

PETROLEUM AND NATURAL GAS REGULATORY BOARD

Case No.: Legal/09/2022 (Old Case No. Legal/14/2019 & Legal/124/2015)

In the matter:

Mahanagar Gas Limited ...Complainant
VERSUS
GAIL (India) Ltd.
Oil & Natural Gas Corporation Ltd. ...Respondent(s)

Counsel(s)/ Authorized Representatives Present For

Complainant Mr. Ishaan Chaaya (Adv.)
Respondent No.1 Ashwani Kataria (Adv.) , A.K. Atraya (DGM) and
Mr. Devendra Yadav CM (Law)
Respondent No.2 Mr. Shashwat Kumar (Adv.), Mr. Naman Mittal
(Adv.), Mr. Amitanshu Saxena (Adv.), Mr.
Abhishek Yadav (DLA) and Mr. Himanshu
Katoch (Sr. Marketing Officer)

Coram: GajendraSingh A.K.Tiwari Ajit Kumar Pande
(Member-I) (Member-II) Member(Legal)

ORDER
30.09.2022

The present matter was remanded from the Hon'ble Appellate Tribunal for Electricity vide Judgment dated 16.07.2021 passed in Appeal No. 110 of 2020 is hereby disposed of, vide detailed order passed separately.

Sd/-
Gajendra Singh
(Member-I)

Sd/-
A.K.Tiwari
(Member-II)

Sd/-
Ajit Kumar Pande
Member(Legal)

PETROLEUM AND NATURAL GAS REGULATORY BOARD

NEW DELHI

Case Ref: Legal/09/2022 (Remanded back by the Hon’ble APTEL vide Judgement dated 16.07.2021 passed in Appeal No. 110/2020)

Old Case Ref: PNGRB/Legal/1-BC/14/2019

In the matter of

Mahanagar Gas Ltd

MGL House, G-33
Bandra – Kurla Complex
Bandra(East),
Mumbai – 400051.

.....Complainant

Versus

1. GAIL (India) Ltd.

GAIL Bhawan,
16, Bhikaji Cama Place,
R. K. Puram,
New Delhi-110066

2. ONGC Limited

Plot No. 5A-5B,
Nelson Mandela Road,
Vasant kunj,
New Delhi – 110070

..... Respondents

ORDER
30.09.2022

Introduction

1. The Hon’ble Appellate Tribunal for Electricity (hereinafter referred to as “**Hon’ble Tribunal or APTEL**”) vide Order dated 16.07.2021 passed in Appeal no. 110/2020 titled *Mahanagar Gas Limited Vs PNGRB*, remitted back the matter to this Board for fresh adjudication.
2. The Mahanagar Gas Limited (**hereinafter referred to as the “Complainant or MGL”**) is an authorized entity for laying, building, operating and expanding the City Gas Distribution (CGD) Network in and around the city of Mumbai. The GAIL (India) Ltd. (**hereinafter referred to as “GAIL or Respondent No.1”**) is a Public Sector Undertaking under the Ministry of Petroleum and Natural Gas and is the largest operator of natural gas pipelines in the country. The ONGC

Limited (**hereinafter referred to as “ONGC or Respondent No.2”**) is also a Public Sector Undertaking and it is the country’s largest oil and gas exploration and production company.

3. The Complainant filed the Appeal before the Hon’ble APTEL, challenging the Petroleum and Natural Gas Regulatory Board's (**hereinafter referred to as the “Board” or "PNGRB"**) order dated 18.03.2020 (**hereinafter referred to as the "Order"**) passed in PNGRB/Legal/1-BC/14/2019, wherein the Board directed the Complainant and Respondent No. 1, GAIL (India) Ltd., to pay transportation charges in accordance with the Provisional Initial Unit Tariff Order TO/12/2013 dated 30.12.2013 (**hereinafter referred to as the "Tariff Order"**) in respect of the Uran-Trombay Natural Gas Pipeline (**hereinafter referred to as the “UTNGPL”**), which transports gas from ONGC’s gas processing plant at Uran to Trombay.

