

Dated: 29.07.2020

To,
The Secretary,
Petroleum & Natural Gas Regulatory Board,
1st Floor, World Trade Centre,
Babar Road, New Delhi – 110001

Subject: Suggestions/Comments/views on the Draft PNGRB (Determination of Natural Gas Pipeline Tariff) Amendment Regulations, 2020

Ref: 1) PNGRB's public consultation notice (ref: Infr/NGPL/125/Integration/01/17) dated 28.09.2017 on GAIL's concept paper on Unified Tariff.
2) PNGRB's public consultation notice (ref: PNGRB/COM/2-NGPL/Tariff (3)/2019) dated 02.08.2019 on proposed amendment in the PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008.
3) PNGRB's Public Notice dated 29.04.2020 on proposed amendment in the PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008.

I. INTRODUCTION

- 1.0 This has reference to a Public Consultation Document ("**PCD**") web-hosted by PNGRB on 29.06.2020 proposing amendments in the PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008 in relation to common carrier natural gas pipelines which are on the same lines of earlier proposals as referred in (1) to (3) above. Vide the PCD, the PNGRB has proposed amendments in PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008 ("**2008 Tariff Regulations**") to introduce the concept of the integrated natural gas pipeline system and fixation of Unified Tariff for such integrated natural gas pipeline system. In the amendment proposed by PNGRB under this PCD, for non-bid-out cost-plus pipelines, PNGRB has proposed fixation of entity-wise unified tariffs by specifying entity-wise "integrated natural gas pipeline systems" ("**INGPS**") and has also proposed to simplify the present multiple zonal tariffs into just two zonal tariffs for INGPS.
- 1.1 We at DSK Legal have actively been involved with regulatory matters concerning tariff determination, access on common carrier natural gas pipeline matters, and other allied matters. We have advised and represented various entities/consumers before the PNGRB, Hon'ble Appellate Tribunal for Electricity, Hon'ble Supreme Court concerning various matters relating to Petroleum and Natural Gas Regulatory Act ("**PNGRB Act**"). With this background, we wish to submit our independent views on matters of interpretation of provisions of PNGRB Act, scope and ambit of powers of PNGRB under the statutory framework of the PNGRB Act and the Tariff Regulations, in order to accommodate the proposal that is being proposed/contemplated by PNGRB.

II. Proposed Amendment in the 2008 Tariff Regulations and points mentioned in Annexure 2 to the PCD for suggestions/views/comments during the open house:

- 2.0 Vide the proposed amendment to 2008 Tariff Regulations, the PNGRB seeks to bring in the concept of INGPS and fixation of Unified Tariff in the 2008 Tariff Regulations.

- 2.1 In addition to the above, suggestions/views have been sought on the following from the stakeholders:
- a. Whether integration should be considered only for cost-plus pipelines or Bid out Pipelines can also be included for the purpose of Unified Tariff and what could be the methodology for including bid out pipelines and any legal difficulty envisaged therein?
 - b. Whether while determining the Unified Tariff, pipelines of subsidiary companies can be included in the Integrated Natural Gas Pipeline System or not and any legal difficulty envisaged therein?

III. Present Regulatory regime under the PNGRB Act and Regulations framed therein in respect of INGPS and fixation of unified transportation tariff for such INGPS:

