about the presentation of the complaint within the specified period of time.
We, on giving consideration to the submission of both the parties in the light of the statutory provisions and the pronouncement of the superior / Apex Court, on this issue do not find any substance in the GGCL’s contentions and hold that the complaint is not time barred.

Our attention has also been drawn on the GGCL’s letter dated 11.11.2013 wherein it has categorically been stated that UPL is not a CGD customer of GGCL. It has rather entered into an agreement with UPL for re-delivery of the said quantity of gas contracted by the UPL with GAIL at the UPL’s premises at the specification as specified by UPL in bilateral contract at commercially negotiated rate.

It was also stated by GGCL in the said letter dated 11.11.2013 that UPL is being charged HAPI tariff along with charges for the dedicated facilities of the compressor being utilized continuously for re-delivery of natural gas at 43-45 bar pressure and other allied infrastructure.

Notwithstanding such admissions, GGCL had unilaterally decided to convert the GTA into CGD Network Agreement, in utter dis-regard of the provisions of Regulation 3 (2) (c) of the CGD Authorizing Regulations.

GGCL thus, on the one hand denies the status of UPL as a CGD customer but simultaneously compelled it to enter into CGD network agreement in place of GTA.
Moreover, AMJH pipeline which was initially a dedicated pipeline of HAPI to transmit gas at UPL's power plant and was subsequently utilized to cater the need of other consumers, is now being claimed as a part of CGD network of GGCL and such a situation leads to this conclusion that GGCL is not only transmitting impermissible quantity of gas to UPL through its CGD network pipeline it is rather supplying gas through this network to such a customer who is not a CGD customer and is thus, violating the provision / condition where under CGD Network can be used only for CGD customers.

Moreover, no entity can utilize the pipeline of its CGD network for re-delivery of gas beyond its prescribed limit of any unique specification.

Ld. Counsel also draw our attention on the provisions of Regulation 11 of the PNGRB (Access Code for City or Local Natural Gas Distribution Networks) Regulations, 2011 hereinafter referred as the “Access Code Regulations which reads as under:

11. Charges.

(1) the shipper shall pay to the authorized entity the following charges for using its city or local natural gas distribution network as specified on the invoice generated by the authorized entity, namely :-

(a) network tariff which includes gas transportation in CGD network, odourization gas metering, gas reconciliation and system use gas;
(b) compression charges;
(c) overrun charges, if applicable;
(d) system imbalance charges, if applicable;
(e) off-spec gas charges, as agreed in access arrangement;
(f) applicable taxes;
(g) any other charges mutually agreed in the access arrangement such as-
   (i) ship or pay;
   (ii) transport or pay;
   (iii) technical upgradation of system;
   (iv) R&D;
   (v) any other charges with the approval of the Board.

GGCL despite being bound by the said Regulations and despite repeated requests of the UPL always declined to furnish the details / bifurcation of the charges. It rather imposed facilitation charges at different rates and lastly at the rate of Rs. 67.69 per MMBTU at net calorific value from March 09, 2009 till July 31, 2013 without seeking specific approval from the Board under Regulation 11 (g) (v) of the Access Code Regulation.

On the contrary, GGCL in para 14, 15, 19, 21 & 22 stated that the tariff, as determined by the Board under the Pipeline Tariff Regulations would not be applicable to the facilitation arrangement as the Pipeline Tariff specifically exclude the pipeline which are part of the CGD network and further, no regulation has yet been notified by the Board to
regulate such a facilitation agreement and moreover, the AMJH pipeline is just one of the component of the special arrangement which include transportation and other additional facilities including compressors for re-delivery of gas at unique specification of UPL and therefore, the tariff determined by the Board cannot be the sole tariff to be charged from the UPL.

The essence of GGCL’s contention thus appears that the transportation tariff, as determined by the Board cannot be made applicable to re-delivery arrangement because such an arrangement is unique in nature and no Regulations have been framed as yet by the Board to regulate such arrangement. Besides, the provisions of Regulation 11 (4) of the Access Code Regulations permits an authorized entity to charge an additional compression charge towards compression of natural gas to the extent not included in the natural gas pipeline tariff.

Ld. Counsel for UPL submitted that the issue as emerged from the contentions of the GGCL is as to whether the action of GGCL to compel the UPL to enter into CGD network agreement for supply of 171,000 SCMD per day through its CGD Network and to impose the facilitation charges, under above circumstance, can be considered as justified.

Ld. Counsel for UPL submitted that it is settled principle of law that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone and following of any other course would not be permissible. Reliance is placed on the
judgment of the Apex Court in *Selvi J. Jayalalithaa and Ors. V. State of Karnataka and Ors.* (2014) 2 SCC 401 wherein the Division Bench held as follows:

“There is yet an uncontroverted legal principle that when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. In other words, where a statute requires to do a certain thing in a certain way, the thing must be done in that way and not contrary to it at all”.

Ld. Counsel also submitted that AMJH pipeline, which in fact is a common carrier natural gas pipeline, but if argument sake, is considered as a part of CGD network, in that case too, the tariff can be levied by the entity as determined by the Board under the provisions of Section 22 of the Act read with the relevant provisions of the CGD Authorizing Regulations and PNGRB (The Determination of Network Tariff for CGD Network and Compression Charges for CNG) Regulation 2008. But GGCL itself has tried to regulate the transportation tariff under the garb of contractual arrangement whereas the tariff cannot be a subject matter of bilateral agreement and the very existence of bilateral agreement in violation of the regulatory provisions leads to this assumption that the GGCL exercised its dominant position and coerced the UPL to enter into such agreement because the UPL did not have any other source of transmission of gas except AMJH pipeline, for its power plant at Jagadia.

Besides, any agreement or arrangement entered into or made by an authorized entity by exceeding the terms and conditions of authorization or by violating the existing
provisions or by entering into such arrangement for which no regulation existed but required prior approval of the Board under Regulation 11 (4) of the Access Code. Regulation further strengthens the use of monopolistic power by GGCL and also its involvement in restrictive trade practice.

Ld. Counsel also submitted that the GGCL claims the AMJH pipeline is a part of CGD network and cannot be treated as a natural gas pipeline but failed to explain that, if it be so, then how it can claim the benefit of charging additional transmission charges under Regulation 11 (4) of the said Regulations.

Ld. Counsel lastly submitted that the fixation of tariff / transmission charge for transportation of gas by using AMJH pipeline is a subject matter of exclusive jurisdiction of the Board and the GGCL had no authority to usurp this power of the Board and to fix the tariff unilaterally by entering into bilateral contracts and the GGCL, in gross derogation of law forced the UPL to enter into CGD network agreements and charged excessive transportation rates from it and thus, exercised its dominant position and indulged in restrictive trade practice.

Ld. Counsel for the GGCL, in response to the submissions as made on behalf of the UPL, submitted that before proceeding further the correct mode of arrangement of supply and delivery of gas at the power plant of UPL needs to be understood. On this aspect, Ld. Counsel submitted that natural gas is delivered by GAIL into the CGD network of GGCL at two City Gas Stations one at Surat and another at Ankleshwar-
Bharuch at 30 kg. / cm² and 10 kg. / cm² pressure respectively. The gas delivered at
CGS Surat goes to Surat Local Distribution Zone (LDZ) and similarly, at Ankleshwar
CGS, it flows to the Ankleshwar LDZ; therefore, the gas supplied by GAIL for UPL never
enters into the HAPI pipeline. GGCL thus utilizes this low pressure gas for its CGD
customers and a quantity equivalent to the booked capacity of the UPL is arranged from
the HAPI pipeline from the GGCL's own supplies and re-delivered to the UPL after
increasing the pressure of the gas.