Brief facts of the Case

4. The facts of the case are that the Uran-Trombay Natural Gas Pipeline was laid by ONGC to evacuate the discovered gas from off-shore field and Uran is the Landfall point to bring the off-shore gas available to the consumers. The Price of the gas produced from the nominated blocks of Oil Companies has been notified from time to time by the Government of India. The First Order was issued by the Ministry of Petroleum and Natural Gas (**hereinafter referred to as “MoP&NG”**) Government of India, on 30.01.1987 vide letter ref no. O-15019/6/83-ONG/US(EO)/GF. As per the said pricing order, the gas prices are applicable at the ‘Landfall Point’ for the gas being procured from the offshore sites. The Natural Gas which is being produced by ONGC at its offshore sites is being supplied to GAIL, according to the allocation by the MoP&NG, for further supply by GAIL to its downstream customers.
5. The Respondent No. 1 entered into a Gas Sales Agreement (**“hereinafter referred to as GSA”**) with Respondent No. 2 on 07.07.2006. The said agreement covers the sale of gas by ONGC to GAIL from various sale/delivery points. The transportation charges were initially agreed at Rs.12/KCM for the Uran-Trombay segment. The Schedule A consists of a tabular representation of delivery points, custody transfer points, custody transfer measurement system, frequency, typical pressure etc. and for UTNGPL, delivery point is Trombay and custody transfer point is URN-GTP-03. On 05.06.2009, the Complainant entered into a long-term Gas Sales and Transportation Contract with GAIL for the supply of Administered Price Mechanism (APM) natural gas.
6. ONGC being the producer of the Gas, supplies the natural gas from its gas processing plant at Uran to Trombay through this pipeline where from the Respondent No. 1, GAIL purchases the gas for onward sale to the Complainant through a 7.7 km long pipeline of 18 inch diameter along with a few other entities through separate pipelines, owned by GAIL (India) Ltd. Since

UTNGPL was becoming very old, ONGC replaced this pipeline in 2008 with an upgraded new Uran-Trombay pipeline of 20” diameter, commissioned on 30.05.2008.

7. The Board vide its decision dated 03.05.2011 granted the authorisation to Respondent No.2 for UTNGPL under Regulation 17(1) of PNGRB (Authorising Entities to Lay, Build, Operate or Expand Natural gas Pipelines) Regulations, 2008 (**hereinafter referred to as the “Authorisation Regulations, 2008”**) and declared it as a Common Carrier Pipeline. The Pipeline runs from Uran to Trombay in Maharashtra, owned and operated by the Respondent No. 2 and has been in existence since 1978-79.
8. ONGC applied for fixation of transportation tariff under Section 22 of PNGRB Act, 2006 and the Board vide its order dated 30.12.2013 fixed the provisional initial unit pipeline tariff for UTNGPL at Rs.5.70 per MMBTU with effect from 20.11.2008. In pursuance to the same, ONGC raised debit note for the period from 20th November, 2008 to 31st March, 2014. GAIL in turn, raised a debit note on the Complainant for recovery of applicable transportation charges for the period from 2008 to 2014.
9. The complainant approached the Board to seek clarification on the imposition of transportation tariff by GAIL. The Complainant alleged that ONGC has wrongly interpreted and applied the Tariff Order passed by the Board as ONGC could not have raised any debit note to claim the transportation tariff from GAIL, since ONGC was carrying its own gas from Uran to Trombay and the delivery point for supplying gas to GAIL was Trombay and not Uran.
10. A Complaint was filed by the Complainant before the Board under Section 25 read with Section 12 (1) (b) of the PNGRB Act, 2006 seeking following relief:-
 - a) *declare/clarify that the order dated 30th December, 2013 only fixes "transportation tariff" to be paid by a third-party user (shipper/marketer) for the utilization of the pipeline as a "common carrier" by such third party to transport its Gas;*
 - b) *declare/clarify that the order dated 30th December, 2013 cannot be read, interpreted or applied such that ONGC can charge the tariff fixed thereunder (Rs.5.70/MMBTU) even for the Gas that it sells (i.e. transfers custody of and title to) to GAIL at Trombay, whether retrospectively or going forward;*
 - c) *Declare/clarify that the reading, interpretation and application of the order dated 30th December, 2013 by ONGC is against the PNGRB Act and the regulations framed thereunder;*
 - d) *Declare/clarify that GAIL cannot pass on the demand towards such tariff to the Appellant, and the demands made should be quashed;*