- 3.0 As we understand from the proposed amendments, the INGPS is nothing but authorising all the inter-connected common carrier natural gas pipelines of one entity as once common INGPS. From a legal standpoint, there does not seem to be any embargo/restriction on the PNGRB under the provision of the PNGRB Act, 2006, which restricts the PNGRB from doing so, i.e. fixation of entity-wise unified tariffs by specifying entity-wise INGPS.
- 3.1 At present, broadly two categories of common/contract carrier natural gas pipelines exist under the regime set out under the PNGRB Act which are as under:
- (i) Cost-Plus Pipelines: These are authorized by the Central Government and/or Existing Pipelines before the establishment of PNGRB. For these pipelines, based on their respective capital employed and costs, PNGRB calculates transportation rates/tariffs for them under the PNGRB tariff determination regulations to give these pipelines 12% post tax return on capital employed.
 - (ii) Bid-out Pipelines: These are awarded by PNGRB to various entities after the establishment of PNGRB, based on the bids submitted by the entities. For these pipelines, the entities themselves had worked-out their respective transportation rates/tariffs and based on the bid-out tariffs as committed by the bidders for 25 years, these pipelines have been authorized to the respective entities.
- 3.2 The mechanism set out under the PNGRB Act in respect of common carrier natural gas pipelines ("**NG pipelines**") is as under:
- (i) The PNGRB is empowered to declare/authorise such pipelines as common carrier being laid, build, operated or expanded by Entity on non-discriminatory open access basis (Reference is made to Section 17, 18 read with Section 2(j) of the PNGRB Act)
 - (ii) The authorisation is granted specifically to an "authorised entity" which is laying, building, operating and expanding common carrier NG pipeline. In essence, the authorisation is concentric to such 'authorised entity' (Reference is made to Section 11(c), 16, 19 read with Section 2(d) of the PNGRB Act).
 - (iii) Further, it is in the exclusive domain of the PNGRB to regulate the access on 'common carrier being laid and operated by the authorised entity to ensure fair trade and competition amongst entities and frame pipeline access code regulations (Reference is made to Section 2(j) of the PNGRB Act read with Section 19 of the PNGRB Act)

- (iv) The PNGRB has the exclusive jurisdiction to fix and determine the transportation tariff/rates for such common carrier keeping in line with the guiding principles laid down under Section 22(2) of the PNGRB Act.
- 3.3 It is material to note that the PNGRB Act, 2006 doesn't define what a NG Pipeline is, and the definition is provided under 2008 Tariff Regulations. As per the said Regulations, "natural gas pipeline" means **any pipeline** including spur lines for the transport of natural gas and includes all connected equipments and facilities but excludes dedicated pipelines. So the definition of 'NG pipeline' under the existing 2008 Tariff Regulations would cut across the limitation of authorisation or acceptance of multiple pipelines of an entity as the unified/integrated natural gas pipeline.
- 3.4 In case, the common carrier NG Pipelines which are inter-connected to each other and laid, build and operated by one 'authorised entity' are declared as one common carrier, the said integration will fall within the definition of "common carrier" under Section 2(j) of the PNGRB Act. In this regard, the language employed by legislature in Section 19 of the PNGRB Act is noteworthy which is as under:
- "When, either on the basis of an application for authorisation for laying, building, operating or expanding a common carrier or contract carrier or for laying, building, operating or expanding a city or local natural gas distribution network is received or on sue motto basis, the Board forms an opinion that it is necessary or expedient to lay, build, operate or **expand a common carrier or contract carrier between two specified points**, or to lay, build, operate or expand a city or local natural gas distribution network in a specified geographic area, **the Board may give wide publicity of its intention to do so** and may invite applications from interested parties to lay, build, operate or expand such pipelines or city or local natural gas distribution network.
- 3.5 As is evident from the above-extracted provision, the PNGRB is well within its power to expand a common carrier between two specified points for which, it can give wide publicity of its intention to do so. Hence, the integration of existing common carrier being operated by one "authorised entity" can be declared as one common carrier i.e. 'INGPS' by the PNGRB in accordance with the procedure set out under the PNGRB Act and Regulations framed thereunder. In other words, the concept of common carrier is not static but dynamic. Emphasis is laid on the phrase '*expand common carrier*' which is being used by the legislature in various sections of the PNGRB Act. Further, it is relevant to state that such integration of inter-connected common carrier NG pipelines will ease out the complexity related to the transportation of natural gas in the country.
- 3.6 In respect of the power of fixation of the unified tariff for such INGPS, the same is also well within existing statutory and regulatory framework set out under the PNGRB Act. Once the existing cost-plus common carrier NG pipelines of an 'authorised entity' is integrate as one by the PNGRB, the said pipelines i.e. INGPS, will be deemed to be as one 'common carrier' within the meaning ascribed to the term 'common carrier' under Section 2(j) of the PNGRB Act. So long as such common carrier NG pipelines is operated by the same 'authorised entity', they can be integrated to be operated as one 'common carrier' by the PNGRB under the PNGRB Act.
- 3.7 Accordingly, post the integration, the PNGRB is empowered to fix and determine the transportation rate/tariff for such 'INGPS' i.e. unified tariff under Section 22 read with Section 2(zn) of the PNGRB Act. The above understanding of the regulatory regime under the PNGRB Act is strengthened by language employed by legislature in Section 21(2) of the PNGRB Act which reads as under:
- "An entity other than an entity authorised to operate shall pay transportation rate for use of common carrier or contract carrier to the entity operating it as an authorised entity."*