The natural gas in the CGD network pipeline connecting to the UPL's plant at Jhagadia
is at a pressure of 30 kg. / cm² which is raised to 43 kg / cm² using the dedicated
compressors specially installed to meet the gas specification required by UPL at its
plant at Jhagadia.

Moreover, the right of first refusal of the spare capacity lies with the CGD customer and
not with the UPL.

Ld. Counsel also submitted that UPL is not a CGD customer of the GGCL and while
filing the application / information for seeking authorization of the CGD network, the
GGCL had not included the UPL as a customer of its CGD network and merely, the
capacity being utilized by the UPL was included for the purpose of calculating
volume deviser with a view to lessen the burden of the CGD customers.
The crux of the submissions put forward before us on behalf of the GGCL is that the facilitation arrangement puts to use the GGCL's HAPI pipeline, CGD network and the dedicated compression facility for re-delivery of gas to the power plant of UPL at desired specification and such an arrangement is not envisaged under the regulatory framework notified by the Board and in absence of any regulation or statutory provision, the arrangement between the parties amounts to contractual arrangement requiring no intervention by the Board.

Ld. Counsel further submitted that while granting authorization on 8.11.2012 of CGD network, the marketing exclusivity for a period of 3 years from the date of authorization was granted in favour of GGCL and thus in terms of Regulation 3 (1) of the PNGRB (Access Code for City or Local Natural Gas Distribution Networks) Regulations, 2011 (Access Code Regulation) inter-alia any entity which wants access to entry point capacity, exit point capacity and delivery at CNG exit point capacity on such CGD Network with volume attributable to the CGD customer can do so only at the end of the exclusivity period. In the instant case, the UPL, not being a CGD customer, is not entitled to book capacity on the CGD network of the GGCL. In addition to above, as the natural gas is not being delivered at any of the entry points of the HAPI pipeline, therefore, the capacity of HAPI pipeline could have not been booked by the UPL and as such, the UPL cannot be considered to be a Shipper on the HAPI pipeline as well.

On the issue of involvement into restrictive trade practice, Ld. Counsel submitted that emphasis has been laid by the Ld. Counsel for UPL on Regulation 11 of the Access
Code Regulations to urge that bifurcation of the charge must have been clearly reflected in the invoice generated by GGCL and any other charge, not included in the invoice/list could have not been imposed without specific approval of the Board. This argument does not have any merit, because the Board has to consider the fact that the UPL is not a CGD customer of the GGCL and the Access Code Regulations do not have application to a non-CGD customer during the period of exclusivity. Otherwise too, the definition of compression charges in the Access Code Regulation is only in respect of compression charges for CNG whereas the UPL is not a CNG customer under the CGD network. It is also pertinent to mention that the dedicated compressors have especially been installed by the GGCL to meet the specification for the power plant of UPL.

Besides, the expenditure on installing dedicated compressors for the gas specifications of the UPL have not been included by the GGCL in its tariff filing, in order to avoid the cross subsidization of the said burden by other consumers. By insisting on applying the network tariff to itself, the UPL is trying to wiggle out of its responsibility to pay for the additional expenditure involved in the installation, maintenance and operation of the dedicated compressors.

Furthermore, no regulation or statutory provision prohibits the GGCL to charge the negotiated amount from the UPL especially under the circumstance when the CGD Network Agreement was extended till Dec., 2014 on the request of UPL.
Ld. Counsel lastly submitted that the transportation charges under the CGD network agreement dated 24.7.2013 were reduced from Rs. 94.87 per MMBTU to Rs. 81.00 per MMBTU in furtherance of the request of UPL which leads to this assumption that the charges were mutually negotiated between the parties and the agreement was not the result of any coercion or fraud, as alleged by UPL.

On the pronouncement of this Board and the APTEL in Shyam Industries matter, it has been submitted that the findings of the Board and the Tribunal were in the context of recovery of entire network cost from the customers and in that respect, it was held that the network tariff can only be charged after approval of the Board whereas in the instant matter, the question of charging network tariff does not arise because the UPL is neither a customer of CGD network nor its power plant is connected by a dedicated pipeline. Moreover, the charges levied on the UPL is a negotiated amount for the re-delivery of gas through the infrastructure of GGCL at specified pressure and as such, the network tariff cannot be applicable.

At the very outset, it has to be ascertained as to which network is being used by GGCL to supply gas of uPL at the power plant (Jagadia) which it procures from GAIL.

It is not in dispute that GGCL has laid / commissioned 73.2 km. natural gas pipeline from Hazira to Ankleshwar (HAPI) on 10.5.1999 and had also laid 23 km. long pipeline from Amboli to Jagadia (AMJH) to connect the UPL’s power plant to HAPI pipeline at
Amboli and by the year 2005, GGCL started using it to cater the need of other consumers, in addition to UPL and thus, it lost its character of dedicated pipeline.

It is established on record that short duration contracts were executed between the parties for transmission of gas during Dec., 2008 to April, 2009 and after the Gas Transmission Agreement dated 6.3.2009, the City Gas Distribution Network Agreement was executed for the first time between the parties on 3.4.2009. But it is a definite case of the GGCL that UPL has never been a customer of its CGD network and as such, the provision of Section 3 (2) (c) of the CGD Authorization Regulations were not applicable and therefore, the quantity of 171,000 SCMD of natural gas could have been supplied by GGCL to UPL.

It is also an admitted fact that UPL has been procuring natural gas from GAIL; and GGCL had entered into gas transmission agreement with UPL on 4.12.2008 and thereafter, some more agreements were executed between them for availing / providing the transmission, distribution and compression facility of GGCL.

The admission of the GGCL made in para 8 of its letter dated 11.11.2013 (Annexure-A-9 of the complaint) bears vital significance which is being re-produced hereunder:

"UPL being a natural gas pipeline customer and not a CGD customer is being charged HAPI Pipeline tariff along with charges for the dedicated..."
facilities of the compressor (being specifically utilized for re-delivery of natural
gas to UPL at 43-45 barg) and other allied infrastructure.

Besides, GGCL in para 21 of its counter reply placed reliance on the proviso to
Regulation 11 (4) of the Pipeline Authorizing Regulations to suggest that this Board can
allow the authorized entity to charge an additional compression charge towards
compression of natural gas to the extent not included in the Natural Gas Pipeline Tariff.
This provision / Regulation pertains to the authorization of natural gas pipeline which
means (as defined in Section 2 (f) of the Pipeline Authorizing Regulations) any pipeline
including spur lines for transport of natural gas and includes all connected
equipments and facilities but exclude dedicated pipeline and the pipeline in a
CGD network.

This aspect further strengthens the view that the GGCL itself acknowledges UPL as a
shipper of natural gas pipeline and imposition of compression charge is being justified
by taking advantage of the said Regulation 11 (4) of Natural Gas Pipeline Authorizing
Regulations.

Moreover, GGCL stated in para 12 of its counter affidavit that the gas can be fed at both
the terminals i.e. Mora (Hazira) and Amboli ( Ankleshwar) or at the designated entry /
exit point on HAPI. However, the complainant (UPL) does not get the gas delivered
from GAIL into the HAPI pipeline and intended to take delivery at the city gas stations of Surat and Ankleshwar.

This contention of GGCL makes it clear and judicial notice can also be taken of the fact that the gas could have been and can be received from GAIL at Hazira through regional natural gas pipelines network of GGCL.

Furthermore, GGCL in para 2.6 of its written submission disclosed that it had included the volume utilized by the complainant in its tariff filing made to the Board for the HAPI pipeline and also for its CGD network.

It is thus admitted to GGCL that the volume of gas utilized by UPL has also been included in the volumes of HAPI pipeline for getting its tariff determination.