e) Declare/clarify that without prejudice, and on a separate note that ONGC is in breach of regulations that require it to charge a provisional tariff, which it did not charge, and should therefore not be allowed to take advantage of its own breach, and should not be allowed to charge tariff on this ground as well.

11. The Board vide its order dated 15.10.2015 dismissed the Complaint. The Complainant challenged the Order dated 15.10.2015 passed by the Board before the APTEL by way of Appeal No. 147 of 2016. The Hon'ble APTEL vide judgment dated 20.09.2019 set aside the PNGRB's Order dated 15.10.2015 and remanded back the matter to the Board. The Board after hearing all the parties passed an order dated 18.03.2020, which was again challenged by MGL/Complainant before the Hon'ble APTEL by way of Appeal No. 110 of 2020.
12. The Hon'ble APTEL vide its order dated 16.07.2021 remanded back the matter to the Board by setting aside the Board's order dated 18.03.2020 and directed to decide the following issues within 3 Months from the date of appointment of Member (Legal). The following order was passed:

“Thus, it is ordered that:-

*1) The impugned order dated 18.03.2020 passed by PNGRB is hereby quashed and set aside.
2) The matter remanded for fresh adjudication by the PNGRB. PNGRB, while deciding the case afresh, shall also specifically decide these issues in totality:*

- i. Whether the transportation tariff determined under Tariff Order dated 30th Dec. 2013 or any further tariff orders passed by PNGRB has any application to Gas by ONGC from Uran to Trombay for delivery to GAIL at Trombay, as it is the transportation of ONGC's "own" Gas.*
- ii. Whether the PNGRB fixed transportation tariff can be imposed retrospectively with effect from 20 November 2008?*
- iii. Did the Uran to Trombay pipeline be declared by way of a notification to be a Common Carrier in terms of the Act and the Regulation?...”*

13. It is necessary to outline the reasons why this Board took time to examine the above said issues framed by the Hon'ble APTEL. The Member (Legal) joined the Board on 15.03.2022. Thereafter, notices were issued to all the parties on 01.04.2022 directing them to appear before the Board for a hearing in the matter on 07.04.2022. On the said date, a request was made by the Counsel for the Complainant that considering the fact that the record of the case is voluminous and the matter has been pending at various forums since a long time, therefore time maybe given to the Complainant to file a Convenience Compilation before the Board. The Board accepted the request made by the Complainant to file a Convenience Compilation on or before 29.04.2022 and listed the matter for final arguments on 11.05.2022. Thereafter,

a letter for adjournment was received on behalf of the Complainant requesting for an adjournment on the ground of non-availability of the main arguing counsel. An email making the same request was also received by the Board from the Complainant on 10.05.2022. The Board, vide email dated 10.05.2022, made it clear to the Complainant that the Board is not inclined to accept the request for adjournment received on behalf of the Complainant, given the time constraint of three months in terms of directions issued by the Hon'ble APTEL in its judgment dated 16.07.2021.