- 4.0 Having declared the integrated pipelines as a “new” common carrier pipeline, PNGRB, is well empowered to determine/fix the tariff for the new “Common Carrier” Pipeline so declared by the PNGRB under the provisions of Section 11(e)(ii) and Section 21 of the PNGRB Act. Although, the PNGRB presently levies separate tariff for separate authorisations, the proposed amendment for unified tariff for integrated natural gas pipeline of an entity is also well within the existing statutory and regulatory framework.
- 4.1 We strongly support the fixation of one tariff for such INGPS vide the proposed amendment to 2008 Tariff Regulations for the reason that it will result in achieving the main objective behind the PNGRB Act, i.e. protect the interest of consumers. Currently, separately authorized common carrier NG pipelines have separate tariffs, be it cost-plus pipelines or bid-out pipelines. Tariff application to pipeline users/customers is on the basis of contractual paths. As per the contract, if a customer is delivered gas through multiple pipelines, then the total transportation tariff for that customer is applied based on the added tariffs of the multiple separately authorized pipelines. This is resulting in very high transportation tariffs for far-off customers. The fixation of a unified tariff will result in reduction of transportation rates for most of the customers.
- 4.2 In order to address the issue of additive tariffs, PNGRB has currently proposed an amendment to unify the multiple inter-connected cost-plus pipelines of an entity as one unified/integrated pipeline system, and calculate/fix one unified tariff for them. The unified tariff so determined shall be recovered from users/customers of the unified/integrated pipeline system by way of simplified two-zone tariffs, i.e. first zone at up to 300 km from gas injection and all remaining customers of the INGPS will uniformly bear the second zone tariff.

IV. Legal aspects w.r.t. Bid-Out Pipelines vis-à-vis Cost-plus pipelines:

- 5.0 In respect of integration of cost-plus pipelines along with bid-out pipelines by the PNGRB, the same may not be legally sustainable considering the regulatory regime set out under the PNGRB Act and Regulations framed thereunder.
- 4.1. In terms of Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008 ("**Authorization Regulations**"), the entities are authorized to Lay, Build, Operate or Expand Natural Gas Pipelines under the following categories:
- i) Entities authorized through bidding route ("**Bid Out Entities**")
 - ii) Entities authorized by the Central Government before the appointed day i.e. 01.10.2007
 - iii) Entities laying, building, operating or expanding natural gas pipeline before the appointed day but not authorized by the Central Government.
- 4.2. The power to authorise to lay, build and operate natural gas pipelines to the Bid Out Entities through bidding route is conferred on the PNGRB under Section 19 read with Section 61(2)(p) of the PNGRB Act, the relevant portion of which is extracted hereinbelow:

"19. Grant of authorisation:-

(1) When, either on the basis of an application for authorisation for laying, building, operating or expanding a common carrier or contract carrier or for laying, building, operating or expanding a city or local natural gas distribution network is received or on suo motu basis, the Board forms an opinion that it is necessary or expedient to lay, build, operate or expand a common carrier or contract carrier between two specified points, or to lay, build, operate or expand a city or local natural gas distribution network in a specified geographic area, the Board may give wide publicity of its intention to do

so and may invite applications from interested parties to lay, build, operate or expand such pipelines or city or local natural gas distribution network.

