

TISHAMPATI SEN

(Enrolment No.: D/1559/2009)

ADVOCATE ON RECORD
SUPREME COURT OF INDIA

29.07.2020

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

Ref: Public Notice - No. PNGRB/COM/2-NGPL/TARIFF(3)/2019 Vol II, dated 29.06.2020

Subject: Comments and suggestions on the proposed amendment to the Petroleum and Natural Gas Regulatory Board (Determination of Natural Gas Pipeline Tariff) Regulations, 2008

Dear Sir,

1. By way of the Public Consultation Document (PCD), dated 29.06.2020, the Petroleum and Natural Gas Regulatory Board (“PNGRB”) invited comments, suggestions and / or views in relation to the proposal to amend the *Petroleum and Natural Gas Regulatory Board (Determination of Natural Gas Pipeline Tariff) Regulations, 2008* (hereinafter referred to as the “NGPL Tariff Regulation”).
2. Being a legal practitioner and having been involved in various legal matters in relation to PNGRB and having advised clients in relation to matters relating to tariffs for natural gas pipelines, there are certain principal legal issues which come to light, upon review of the said proposed amendments. It is in this respect, and the request made by the PNGRB in terms of the PCD, that I wish to submit my independent views on matters of law, i.e. the said proposed amendments in light of the existing statutory framework of the PNGRB Act and the Tariff Regulations.
3. Upon a review of the proposed draft amendments to the NGPL Tariff Regulations, it appears that the amendment is structured in relation to the fixation of a Unified Tariff for common/contract carrier natural gas pipelines. In the amendment proposed by PNGRB - for which the comments are being sought - 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.
4. From a legal point of view, while there does not seem to be a restriction, in terms of the PNGRB Act, 2006, on the PNGRB from making the proposed amendments, i.e.

Office: Chamber No. 39, R.K. Garg Block, Supreme Court of India, New Delhi – 110001,
8571, C-8 Vasant Kunj, New Delhi - 110070
T: +91 11 49404576
E: ts@trschambers.in

TISHAMPATI SEN

(Enrolment No.: D/1559/2009)

ADVOCATE ON RECORD
SUPREME COURT OF INDIA

fixation of entity-wise unified tariffs by specifying entity-wise “integrated natural gas pipeline systems” (INGPS), there may be certain legal issues which could be relevant to consider, in the context of the said amendments, which are discussed in some detail herein below.

Present Position & Proposed Amendment

5. The declaration and authorization of the Common Carrier pipelines is provided for in terms of the PNGRB Act, which is described as under:
 - (i) In terms of Section 17 and 18, read with Section 2(j) of the PNGRB Act, the PNGRB is authorized to declare/authorise such pipelines as common carrier being laid, build, operated or expanded by an Entity on a non-discriminatory open access basis. Such authorization is granted specifically to an “authorised entity” which is laying, building, operating and expanding common carrier NG pipeline.
 - (ii) Further, it is the PNGRB, which has the sole mandate 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)
 - (iii) The PNGRB has the sole authority to fix and determine the transportation tariff/rates for such common carrier in accordance with the guiding principles laid down under Section 22(2) of the PNGRB Act.
6. At the very outset, it may be pertinent to note that the PNGRB Act, 2006 doesn't define what a Natural Gas Pipeline is. It is the PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008 which defines a Natural Gas Pipeline to mean any pipeline including spur lines for transport of natural gas and includes all connected equipments and facilities, but excludes Dedicated Pipelines. 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.
7. As is well known, there are two categories of common/contract carrier natural gas pipelines:
 - (i) Cost-Plus Pipelines: These are authorized by the Central Government and/or are the Existing Pipelines before the establishment of PNGRB. For these pipelines, based on their respective capital employed and costs, PNGRB calculates

Office: Chamber No. 39, R.K. Garg Block, Supreme Court of India, New Delhi – 110001,
8571, C-8 Vasant Kunj, New Delhi - 110070
T: +91 11 49404576
E: ts@trs chambers.in

TISHAMPATI SEN

(Enrolment No.: D/1559/2009)

ADVOCATE ON RECORD
SUPREME COURT OF INDIA

transportation rates/tariffs for them under the PNGRB tariff determination regulations.

- (ii) Bid-out Pipelines: These have been 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.
8. Currently, specific authorized pipelines have distinctive and separate tariffs, be it cost-plus pipelines or bid-out pipelines. Tariff application to pipeline users/customers is on the basis of the specific contractual provisions and concepts. As such, there are reported issues where 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 has often been highlighted as resulting in very high transportation tariffs for far-off customers.
9. It would appear that in order to address the issue of additive tariffs and high costs on customers, PNGRB is proposing, by way of the 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 in terms of the 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 ANALYSIS AND COMMENTS

10. 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.
11. The power to authorize to lay, build and operate natural gas pipelines to the Bid Out Entities through bidding route is conferred on the Board under Section 19 read with Section 61(2)(p) of the PNGRB Act, relevant portion of which is extracted hereinbelow:

Office: Chamber No. 39, R.K. Garg Block, Supreme Court of India, New Delhi – 110001,
8571, C-8 Vasant Kunj, New Delhi - 110070
T: +91 11 49404576
E: ts@trschambers.in

TISHAMPATI SEN

(Enrolment No.: D/1559/2009)

ADVOCATE ON RECORD
SUPREME COURT OF INDIA

“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;”

12. 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

Office: Chamber No. 39, R.K. Garg Block, Supreme Court of India, New Delhi – 110001,
8571, C-8 Vasant Kunj, New Delhi - 110070

T: +91 11 49404576

E: ts@trs chambers.in

TISHAMPATI SEN

(Enrolment No.: D/1559/2009)

ADVOCATE ON RECORD
SUPREME COURT OF INDIA

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.***

.....”