All these factors lead to this conclusion that the GGCL itself, in effect, has been treating the UPL as a shipper of its natural gas pipeline on the appointed day and even thereafter till various Regulations were framed / notified by the Board and after having understanding of all the relevant legal provisions, appears to have made a strategy to represent AMJH pipeline as a part of its CGD network and accordingly proceeded for authorization of its natural gas pipeline and the CGD network so that, a new concept of facilitation charges could be invented to escape from the regulatory framework. But the provision of Section 16 of the Act makes the entire exercise of GGCL futile which reads as under:

\[\text{..}\]
No entity shall:-

(a) Lay, build, operate or expand any pipelines as a common carrier or contract carrier;

(b) Lay, build, operate or expand any city or local natural gas distribution network, without obtaining authorization under this Act:-

Provided that an entity :-

(i) Laying, building, operating or expanding any pipeline as common carrier or contract carrier; or

(ii) Laying, building, operating or expanding any city or local natural gas distribution network,

immediately before the appointed day shall be deemed to have such authorization subject to the provisions of this Chapter, but any change in the purpose or usage shall require separate authorization granted by the Board.

It transpires that the proviso to Section 16 of the Act relates to an entity like GGCL, which has been laying, building, operating or expanding any common carrier / contract carrier pipeline or CGD network immediately before the 'appointed day' without authorization of the Central Government whereas proviso to Section 17 (1) & (2) state about the entity by which the similar activities were being carried on under the authorization of the Central Government on the 'appointed day'.

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The status of both types of entities is recognized by the Board in a different manner.

An entity authorized by the Central Government was merely obliged to furnish the particulars of such activities to the Board within 6 months from the 'appointed day' and the Board, subject to the provisions of the Act and consistent with the norms and the policy guidelines laid by the Central Government, could accept or reject the application for authorization. The Board dealt with the matters of authorization of such entities under Regulation 17 of the Natural Gas Pipeline Authorizing Regulations and the CGD Network Authorizing Regulations, as the case may be.

The entities having no authorization from the Central Government on the 'appointed day' are deemed as 'authorized' subject to the provisions of Chapter-IV of the Act. However, any change in the purpose or usage required separate authorization from the Board and the Board to deal with the said activities of such entities specified various pre-requisites under Regulation 18 of the said Regulations, besides furnishing the Performance Bond and to comply with the service obligations and the quality of service standards.

It can thus be concluded that any entity which was laying, building, operating or expanding any pipeline as common carrier or contract carrier, or any city or local natural gas distribution network immediately before the appointed day shall be deemed to have such authorization. In other words, HAPI pipeline including AMJH pipeline and the CGD network (excluding AMJH pipeline) shall also be deemed to have
been authorized accordingly on the appointed day i.e. on 1.10.2007 because, it is established on record that AMJH pipeline was originally laid as a dedicated pipeline for transmission of natural gas to the UPL's power plant but it was being used on and before the 'appointed day' for transmission of gas to other consumers and as such, the original character of AMJH pipeline stood converted from dedicated pipeline to a spurline.

It is evident from the definition of natural gas pipeline (Ref. 2 (f) of Authorizing Regulations) that a spurline is included within the meaning and definition of natural gas pipeline. Thus, 23 km. long AMJH pipeline was to be added / included with 73.2 km. natural gas pipeline (HAPI) and thus, on the appointed day, AMJH pipeline was a natural gas pipeline and deemed authorization of natural gas pipeline (HAPI) shall also include the authorization of AMJH pipeline as a natural gas pipeline.

But GGCL, in contravention of the existing legal provisions, excluded the AMJH pipeline from the natural gas pipeline and approached the Board for authorization only for 73.2 km. HAPI pipeline and included 23 km. long AMJH natural gas pipeline as a part of its CGD network.

But the GGCL, even after the grant of Authorization, had categorically admitted in its above-described letter dated 11.11.2013 that UPL is a natural gas pipeline customer. The fact of taking advantage of Regulation 11 (4) of the Pipeline Authorizing Regulations also provides factual support to the legal fiction of deemed authorization.
GGCL itself required the UPL to convert the GTA into CGD Network Agreement but simultaneously contended that UPL is not a CGD customer of its network. GGCL did not pay any heed to the fact that Access Code Regulations relating to CGD Network do not have application during the exclusivity period as evident from Regulation 3 of the Access Code Regulations. Moreover, it failed to explain as to under which provision of law it had agreed to transmit 171,000 SCMD to UPL which was a party to the CGD Network Agreement and further failed to explain the justification of charging compression charges without seeking approval of the Board.

Besides, the GGCL, as held by the Apex Court in 'Selvi J. Jayalalithaa case (Supra), was obliged to confine its activities within the ambit of the terms and conditions of Authorization granted by the Board in its favour and also to, abide by the relevant Regulations and the statutory provisions but being an authorized entity, it was not allowed to invent a new concept of facilitation charges by transgressing its limits.

It is thus evident that while acknowledging/granting authorization, the change of character of AMJH pipeline from dedicated pipeline to spurline of HAPI was not brought to the notice of the Board and authorizations were obtained by GGCL by suppressing or misrepresenting the material facts for which a separate action will have to be initiated.

Nevertheless, for the purpose of this case, we have to proceed by treating AMJH pipeline as a common carrier / contract carrier natural gas pipeline.
On the issue of the involvement of GGCL in restrictive trade practice, the provisions of Section 2 (zi) of the Act needs to be kept in mind which are being reproduced below:

"restrictive trade practice" means a trade practice, which has; or may have, the effect of preventing, distorting or restricting competition in any manner and in particular—

(i) Which tends to obstruct the flow of capital or resources into the stream of production, or

(ii) Which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to petroleum, petroleum products or natural gas or services in such manner as to impose on the consumers unjustified costs or restriction;

In view of the above definition, following factors are significant in order to arrive at some logical conclusion:

(i) GGCL failed to produce any evidence to rebut the contention of UPL that AMJH pipeline was originally laid as a dedicated pipeline to supply natural gas to UPL's power plant by incurring expenditure of approx. Rs. 25-30 crores and has recovered Rs. 159 crores for transmission of gas through this AMJH pipeline from UPL. Besides, this dedicated pipeline at later stage was also used to transmit the gas of various other customers.
(ii) The GGCL, after ensuring multi-time recovery of the expenditure of AMJH pipeline represented it before the Board as a part of its CGD network, knowingly well that it was the only pipeline for transmission of gas to the UPL's power plant and by adopting such strategy, it imposed un-regulated charges for transmission and compression etc.

(iii) The authorization for the network has been granted by the Board under Regulation 18 of the Authorizing Regulations as was existed and being operated before the appointed date i.e. 1.10.2007 and thus, GGCL was obliged to make application before the Board immediately for further action. But GGCL approached the Board regarding authorization of its network after the passage of about a year and converted the existing Gas Transmission Agreement (GTA) into CGD Network Agreement in order to enable itself to impose arbitrary charges.

(iv) Although, GGCL entered into CGD Network Agreement with UPL but has been supplying impermissible quantity of natural gas by increasing its pressure and then tried to justify it, which is normally not done unless it was to achieve undue gains.

(v) GGCL, despite repeated requests of the UPL did not furnish the details / bifurcation of the charges. It rather pleaded that the Access Code Regulations do not have any application to a non-CGD customer and as such, under the provisions of the Access Code Regulations, GGCL was not obliged to furnish bifurcation during the period of exclusivity.
Our attention has been drawn by the GGCL on the conduct of the UPL that the UPL on one hand makes allegations of coercion, arbitrariness and involvement into monopolistic / restrictive trade practice and on the other hand, has been pursuing the GGCL to enter into similar arrangement.

