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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

SUGGESTIONS/COMMENTS/VIEWS VIS-À-VIS PUBLIC NOTICE DATED 29.06.2020 ISSUED BY PNGRB

This is with reference to the Public Notice issued by Petroleum and Natural Gas Regulatory Board (**PNGRB**) dated 29.06.2020, which proposes the fixation of Unified Tariff for common/contract carrier natural gas pipelines, by amending the relevant PNGRB Regulations. Vide the said amendment PNGRB has proposed fixation of entity-wise unified tariffs for non-bid-out cost-plus pipelines, by specifying entity-wise “integrated natural gas pipeline systems” (INGPS), inter-alia other things.

Mandate and Jurisdiction of PNGRB:

Before analysing the legality of the provisions that are proposed to be incorporated via the said amendment, it’s imperative to answer the question whether PNGRB has the mandate to effectuate such amendment, i.e. “Fixation of Unified Tariff for common/contract carrier natural gas pipelines.”

- The PNGRB Act was introduced to regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas in a manner so as to protect the

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interests of consumers and further, to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets for the same.

- Going by the spirit and object of the PNGRB Act, and from a legal standpoint, the PNGRB Act, 2006 doesn't preclude the PNGRB Board from fixing entity-wise unified tariffs by specifying entity-wise "integrated natural gas pipeline systems" (INGPS).
- PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008 define "**natural gas pipeline**" as any pipeline including spur lines for transport of natural gas and includes all connected equipments and facilities, such as, compressors, storage facilities, metering units but excludes Dedicated Pipelines and Pipelines in a City or local natural gas distribution network.
- In view of the foregoing paras, existing Tariff Regulations would cut across the limitation of authorisation or acceptance of multiple pipelines of an entity as the unified/integrated natural gas pipeline. Therefore, legally allow the PNGRB to unify the tariff for integrated natural gas pipeline of an entity.

Further, via **Annexure - 2** of the said Public Notice, PNGRB has invited suggestions/comments/views of stakeholders on specific issues/questions with respect to the proposed amendment. Out of all the said issues/questions, barring the ones warranting technical expertise, the following ones require legal deliberation and analysis:

- 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.

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- 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 suggest proposed methodology for including bid out pipelines and any legal difficulty envisaged therein.

Present framework of existing regulatory regime under PNGRB:

In order to effectively address the abovementioned issues, it is imperative to have a brief understanding of the existing framework, and specifically, of the following:

- At present, broadly two categories of common/contract carrier natural gas pipelines are there –
 - **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.
 - **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.
- Currently, separately authorized 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 contract, if a

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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.

- 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 upto 300 kms from gas injection and all remaining customers of the INGPS will uniformly bear the second zone tariff.

LEGAL ISSUES VIS-À-VIS BID-OUT PIPELINES AND PIPELINES OF SUBSIDIARY COMPANIES

Taking into consideration the existing framework governing the pipelines and several regulations of authorization rules, two questions need detailed legal analysis:

1. Whether while determining the Unified Tariff, pipelines of subsidiary companies can be included in the Integrated Natural Gas Pipeline System or not and whether any legal difficulty is envisaged therein?
2. Whether integration should be considered only for cost-plus pipelines or for Bid out Pipelines as well for the purpose of Unified Tariff and what methodology may be adopted for including bid out pipelines, and whether any legal difficulties may be encountered?

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Unification of pipelines of the subsidiary companies along with the pipelines of the parent/holding company to form an Integrated Natural Gas Pipeline System

- According to **Section 2(p) of the PNGRB Act**, the definition of entity does not include group/associate/subsidiary companies. As such, the authorisation of a pipeline is non-transferrable to any group/associate/subsidiary company.
- As per **Regulation 2(1)(b)** of Petroleum and Natural Gas Regulatory Board (Affiliate Code of Conduct for Entities Engaged in Marketing of Natural Gas and Laying, Building, Operating, or Expanding Natural Gas Pipeline) Regulations, 2008 ("**Affiliate Code of Conduct Regulations**"), such group/associate/subsidiary companies of the Authorised entity are termed as "**Affiliate**".
- According to Regulation 8, such Affiliates are to be treated at par with any other entity. Further, according to Regulation 9 of the Authorisation Regulations, authorisation of the bid-out pipelines can be renounced in favour of another entity, which can be a group/associate/subsidiary of Bid-out Entity subject to the approval of the Board.
- As a result of the contention made in the previous para, the said renunciation of authorisation of bid-out pipelines cannot result in unification of bid-out pipelines with other pipelines of such group/associate/subsidiary of Bid-out Entity.
- 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.

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- Therefore, any such unification of the bid-out pipeline with any of its parent company may face a legal challenge.

Unification of bid-out pipelines along with cost-plus pipelines

- 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 categories mentioned above.
- **Section 19** read with **Section 61(2)(p)** of the PNGRB Act confers power on the Board to authorise to lay, build and operate natural gas pipelines to the Bid Out Entities through bidding route is conferred on the Board under
- 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 terms of **Regulation 7** and **11** of the Authorisation Regulations.
- Regulation 7 and 11 of the Authorisation Regulations state that the Board has to approve the tariff as arrived at through the bid-out route and nothing else. Accordingly, such bid-out zonal Tariff is binding as per the already notified regulations and cannot be deviated from either by the Board or the Bid-out Entity.
- With respect to the proposed amendments, unification of the cost-plus pipelines along with bid-out pipelines for the unification of tariff and imposition of the same on bid-out pipelines will tantamount to change in the Tariff arrived on zonal postalized basis through the competitive

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bidding route. Further, imposition of a new tariff will result in cancelling the original tender entered into between them.

- The Hon'ble Supreme Court in various judgments has held that once a tender has been awarded, the parties cannot be allowed to alter the conditions therein. Various High Courts have also held that the tender conditions cannot be changed once the bidding process is complete. It is pertinent to note that the sanctity of the tender process must be preserved.
- 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 favouritism.

CONCLUSION

The following conclusions may be inferred from the aforesaid analysis:

- I. **PNGRB Mandate:** It is concluded that there is no restriction/difficulty in the PNGRB Act, 2006, or the regulations notified thereunder, which restricts the PNGRB from fixing entity-wise unified tariffs for its multiple inter-connected cost-plus pipelines.
- II. **Subsidiary companies' pipelines:** For the purpose of Unified Tariff, unification of pipelines of the subsidiary companies along with the pipelines of the parent/holding company will not be consistent with the definition of "entity" as in section 2(p) and payment of transportation rate as in section 21(2) of the PNGRB Act.
- III. **Bid-out pipelines:** For the purpose of Unified Tariff, unification of bid-out pipelines, along with the cost-plus pipelines, will not be legally permissible

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and it will not be consistent with the Regulation 11 (2), (3) of the PNGRB Authorization Regulations.

IV. **Cost-plus pipelines:** 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.



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