(2) The Board may **select an entity** in an **objective and transparent manner** as specified by regulations for such activities.

Section 61(2)(p):

"(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

.....

(p) the **manner of selection of an entity** under sub-section (2) of section 19;"

- 4.3. Further, for Bid-out Entities, transportation tariff is applicable in terms of the zonal tariff submitted by the successful bidder and accepted by PNGRB. In this regard, Regulation 7 and Regulation 11 of the Authorisation Regulations is noteworthy and is extracted herein below:

"Regulation 7. Bidding criteria.

(1) The Board shall tabulate and compare all financial bids meeting the minimum eligibility criteria, as per the bidding criteria given below, namely:-

(a) **Lowness of the present value of the unit natural gas pipeline tariff bid** under this clause for the first tariff zone in the natural gas pipeline for each year of the economic life of the project. [natural gas pipeline tariff bid shall be for each year of the economic life of the project].

....."

"Regulation 11. Fixation and recovery of natural gas pipeline tariff.

(1) The natural gas pipeline tariff shall be **fixed** on a zonal postalized basis, **as per the bid by the entity** namely under criteria (a) to (c) of sub-regulation (1) of regulation 7.

(2) The natural gas pipeline tariff determined for different tariff zones on the basis specified in sub-regulation (1) shall be **accordingly recovered by the entity from the customers** located in different tariff zones.

(3) The applicable natural gas pipeline tariff shall be recovered through an invoice on a non-discriminatory basis, that is, **without any premium or discount, from all customers.**

....."

- 4.4. As is evident from above, the Board has to approve the tariff as arrived at through the bid-out route and nothing else. Further, the customer located in different tariff zones cannot be obligated to pay any other tariff other than the bid-out zonal tariff quoted by the winning entity on the basis specified under Regulation 11(2), 11(3) above. Accordingly, such bid-out zonal Tariff is legally binding as per the already notified regulations and cannot be deviated from either by the Board or the winner Bid-out Entity.

- 4.5. In the instant case, the unification of the cost-plus pipelines along with bid-out pipelines and imposition of unified tariff on bid-out pipelines will tantamount to change in the Tariff arrived on zonal postalized basis through the competitive bidding route and imposing of a new tariff onto them, which in turn will result in canceling the original tender entered into between them. Also, the same will be in direct contravention of Section 19(2) of the PNGRB Act as it will hit the sanctity of selecting an entity in an "objective and transparent manner".
- 4.6. It is a trite law that sanctity of a bid must be maintained and subsequent alterations and deviations in the bidding terms will not be able to uphold it is own under the law, as that would amount to defeating the very purpose of bidding.
- 4.7. In the instant case, contemplating a unified tariff arrangement for bid-out pipelines as enumerated above will not be permissible for Bid Out Entities authorized through the bidding route as altering the zonal tariff originally arrived at through the competitive bidding process would tantamount to nullifying the bidding process itself.
- 4.8. In the case of *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and others [(2000) 5 SCC 287]*, *The Hon'ble Supreme Court held as under:*
The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition a wider net will be permissible and a larger participation or more attractive bids could be offered."
- 4.9. It is thus clear that once the tender conditions are decided and the same is awarded, there can be no alteration in the same as that would amount to undermining the sanctity of a bidding process and would leave room for arbitrariness and favoritism. Therefore, it is opined that the unification of Cost-plus pipelines and Bid-out Pipelines and imposing a unified tariff regime on such Bid Out Entities post will be hit and undermine the sanctity of the bidding route and thus unsustainable under the extant law including PNGRB Act and regulations framed therein.