It brought to our notice by filing affidavit of its I/C CEO, Sh. P.P. G. Sarma that the UPL, despite giving a challenge to the legality of CGNDA dated 24.7.2013 itself extended a request on 24.7.2014 to GGCL for execution of a similar CGNDA and re-delivery agreement for diversion of PMT for its CS2 Plant at Jagadia where-upon the GGCL, in addition of seeking clarifications, raised objection and expressed its inability to accede to this request and made it clear that no fresh facilitation agreement will be executed with the UPL till the dispute is adjudicated upon by the Board.

The UPL however, rebutted the contention of the GGCL and stated in the affidavit of its Vice President (Corporate Affairs) Sh. Padmendra Singh Rawat that the facts and circumstances, relating to the earlier facilitation arrangements and the proposed arrangement, were entirely distinct because the questioned proposal, as floated on behalf of the UPL pertained to the transmission of gas within the limit of 100,000 SCMD which could be supplied even through the CGD Network whereas the earlier facilitation arrangement / CGNDA was for the supply of 171,000 SCMD gas which could have not been supplied through CGD Network under Regulation 3 (2) (c) of the CGD Authorizing Regulations.
However, both the parties have agreed, at their own, to maintain status-quo till the issue of legality of the facilitation arrangement is settled by the Board.

So far, as the submission of the GGCL regarding reduction of the charges from Rs. 95/- to Rs. 81/- per MMBTU, after mutual discussion, is concerned that too, does not carry any weightage, because any agreement contrary to law would have no effect even if both the parties concur there-to. On the contrary, if it transpires that one of the parties to the agreement had potential to compel the other to accede to his whims, leaving no option for the other but to accept, this circumstance itself will be suggestive of exercise of monopolistic or restrictive trade practice.

In the instant matter, AMJH pipeline owned by the GGCL, is the only pipeline for transmission of gas to the UPL’s power plant and the GGCL took advantage of this situation and got the GTA converted into CGD Network Agreement in the year 2009 i.e. after the enforcement of the Act and the Regulations and after realization of more than 5 times cost of this pipeline and then transmitted 171,000 SCMD gas per day, in utter disregard of the Regulation 3 (2) (c) of the CGD Authorizing Regulations. These facts too lead to the assumption of dominance of GGCL.

Moreover, the GGCL did not furnish the details / bifurcation of the charges being levied on the UPL even during these proceeding or prior there to.
The GGCL, despite executing the CGD Network Agreement has been abstaining from recognizing the UPL as its CGD customer. The GGCL rather admitted the UPL as its natural gas pipeline customer in its letter dated 13.11.2013 i.e. after the grant of authorization but declined to levy the regulated tariff / compression charges. It, thus took undue advantage of its monopolistic position and imposed charges @ Rs. 81 per MMBTU whereas this Board has determined the tariff @ Rs. 4.92 per MMBTU vide order dated 4.9.2013 for HAPI natural gas pipeline.

On the basis of above discussions, it is held that UPL is the shipper of natural gas pipeline (HAPI) including the AMJH spur lines of GGCL and GGCL has exercised its monopolistic status and indulged into restrictive trade practice. The GGCL, in order to gain undue pecuniary advantage, violated the terms and conditions of the Authorization and also violated the statutory provisions and the Regulations framed under the Act.

It is also held that the GGCL had suppressed the material fact and mis-represented the Board regarding the status of AMJH pipeline while seeking authorization.

The Chairperson, Member (PKB) and Member (Legal) have expressed their concurrence to the above said view-point whereas Member (KKJ) and Member (BM) have given their dissenting note (enclosed herewith) and as such the majority is of the view that AMJH pipeline was a common carrier pipeline on the 'appointed day' and continues to be so but GGCL, while seeking authorization for natural gas pipeline
(HAPI) and the CGD network, wrongly shown the AMJH pipeline as a part of its CGD network and also furnished incorrect declaration about the same in its application.

Furthermore, GGCL, despite being bound by the provisions of the Act and the relevant Regulations, acted beyond their scope by inventing a new concept of facilitation charges and thereby levied arbitrary and exorbitant charges over the UPL for transportation of natural gas to its power plant.

We, on giving consideration to all these factors, hold that this Board is not competent to grant relief for the recovery of excess transportation charges prior to the date of Authorization but with regard to other reliefs, direct the GGCL as under.

**ORDER**

The GGCL is directed to approach the Board within 15 days for modification of Authorizations granted in its favour by the Board for its natural gas pipeline network and CGD network in the light of above observations.

GGCL is also directed to charge tariff from the UPL, as determined by the Board, for HAPI w.e.f. the date of grant of Authorization and to make adjustments accordingly, and also to abide by the provisions of Regulation 11 (4) of the Natural Gas Pipeline Authorizing Regulations regarding compression of gas.
A penalty of Rs. 1,00,000.00 (Rupees One Lakh only) under Section 28 of the Act is imposed on the GGCL on account of its involvement in restrictive trade practice and also for violation of the terms and conditions of Authorization. The amount of penalty shall be deposited by the GGCL in the office of the Board within a period of one month from today.

In case, GGCL fails to ensure timely compliance of this order, the Secretary of the Board shall inform the Board so that further action could be taken against the GGCL.

(S.Krishnan)  (P.K.Bishnoi)  (Subhash Chandra)
Chairperson  Member(PKB)  Member(Legal)
The following issues needs to be kept in view before a judgement is delivered on the complaint filed by M/s United Phosphorous Ltd. (UPL) against M/s Gujarat Gas Company Ltd. (GGCL) under section 25 (read with other provisions) of the PNGRB Act.

1. GGCL has been delivering natural gas to UPL as per UPL's requirement under changing conditions since 2002, and as per contracts (signed by both parties from time to time). So, UPL has not suffered any shortfall in supply. Its complaint is about the transportation tariff charged by GGCL at different periods of time, in excess of what PNGRB has provisionally fixed for Hazira-Ankleshwar Pipeline (HA-PL). The moot question is: Is this charge tenable under the existing provisions of the Act and relevant Regulations?

2. Originally, two pipelines of GGCL were involved in supplying gas on delivered basis to UPL, i.e. the main HAPL catering to customers along this route and the Amboli-Jhagadia extension pipeline (AMJH-PL) exclusively catering to UPL.

3. Over the years, the nature of the AMJH-PL has undergone change. In course of time, more customers were connected to it, at the instance of a Gujarat State Government agency, and it assumed the character of a common carrier/contract carrier. But, at that time there was no statutory regulation in place to address these issues and, in the absence of it, transactions were made on the basis of contractual agreements as per parties' commercial considerations.

4. The PNGRB Act came into force in 2007 and the Board notified regulations for authorization of natural gas pipelines and CGD networks in 2008. In response, GGCL applied to PNGRB on 21st July, 2008 for authorization of CGD network for the Surat-Bharuch area. The pipeline design structure given in the application included AMJH-PL. PNGRB granted authorization of the above CGD network to GGCL on 8th November, 2012. However, the tariff for this CGD network is yet to be finalised by PNGRB. In its absence, the existing contractual arrangements between GGCL and UPL continued.

5. As supply of gas from the old source shank, UPL entered into an agreement with GAIL in November, 2008 to meet the shortfall. At the instance
of UPL, GGCL agreed to deliver the gas (from GAIL) at locations, as convenient to UPL, falling in the CGD area.

6. Initial provisional tariff for HAPL has been fixed by PNGRB, but not for the Surat-Bahruch-Ankleshwar CGD area. Moreover, UPL's demand for gas at around 1,71,000 scmd makes it ineligible to draw gas from CGD network as per the present PNGRB regulations. Therefore, it is but natural that UPL, as a major customer, continues to avail gas through the contractual arrangements, as before, with GGCL.