13. As is evident from above, the Board has to approve the tariff as arrived at through the bid-out route and nothing else. Further, it may not be binding on the customer located in different tariff zones to pay any other tariff other than the tariff determined for different tariff zones on the basis specified under Regulation 11(2), 11(3) above. 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. Even otherwise, the unification of the cost-plus pipelines along with bid-out pipelines and the levy of unified tariff on bid-out pipelines will lead to a change in the Tariff arrived on zonal basis through the competitive bidding route and imposing of a new tariff onto them, which in turn may lead to the casting of the original tender in doubt as to its legal sanctity in the first place.
14. The consequence of the above, which is likely to be construed to be an alteration of the bidding terms, may vitiate the sanctity of the bid in the first place. Apart from the same being in direct contravention of Section 19(2) of the PNGRB Act which requires the selection of an entity in an “*objective and transparent manner*”, the same may also fly in the teeth of settled 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.

Office: Chamber No. 39, R.K. Garg Block, Supreme Court of India, New Delhi – 110001,
8571, C-8 Vasant Kunj, New Delhi - 110070
T: +91 11 49404576
E: ts@trschambers.in

TISHAMPATI SEN

(Enrolment No.: D/1559/2009)

ADVOCATE ON RECORD
SUPREME COURT OF INDIA

15. Reference in this regard may be made to the judgment of the Hon'ble Supreme Court in the case of *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and others [(2000) 5 SCC 287]*, where 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."

16. In light of the above law, and considering the proposed amendment, a view may be taken that in the instant case, contemplating a unified tariff arrangement for bid-out pipelines as enumerated above may not be permissible for Bid Out Entities authorized through bidding route as altering the zonal tariff originally arrived at through the competitive bidding process may lead to nullifying the bidding process itself. It would be prudent to take the view that once the tender conditions are decided and the same is awarded, there can be no alteration in the same, as doing so may well amount to undermining the sanctity of a bidding process on grounds of arbitrariness and favouritism. Therefore, it is opined that 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 bidding route and thus unsustainable under the extant law including PNGRB Act and regulations framed therein.
17. The other issue which arises and for which a legal view may need to be taken is the legal aspects with respect to the Bid - Out Pipelines vis a vis the cost plus pipelines. In this regard, the analysis of Regulation 9 of the Authorisation Regulations may be relevant:

"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.

Office: Chamber No. 39, R.K. Garg Block, Supreme Court of India, New Delhi – 110001,
8571, C-8 Vasant Kunj, New Delhi - 110070

T: +91 11 49404576

E: ts@trs chambers.in

TISHAMPATI SEN

(Enrolment No.: D/1559/2009)

ADVOCATE ON RECORD
SUPREME COURT OF INDIA

(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.

18. From the above, it becomes apparent that the authorisation of the bid out pipelines can be subject to renunciation 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 procedure set out under Regulation 19 above.
19. However, 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 for the reasons as discussed above. Further, on a perusal of Section 2(p) of the PNGRB Act i.e. definition of entity, it is evident that the same does not include group/associate/subsidiary companies within the definition of the same 'Entity'.
20. 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 renounced to another entity which can be a group/associate/subsidiary companies of such Authorised entity subject to approval of the Board.

Office: Chamber No. 39, R.K. Garg Block, Supreme Court of India, New Delhi – 110001,
8571, C-8 Vasant Kunj, New Delhi - 110070

T: +91 11 49404576

E: ts@trschambers.in

TISHAMPATI SEN

(Enrolment No.: D/1559/2009)

ADVOCATE ON RECORD
SUPREME COURT OF INDIA

21. In light of the above, while considering the unified tariff for multiple inter-connected cost-plus pipelines (at the level of each entity/operator), the summary of the above suggestions are as follows:

- (a) While, there is no restriction in the PNGRB Act, 2006, or the regulations notified thereunder, which restricts the PNGRB from making the proposed amendments, in relation to the fixation of entity-wise unified tariffs for its multiple inter-connected cost-plus pipelines. However, for the purpose of Unified Tariff, unification of bid-out pipelines, along with the cost-plus pipelines, may not be legally permissible, and may not be consistent with the Regulation 11 (2), (3) of the PNGRB Authorization Regulations.
- (b) Further, once again for the purpose of Unified Tariff, unification of pipelines of the subsidiary companies along with the pipelines of the parent/holding company may also 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.

I trust that you would find my above analysis and views helpful. I remain available for any further assistance.

Sincerely



(TISHAMPATI SEN)