V. Legal Aspect w.r.t to including Pipelines of subsidiary companies in the INGPS:

- 4.10. In respect of whether pipelines of subsidiary companies can be included in the INGPS, analysis of Regulation 9 of the Authorisation Regulations is pertinent which is extracted herein below:
- "9. Grant of authorization.*
- (1) The authorization shall be granted to the selected entity in the format at Schedule D within a period of thirty days of the last date of submitting the bid.*
- (2) The grant of authorization is subject to the entity achieving a firm natural gas tie-up and a financial closure as per regulation 10.*
- (3) The grant of authorization to the entity shall not be renounced by way of sale, assignment, transfer or surrender to any person or entity during the period of three years from the date of its issue.*
- (4) The entity intending to renunciate the authorization in favour of another entity after the end of the three years period shall submit a proposal to the Board at least*

thirty days in advance and shall provide all information as may be called for by the Board.

(5) The Board after satisfying itself that the proposal will not adversely affect the existing or proposed activities of laying, building, operating or expansion of the natural gas pipeline shall either accept the proposal in full or with such modifications as it may deem fit and in a case where the entity is permitted by the Board to take over the activities of laying, building, operating or expanding the natural gas pipeline such entity shall abide by the existing or modified terms and conditions of the authorization including compliance with the service obligations:

Provided that the Board reserves the right to reject the proposal in public interest and in such a case the Board shall provide in writing the reasons for such rejection.

- 4.11. As is evident from the above, the authorisation of the bid out pipelines can renunciate in favour of another entity which can be a group/associate/subsidiary of Bid-out Entity subject to the approval of the Board as per the procedure set out under Regulation 19 above.
- 4.12. However, the said renunciation of authorisation of bid-out pipelines cannot result in the unification of bid-out pipelines with other pipelines of such group/associate/subsidiary of Bid-out Entity for the reasons stated in the answer to aspect No. 1 above
- 4.13. Further, on a perusal of Section 2(p) of the PNGRB Act i.e. the definition of entity, it is evident that the same does not include group/associate/subsidiary companies within the definition of the same 'Entity'. As such, the authorisation of a pipeline is concentric and specific to one such "Entity" authorised by the Board.
- 4.14. Further, as per Section 21(2) of the PNGRB Act read with Authorisation Regulations, the tariff has to be paid by the consumer to the Authorised Entity only and no other entity or affiliate. As such, there is a legal challenge to any sort of unification of pipelines of the group/associate/subsidiary companies along with the pipelines of the parent/holding company i.e. authorised entity under the PNGRB Act as the same will be contrary to PNGRB Act itself and also other Regulations including Affiliate Code of Conduct Regulations. At the most, the authorisation to an Entity of such pipeline can be renunciated to another entity which can be a group/associate/subsidiary companies of such Authorised entity subject to approval of the Board.

VI. Conclusions:

5. Considering the above, we suggest that the PNGRB may consider the following while bringing out amendments to the 2008 Tariff Regulations and other regulations in respect of INGPs and unified tariff for multiple inter-connected cost-plus pipelines (at the level of each entity/operator):
 - (a) For the purpose of Unified Tariff, unification of bid-out pipelines, along with the cost-plus pipelines, will not be legally possible and it will not be consistent with Regulation 11 (2), (3) of the PNGRB Authorization Regulations read with Section 19(2) of the PNGRB Act.
 - (b) For the purpose of Unified Tariff, unification of pipelines of the subsidiary companies along with the pipelines of the parent/holding company will also not be consistent with the definition of "entity" as in section 2(p) and "authorised entity in Section 2(d) read with Section 19, 21(2) and 22 of the PNGRB Act.

- (c) As regards the integration of multiple common carrier NG Pipelines operated by one single authorised entity, there is no restriction in the PNGRB Act or the regulations notified thereunder, which restricts the PNGRB from doing so, i.e. declaration as INGPS and fixation of entity-wise unified tariffs for its multiple inter-connected cost-plus pipelines. However, for the purpose of fixation of entity-wise unified tariffs for its multiple inter-connected cost-plus pipelines, it will be necessary for issuance of an integrated authorization/acceptance by the Board for such cost-plus pipelines of an entity, so that once such an integrated authorization is granted/accepted by the Board, then any user/customer using any hitherto separate pipeline(s), will now be using that unified/integrated pipeline system, and accordingly, can be required to pay the unified tariff as calculated/fixed by PNGRB for using that unified/integrated pipeline system.