7. Once the AMJH-PL became an integral part of the Surat-Bahruch-Ankleshwar CGD network, it could not, under the present regulatory framework, simultaneously be considered under the authorized structure of HA-PL.

8. UPL has been availing the services of the GGCL pipelines since 2002, but never raised similar complaints until the provisional tariff for HA-PL were notified by PNGRB. On the other side, no CGD customer of AMJH-PL has so far raised any complaints against GGCL.

9. In concluding, it may be noted that the present case appears to be a "hybrid" straddling between the existing regulatory framework for natural gas pipelines and CGD networks. At present, while the provisional tariff for HA-PL has been fixed by PNGRB, that for CGD network is yet to be finalized. Until the later is decided and this hybrid variety of activity is duly addressed in either of the regulations, it may not be in the fitness of things to arrive at a conclusion regarding violation of law by GGCL.

(Bhaskar Mohanty)
Member
20.10.2014
BEFORE THE PETROLEUM & NATURAL GAS REGULATORY BOARD
NEW DELHI
CASE NO. 98 OF 2013

IN THE MATTER OF:
United Phosphorus Limited

VERSUS
Gujarat Gas Company Limited

Judgment given by Shri K.K. Jha, Member, PNGRB dated 20 Oct 2014

M/s United Phosphorus Limited (UPL) hereafter called the Complainant is in the business of Pesticides & Chemicals and has a captive power plant at Jhagadia, Bharuch, Gujarat, India. M/s Gujarat Gas Company Limited (GGCL) hereinafter referred to as Respondent is engaged in the business of transmission distribution and marketing of natural gas and has laid and built various pipelines including from Hazira to Akleshwar (HAPI) Pipeline. The said pipeline was commissioned on 10.05.1999. The Complainant has submitted that in order to get transmission of gas to its Jhagadia Power Plant through Respondent’s facilities entered into an agreement with Respondent for supply of natural gas in 2001. The Respondent in pursuance of said agreement laid a dedicated pipeline from Amboli (tap off point at HAPI pipeline upstream of Ankleshwar) to Jhagadia for UPL’s power plant. This pipeline is referred to as AMJH
pipeline. The capacity of AMJH pipeline is 18000 MMBTU per day and the Complainant has booked the capacity of 6000 MMBTU per day in the said pipeline.

The Complainant has submitted that AMJH pipeline laid by Respondent for Jhagadia pipeline ceased to be a dedicated pipeline as many more consumers were being catered through the said pipeline. It has also been submitted by the Complainant that as per law in vogue on subject matter, AMJH pipeline as on date is either a common carrier or contract carrier depending upon the contracts which are in force between Respondent and transporting entities.

From 2001 to 2008, the Complainant continued with their commercial relationship with GGCL for supply and transportation of gas for running their Jhagadia power plant. By December, 2008, the Respondent was finding it very difficult to supply natural gas due to shortage of same and therefore, Complainant entered into an Agreement dated 27.11.2008 with GAIL India Ltd. (GAIL) for supply of 0.2 MMSCMD of gas. The Complainant entered into a Gas Transmission Agreement (GTA) dated 04.12.2008 with the Respondent for reserving capacity. GGCL using its monopolistic position introduced regressive tariff charge in the above mention GTA. It has been alleged that the Respondent did not pay any heed to mandate of law while providing the tariff terms in the above mentioned
GTA in so much as issue of tariff by that time for a common carrier or a contract carrier pipeline was placed in the exclusive jurisdiction of PNGRB. The Complainant further submits that between December 2008 to April 2009 some GTA contracts of short duration which were amended on periodic basis and some fresh GTA were entered into between Complainant and Respondent. It has been alleged that Respondent using dominant position and gross violation of law forced the Complainant to enter into said contracts which contained provision for tariff for transportation of gas to its Jhagadia power plant. The Complainant has averred that from the time Act, Natural Gas Authorization Regulations, Natural Gas Tariff Regulations came into force, it no more remain in the authority of parties to regulate the tariff on the basis of commercial agreements.

The Complainant further submits that after GTA entered on 06.03.2009 worked itself out, the Complainant was told to enter into a City Gas Network Distribution Agreement (CGNDA) for taking supply of gas to its Jhagadia power plant. The Complainant has submitted that the Complainant is not aware of any order where in HAPI pipeline or AMJH pipeline has been approved as a City Gas Distribution Network. The complainant has submitted that it cannot be supplied natural gas on CGD network referring Regulation 3(2) of CGND Authorizing Regulations which reads as follows:
3. Application

(2) A CGD network shall be designed to operate at a pressure as specified in the relevant regulations for technical standards and specifications, including safety standards for maintaining the volumes of supply of natural gas on a sustained basis to meet the following requirements, namely:-

(a) customers having requirement of natural gas upto 50,000 SCMD shall be supplied through the CGD network;

(b) customers having requirement of natural gas more than 50,000 SCMD and upto 100,000 SCMD shall be supplied

(i) through the CGD network; or

(ii) through a pipeline not forming part of the CGD network;

(c) customers having requirement of natural gas more than 100,000 SCMD shall be supplied through a pipeline not forming part of the CGD network.
The Complainant had submitted that a fixed tariff of Rs.67.69 per MMBTU has been charged from 03.04.2009, which was subsequently revised to Rs.81.00 per MMBTU w.e.f. 01.08.2013. The Complainant approached the Board vide various letters and made presentation discussing the issues relating to exorbitant tariff rates. A meeting was convened by the Board on 19.02.2010 in the presence of Complainant, Respondent and GAIL. Pursuant to the meeting, the Board vide its letter dated 26.02.2010 communicated that it has been agreed that M/s UPL and M/s GGCL will analyze the data regarding gas supply from M/s GAIL and usage by UPL and discuss the issue to arrive at a mutually accepted solution. However, in case UPL is not satisfied with the outcome of the discussions, they will be free to approach PNGRB with a formal complaint in accordance with the provision of PNGRB Act 2006 and relevant regulations.

The Complainant vide various letters stated that the tariff charges were exorbitant. However, the Respondent had replied that the tariff was being charged as per mutually agreed terms. The Board granted authorization to the Respondents’ HAPI pipeline under Regulation 18(1) of the Natural Gas Authorization Regulations on 05.07.2012. The Respondent filed transportation tariff for HAPI Pipeline vide letter dated 03.10.2012 wherein GGCL proposed a tariff rate of Rs.7.01/MMBTU w.e.f. 01.01.2009 and Rs.7.20/MMBTU w.e.f. 05.07.2012. It was alleged that the Respondent was charging way beyond the requisite tariff. The Complainant had raised the matter of revision of tariff rate to Rs.81/MMBTU from August 2013 vide letter dated 28.08.2013. The said letter of Complainant was sent to Respondent by the Board vide letter dated 11.10.2013 directing the Respondent to submit a detailed
response within 30 days. The Respondent vide letter dated 11.11.2013 submitted that that Complainant is not a CGD customer since the Respondent had been facilitating the Complainant for re-delivery of 1,71,000 SCMD of gas contracted by the Complainant with GAIL at the Complainant’s premises at such specification mentioned by the Complainant in the bilateral agreed term which is different from the Respondent’s CGD requirement for the geographical area of Surat-Bharuch-Ankleshwar for CGD network for which authorization was received from the Board vide letter dated 08.10.2012 and also different from specification at which the Respondent received gas from GAIL at a commercial negotiated rate. The Respondent had submitted that UPL is not a CGD customer and is a natural gas pipeline customer and there it is being charged HAPI tariff along with charges for dedicated facilities of the compressor and other allied infrastructure for re-delivery of natural gas at 43-45 barg pressure.

The Complainant submits that the Respondent itself admitted UPL is not CGD customer and in fact a natural gas pipeline customer and is thus entitled to pay HAPI tariff at a rate of Rs.4.92/MMBTU w.e.f. 20.11.2008. The Complaint further submits that AMJH pipeline is pipeline connected with HAPI pipeline for which tariff has been fixed at Rs.4.92/MMBTU and submits that AMJH will fall within the tariff zone of the HAPI pipeline as defined under Section 2(h) of the Act, which reads as under:

“Tariff zone” means the zone –

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(i) of a length of three hundred kilometers along the route of the natural gas pipeline; and
(ii) A corridor along with natural gas pipeline with a width of up to ten percent of the total length of the natural gas pipeline without including the length of the spur lines or fifty kilometers measured from the nearest point on the surface of the natural gas pipeline on both sides of the natural gas pipeline, whichever is lower”
Provided that the natural gas pipeline tariff for transport of natural gas shall be uniform for all the customers located within the zone.

Provided further that the entity shall supply natural gas to any customer located in the zone subject to the techno-commercial feasibility of laying, building, operating or expanding a new spur line from the natural gas pipeline.

It has been submitted by the Complainant that AMJH pipeline is 23 km long and falls within the radius of 300 km along the route of HAPI Pipeline. Hence the tariff which is to be paid by customer having access to AMJH would be the same rate which is paid by the customer having access to HAPI pipeline, i.e., Rs.4.92/MMBTU.

The Complainant submitted that reading of the Section 16,48 and 50 of the Act reveals that the Respondent was under obligation to approach this Hon’ble Board for authorization as the purpose and usage were altered from the one for which transportation of gas exclusively for UPL to its Jhagadia pipeline. As the pipeline was no longer a dedicated pipeline and was not even part of the CGD network, the Respondent was
ought to apply before the Board for authorization for operating the pipeline which had failed to do so till date. Therefore, the Respondent should be penalized under Section 48 of the Act.

In view of the submissions made by the Complainant, the Complainant has prayed as follows:

(a) Direct the Respondent to charge Rs.4.92/MMBTU for the transportation of natural gas as has been fixed by the Board on HAPI pipeline' "AMJH pipeline" falling within the tariff zone of the "HAPI pipeline"; and

(b) Conduct an inquiry under Section 26 of the Act and investigate into the status of the "AMJH pipeline" and determine the nature of the pipeline and pass such consequential orders as this Hon’ble Board deems fit; and

(c) Investigate under Section 26 of the Act into the affairs of the Respondent to determine as to what extent amount have been collected from various consumers by way of various commercial arrangements without the force of law; and

(d) Quantify excess transportation charges being recovered by the Respondent by fixing the transportation tariff to be charged on "AMJH Pipeline" and further direct the Respondent to refund forthwith the excess amount to the Complainant with 12% interest from December 2008; and
(e) Punish the Respondent under Section 48 of the Act for operating AMPL pipeline without authorization by this Hon’ble Board.

(f) In the interim, during the pendency of the complaint, direct the Respondent to charge Rs.4.92/MMBTU from the Complainant as transportation charges in order to serve the ends of justice.

(g) Pass any other order(s) as this Hon’ble Board may deem fit and proper.

The Respondent M/s GGCL submitted that in the complaint, the Complainant has alleged the following:

(i) The Respondent is exploiting the Complainant by charging a much higher transportation charge in terms of the agreement between in spite of the determination of transportation tariff by this Ld. Board which is substantially lower.

(ii) Once tariff has been determined by this Hon’ble Board, the Respondent can no longer impose the contractual transportation charges on the Complainant.

(iii) The Complainant has no other alternative other than the Respondent’s pipeline to get re-delivery of gas
obtained from GAIL to its plant, therefore the Complainant is being forced to enter into agreements with the Respondent, which impose an unreasonable transport tariff. This would constitute a restrictive trade practice.

(iv) The Respondent is in contravention of the Regulations notified by this on’ble Board insofar as it Hon Hon’ble Board insofar as it had not got its pipeline from Amboli to Jhagadia authorized by this Hon’ble Board.

The Respondent submitted that the Respondent owns and operates City Gas Distribution (CGD) Network pipeline facilities in the State of Gujarat. It has laid and built various pipelines including a 73.2 kms Natural Gas pipeline from Hazira to Akleshwar (HAPI) which was commissioned on 10.05.1999.

The Respondent had entered into a Gas Supply Contract in the year 2001 with the Complainant and was supplying gas to their plant at Jhagadia from the year 2002 to 2008. The gas supply contract was valid till 31.03.2008.

M/s GGCL has laid 23 kms pipeline from Amboli to Jhagadia connecting the Complainant’s plant at Jhagadia Unit to HAPI pipeline at Amboli.

The Board has notified Regulations as under:

(i) 19.03.2008 – PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations 2008 (“CGD Networks Authorizing Regulations”).
(ii) 06.05.2008 – PNGRB (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations 2008 ("Pipeline Authorizing Regulations").

(iii) 20.11.2008 – PNGRB (Determination of Natural Gas Pipeline Tariff Regulations), 2008 ("Pipeline Tariff Regulations").

In 2008, the Ministry of Petroleum & Natural Gas reduced the Panna-Mukta-Tapti (PMT) supplies to the Respondent from 3.05 mmmscmd to 2.13 mmmscmd with a mandate to supply PMT gas to CNG Domestic, Commercial and SME’s consuming less than 50,000 scmd, thereby inhibiting GGCL to supply to Complainant’s plant from to its allocated sources of Gas. The Respondent in spite of cut continued to mandate supply of Gas to the Complainant’s plant by arranging Gas Supplies at market determine prices.

On 13.11.2008, the Complainant approached the Respondent on its own volition and requested to put in place an arrangement by 01.12.2008 for re-delivery/transportation of gas obtained from another supplier operating in the same geographical area, i.e., M/s GAIL India Ltd. In pursuance thereof, as an interim arrangement, the Complainant and Respondent entered into a Gas Transport Agreement (GTA) on 04.12.2008 for a short term period till 15.12.2008 as an interim arrangement. As per the said arrangement, GGCL’s transmission facilities, distribution facilities and compression facilities were all to be used for the
re-delivery of gas obtained from GAIL to the Complainant’s plant.

The parties executed few more short term GTAs till March 2009 whereby Respondent kept facilitating Gas supply to the Complainant’s plant. On 03.04.2009, the parties entered into City Gas Network Distribution Agreement (CGNDA) which comprehensively captured the special arrangement put in place by the Respondent for re-delivery of Gas obtained from GAIL to the Complainant’s plant in Jhagadia. Thereafter several short terms CGNDAs were executed between the parties at the request of the Complainant, in spite of the Respondent asking the Complainant to enter into a long term agreement.

On 13.02.2009, the Complainant wrote to MoP&NG that the Respondent was charging exorbitant transportation cost under the agreement entered between them for transportation of gas procured from GAIL. The Respondent sent a reply on 27.02.2009 stating that it was waiting authorization and tariff fixation from the HAPI pipeline. It was not offering gas re-delivery service to any other industry except for the Complainant. The distribution as well as the transmission infrastructure of the Respondent was being utilized. The services to the Complainant had been initially provided on a short term basis and extended from time to time upon specific requests of the Complainant.

The Complainant on 27.05.2009 wrote to PNGRB reiterating the same grievance and requested to intervene in the matter. It was
replied by the Respondent that the Complainant was utilizing both its CGD Network as well as its transmission pipelines.

The Respondent submitted that series of communications were exchanged between the parties and on 02.02.2012 the Complainant wrote an email to the Respondent agreeing not to pursue the matters pertaining to the complaint any further. This led to the Respondent to believe that there were no further disputes which were unresolved between the parties. The Respondent submitted that on 05.07.2012, the HAPI pipeline of the Respondent received authorization from the Board and on 08.11.2012 authorization was granted to CGD Network of Surat-Bharuch-Ankleshwar GA in terms of the CGD Network Authorization.

Subsequently, the parties again executed a CGNDA on 24.07.2013 fixing the transportation charges at Rs.81/- per mmbtu. The said CGNDA is valid till 31.12.2014.

The Respondent alleges that despite the Complainant agreeing not to pursue the dispute further and entering into a fresh CGNDA thereafter the same complaints were once again raised before the Board on 28.08.2013. The Board based on tariff order fixed the provisional initial unit natural gas pipeline tariff for the HAPI pipeline in terms of Pipeline Tariff Regulations. The Respondent submits that after unexplained lapse of almost nine months, the Complainant has preferred the present complaint by making completely false allegations against the Respondent suppressing the material facts and abusing the process of the Board.
The Respondent has submitted that the said complaint is barred by limitation. The dispute between the Complainant and the Respondent pertains to the Respondent charging the contractual tariff rate from the Complainant. The Respondent submitted that as per Section 25 of the PNGBR Act, the complaint shall be filed within 60 days from the date of which the Act or conduct has taken place. Even if it is said that the cause of action existed immediately prior to 02.02.2012, then also the complaint suffers from delay and laches being grossly beyond the 60 days period provided by the PNGBR Act. Even if the cause of action arose is taken as 04.09.2013 (i.e. the date of tariff determination of HAPI Pipeline by this Hon’ble Board), the complaint is still barred by limitation. The Complainant has also not moved any application for condonation of delay before the Board nor does it give any justification for approaching this Board at such a later date.

The complaint has been filed under Section 25 read with Section 11(a, 11(e), 11(f)(iii), 12(1)(a), 12(1)(b), 12(2), 48 and 50 of the PNGBR Act. It is submitted that this is a clear case of forum shopping where the complaint is aware that being a purely contractual dispute the correct forum for adjudication would be arbitration, which had been agreed to by the parties in terms of Clause 16 of the CGNDA. It is submitted that Section 12(1)(a) of the PNGBR Act excludes the jurisdiction of this Hon’ble Board in case the parties have agreed for arbitration. However, the Complainant has deliberately couched the complaint in such terms so as to bring it within the ambit of Section 12(1)(b) of the PNGBR Act, in order to avoid the statutory exclusion in invoking the jurisdiction of this Hon’ble Board.
It has been alleged that the Complainant has failed to inform the Board that on 02.02.2012 it had agreed not to pursue the matter. Thus this act of omission of Complainant to be severely condemned by the Board and the complaint should be dismissed rightly for suppression of the material facts and misleading the Board. The Respondent has submitted that HAPI is a 73.2 km pipeline and not 73.4 km pipeline as mentioned by the Complainant. Further the gas can be fed at both the Mora Terminal of Hazira and Amboli Terminal of Ankleshwar or at the designated entry exit points on HAPI. However, the Complaint does not get gas delivered from GAIL into the HAPI pipeline. The gas intended for the Complaint’s Plant is delivered at the City Gas Stations located at Surat, Ankleshwar/Bharuch which form an integral part of the Respondent’s CGD Network.

It is submitted that the Complainant is misleading this Hon’ble Board by equating the provisions of the gas supply contract entered into between the parties in 2001 and the subsequent GTAs and CGNDAs entered into subsequent to March 2008. It is submitted that AMJH pipeline was laid in 2001 with the Complainant as the anchor load. Thereafter due the intervention of Gujarat Industrial Development Corporation for the development of an industrial township at Jhagadia, the AMJH pipeline started catering to several other small and medium scale industries in the area. This led to the laying down of a network of pipelines, which was authorized by this Board as a City Gas Distribution Network on 08.11.2012. Further, it is submitted that in 2001, the Complainant was procuring gas on delivered basis (sales plus transportation) from the Respondent. However, in November-December 2008 the Complainant had entered into an agreement with GAIL for supply of gas to its plant at
Jhagadia and utilized the Respondent’s infrastructure only for re-delivery of gas. Being the city gas distribution network provider in the area to which the Complainant’s plant was connected, the Complainant had entered into a CGNDA with the Respondent. The CGNDA is more in the nature of a facilitation arrangement for re-delivery of gas at the Complainant’s unique specifications and for which the components of transmission, distribution and compression were all being put to use.

The Respondent submitted that Amboli-Jhagadia pipeline was never envisaged as a dedicated pipeline even though same was laid with the Complainant’s plant as anchor load. However, now many other industries at Jhagadia are being catered by the same pipeline. It is also of significance that AMJH network has been included in the authorization dated 08.11.2012 granted by the Board to the Respondent for CGD Network in the GA of Surat-Bharuch-Ankleshwar. The Pipeline Tariff Regulations specifically exclude pipelines which are a part of a CGD network, therefore, the tariff determined by the Board vide its Order dated 04.09.2013 would not be applicable to the transmission of gas to the Complainant.

The Respondent submitted that it is wrong on the part of the Complainant to suggest that the Respondent has not obtained authorization for its AMJH pipeline. The Respondent’s CGD network includes the AMJH pipeline and the said network has been authorized by the Board in terms of the CGD Network Authorizing Regulations. Therefore, the question of AMJH pipeline being separately authorized in terms of the Pipeline Authorizing Regulations or the Pipeline Tariff Regulations does not arise. The Respondent contented that the tariff to be determined/determined by the Board under the Pipeline Tariff
Regulations would not be applicable to the facilitation arrangement between the Complainant and Respondent. The Respondent has contained that there are no regulations notified by the Board which can regulate such a facilitation arrangement (involving transmission, distribution and compression facilities) therefore it can only be governed by contractual terms of CGNDA.

It is submitted that all the arrangements for re-delivery of gas subsequent to the Complainant securing gas from another supplier (i.e. GAIL) were entered into at the request of the Complainant. Furthermore, the draft agreements had been shared with the Complainant and were finalized only after being mutually agreed between the parties. There was no fraud or coercion committed by the Respondent to force the Complainant to enter into the short term contracts or any other contracts whatsoever referred under the complaint. Rather the Respondent has always accommodated the Complainant’s request for short term contracts (on monthly basis), which have required continuous administrative efforts despite Respondent’s recommendations that a medium term contract (3-5 years) ought to be entered into for a stable hydraulics on the CGD network.

It is submitted that on 13.11.2008, the Complainant had approached the Respondent stating it would have to re-deliver the gas obtained from GAIL, through its CGD network. The Respondent was left with only 17 days to execute an agreement which could fully capture the special arrangement between the parties. At that time, there was also no industry practice of a similar sort of agreement having been entered into anywhere in the country. From their very inception, the GTAs and the CGNDAs have provided for a negotiated tariff, for which the
Complainant had voluntarily agreed. Therefore, now it does not lie in the mouth of the Complainant to allege coercion in entering in the contracts. Furthermore, without providing any substantial averments to back up its claim of coercion, the Complainant is only trying to prejudice this Board against the Respondent. It is further submitted that the Complainant is not strict sensu a CGD network customer in respect of the Respondent’s CGD network. Therefore, the restriction of not supplying 1,00,000 SCMD natural gas through the CGD network in terms of the Regulation 3(2) of the CGD Authorizing Regulations would not be applicable. Furthermore, the CGNDA executed between the parties has a provision for vacation of the capacity in case there is requirement of CGD demand, therefore, the Respondent’s supply to the Complainant is in consonance with the relevant Regulations.

It is submitted that the AMJH pipeline has been authorized by the Board as a part of the CGD network. The said pipeline along with the City Gas Stations of the Respondent is being utilized to deliver gas to the Complainant’s plant in Jhagadia. The AMJH pipeline is just one of the components of the special arrangement (which includes transmission, distribution and other additional facilities including compressors for re-delivery of gas at the Complainant’s unique specifications) between the parties, therefore the tariff determined by this Board cannot be the sole tariff that can be charged from the Complainant. Furthermore, the transportation charges in the CGNDA are negotiated charges agreed to between the parties. Over the years, it has changed from USD 2 per mmbtu to Rs.67.69 per mmbtu to Rs.81 per mmbtu. In 2013, the Respondent had initially offered a capacity charge of Rs.95 per mmbtu, but after negotiations between the parties the capacity charge was
reduced to Rs.81 per mmbtu. Therefore, it is clear that the transportation charges are negotiated between the parties and not unilaterally imposed on the Complainant.

Further it has been submitted that the charges being imposed on Complainant are commercially negotiated and a functions of such arrangement that exist between the parties. The gas being supplied to the Respondent by GAIL is at much lower pressure than that which is required by the Complainant because of which additional compression is done which require dedicated compressor to ensure supply continuity to the Respondent’s plant. Therefore, facilitation charge is a function of transportation, distribution and facilitation charges for re-delivery of gas at Complaint’s unique specification. It is submitted by the Respondent that they have never mentioned that it is using only HAPI for catering to the Complainant’s plant.

The Respondent submits that AMJH pipeline is not a common carrier and has never been declared as a common carrier. Under the PNGRB Act and the regulations made thereunder, a pipeline can be categorized as a common carrier only once it has been so declared or authorized by the Board. No such declaration has been made by this Board whereas AMJH pipeline has been included as a part of the Respondent’s CGD network, therefore, its tariff cannot be determined separately under the Pipeline Tariff Regulations. The Complainant has further wrongly contended that the AMJH pipeline falls under the tariff zone of the HAPI pipeline and secondly the Pipeline Authorization and Tariff Regulations specifically exclude such pipeline from the definition of Natural Gas Pipeline. Therefore,
AMJH pipeline cannot fall under the tariff zone of the HAPI pipeline.

The Complainant has not made out a case of having been coerced into the CGNDA with the Respondent. In fact, the Complainant has entered into a GTAs and CGNDAs out of its own volition, even though the Complainant had enough scope of laying dedicated line from GAIL’s network to its plant.

In view of the above statement, the Respondent has prayed that the Board

(a) May dismiss the present complaint with cost and
(b) Pass any order as the Board may deem fit.

Summary of Findings

The Board has authorized HAPI-Ankleshwar (HAPI) as a natural gas pipeline on 05.07.2012. CGD network of Gujarat Gas Company Ltd. (GGCL) which included Amboli-Jhagadia pipeline was also approved by the Board on 08.11.2012. M/s United Phosphorus Ltd. (UPL) had entered into a Gas Supply Contract in the year 2001 with GGGL and the gas to UPL’s Plant at Jhagadia is being supplied from 2002. This clearly brings out that there is legacy arrangement attached to supply of gas to UPL’s Jhagadia plant prior to enactment of PNGRB Act. Amboli-Jhagadia pipeline was laid as a dedicated pipeline to UPL’s plant. However, as stated by GGCL, many other CGD customers were added through this pipeline at the intervention of Gujarat
Government since 2005. It has been observed that UPL was procuring gas from GGCL since 2001 on delivered basis i.e., gas plus transportation cost. However, after entering into an agreement with GAIL in November/December 2008, GGCL’s infrastructure was being utilized for redelivery of gas.

It is pertinent to note that at HAPI gas can be fed at both Mora terminals at Hazira and Amoli terminal at Ankleshwar or at a designated entry/exit points of HAPI. However, the complainant UPL does not get the gas delivered from GAIL into HAPI pipeline. The gas intended for UPL’s plant is delivered at the city gas station located at Surat, Ankleshwar/Bharuch which is integral part of the GGCL’s CGD network.

The issue whether Jhagadia Plant falls under tariff zone of HAPI pipeline is required to be examined under Section 2h(ii) of PNGRB (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations 2008. The Section clearly indicates that the tariff zone means a corridor along the Natural Gas Pipeline with a width upto 10 percent of the total length of the natural gas pipeline or fifty km whichever is lower. The length of HAPI pipeline is 72.3 km hence a width of 7.23 km on both side of the pipeline can be considered as tariff zone. The length of Amboli-Jhagadia pipeline is 23 km hence Jhagadia point does not fall under the tariff zone of HAPI pipeline.

Section 16 of the Act does provide for deemed authorization of the pipeline laid prior to appointed day. However, read in conjunction with Section 17(1) the deemed authorization is applicable only in case of pipelines authorized by the Central
Govt. Any entity not covered U/S 17(1) shall have to seek authorization from the Board U/S 17(2). Keeping this provision in view the authorization of the entity not authorized by the Central Govt. has been provided in Board’s Regulation U/S 18. Thus the contention that Amboli-Jhagadia pipeline is a deemed authorized pipeline is contrary to the provision of the Act as well as Regulations framed by the Board. The Board has already accepted Amboli-Jhagadia pipeline as a part of the CGD network. An additional fact to be observed is that the pipeline from Amboli to Jhagadia is being operated at a low pressure and compressors at UPL’s plant have been specifically provided by GGCL to pressurize the gas to 40-45 kg cm square to meet the requirement of UPL. The low pressure gas is being supplied to other customers of GGL’s CGD network. This clearly reflects that gas is being redelivered to UPL to meet its specific requirement. Hence it is to be treated in the similar way.

The Complainant has failed to make any point regarding suppression of facts/information by GGCL pertaining to inclusion of AMJH pipeline in CGD network. The issue of supplying less than 100,000 scm of gas per day under the CGD network is intended to safeguard CGD business from being encroached upon by big natural gas pipeline operators. The arrangement which has been provided by GGCL is a legacy arrangement prior to formulation of Act as well as Regulation and has to be looked into same perspective. As the transportation/redelivery of the gas involves entry into CGD network, subsequent transfer to natural gas pipeline and again to CGD network and finally compressed gas to be delivered at desired pressure is an issue involving various facets of transportation and redelivery activities. No definite standalone
applicability of the Regulations on such type of arrangement has been provided.

The charges of coercion as alleged by the Complainant have not been substantiated rather the agreement between the Complainant and Respondent has been mutually agreed. The CNGDA with Respondent has been entered by the Complainant on his own volition.

Gas to UPL is being supplied through CGD infrastructure, HAPI Natural Gas pipeline and compression facility installed at UPL’s Jhagadia premises. This activity attracts tariff of HAPI pipeline tariff of CGD network and compression charges being incurred at UPL’s premises. The HAPI pipeline has been authorized by the Board on 05.07.2012 and CGD network of Surat-Bharuch-Ankleshwar GA on 08.11.2012. The authorization being granted under Section 18 of regulations kicks in applicability of tariff w.e.f. date of authorization as pronounced by APTEL in its Judgment on appeal No. 222 of 2012 involving GSPL, RIL and PNGRB.

ORDER

1. I do not find any merit on the claim of M/s UPL for applying HAPI pipeline tariff, hence dismissed.

2. AMJH pipeline is part of CGD network of Surat-Bharuch-Ankleshwar GA as authorized by the Board.

3. The prayer to take cognizance under Section 26 and 48 of the Act is dismissed.
4. GGCL to charge UPL summation of unit rate tariff approved by the Board in respect of HAPI Pipeline, CGD network tariff of Surat-Bharuch-Ankleshwar GA and mutually agreed compression charge towards providing compression facility at UPL's premises w.e.f. 08.11.2012. The Compression charges are to be worked out by taking reasonable rate of return on capital employed, equal to fourteen percent post tax.

(K.K. JHA)
Member (KKJ)