14. On 11.05.2022, despite the email dated 10.05.2022 having already been sent by the Board, the Counsel for the Complainant was still not prepared to address arguments before the Board, because of which the Board was constrained to adjourn the matter to 19.05.2022 in the interest of justice, after imposing a cost of Rs. 1 Lakh on the Complainant. The matter was then listed before the Board on 19.05.2022, when the Counsel for the Complainant did not have proper authorization/Vakalatnama to appear before the Board and it was also indicated that the Complainant is now being represented by another law firm. The Board accordingly directed the Complainant to ensure that the Counsel appearing before the Board are duly authorized and adjourned the matter for hearing on 25.05.2022.
15. Thereafter, the matter was listed before the Board on 25.05.2022, it has come to the knowledge of the Board that a settlement arrived in a matter involving similar circumstances, in which Rashtriya Chemicals and Fertilizers Ltd (RCF) was one of the parties. It was also pointed out to the Board that the disputes in relation to the UTNGPL have been resolved between ONGC and all other entities except the Complainant herein. After hearing the parties and at their request, the Board directed the management of all involved entities to explore the possibility of a settlement within ten days. However, it was submitted by the Counsels for the parties that although the entities have no objection to exploring the possibility of a settlement, the time period of ten days being given by the Board for the same is insufficient. The Board reminded the parties about the directions passed by the Hon'ble Tribunal to decide the matter within three months of joining of the Member (Legal) and pointed it out that the said time limit is expiring on 14.06.2022, then it was submitted by the parties that given the complexities involved in the matter, it will not be possible to decide the same before 14.06.2022. The Board took note of the joint submissions made by the parties and directed them to place on record applications for extension of time. Directing thus, the Board adjourned the matter to 13.07.2022.
16. That in compliance of the order dated 25.05.2022 passed by the Board, applications were received by the Complainant, Respondent No. 2 and Respondent No. 3, indicating that it was not possible to decide the matter within the time granted by the Hon'ble Tribunal and requesting the Board to extend the time to decide the matter by at least three months. The

Board in these circumstances, filed an application before the Hon'ble Tribunal seeking extension of time, granted by the Hon'ble APTEL vide judgment dated 16.07.2021 passed in Appeal No. 110 of 2020, which was expiring on 14.06.2022, by at least three months, the Application has not been listed before the Hon'ble APTEL till date.

17. That it is also pertinent to mention that the Board has preferred an Appeal bearing no. Civil Appeal No. 3129/2022 before the Hon'ble Supreme Court against the general directions passed by the Hon'ble APTEL in order dated 16.07.2021. The Hon'ble Supreme Court, vide order dated 02.05.2022, has been pleased to grant stay on the general directions issued by the Hon'ble Tribunal in its judgment dated 16.07.2021.
18. The Complainant vide letter dated 12.07.2022 informed to the Board that, MGL has filed an Interlocutory Application bearing I.A. No. 91424 of 2022 in the Civil Appeal no. 3129/2022 before the Hon'ble Supreme Court seeking a stay on the proceedings in case No. Legal/09/2022 pending before the Board and in view thereof requested to adjourn the present proceedings. However, the Board adjourned the hearing due to non-availability of the arguing counsel(s), the matter was adjourned to 28.07.2022. Further, the Hon'ble Supreme Court dismissed the application filed by the MGL vide order dated 18.07.2022 and declined to stay the proceedings before the Board.
19. The Board took up the matter on 28.07.2022 for hearing at 12 forenoon, heard the matter at length and the arguments were concluded by the parties at 4:00 p.m. As, it is evident that, the parties are not inclined to settle the dispute, therefore the Board concluded the hearing and asked all the parties, to file the written submissions in the matter latest by 19.08.2022.
20. In order to examine the issues already framed by the Hon'ble APTEL vide Judgement dated 16.07.2022, the following submissions made by the Complainant, Respondent No.1 and 2 are analysed:

Submissions of MGL

- i. On 30.09.2009, ONGC applied to the PNGRB under Regulation 19 of the Authorization Regulations seeking declaration of the UTNGPL as a "dedicated pipeline" which is defined in Regulation 2(1)(f)(i) as a pipeline, "laid to transport natural gas to a specific customer to meet his requirement and not for resale". The effect of being a "dedicated pipeline" would be that such pipeline is excluded from the definition of "common carrier" under the PNGRB Act. The fact of ONGC having contemporaneously applied to the PNGRB for being declared as a "dedicated pipeline" i.e., being outside the regulatory limit of the PNGRB, explains ONGC's conduct of seeking recovery of contractually/mutually agreed transportation charges, outside the purview of the PNGRB.

- ii. ONGC's application dated 30 September 2009 was declined by on the ground that "gas is being resold further to downstream customers by GAIL". GAIL was further reselling the gas to its downstream customers could not be determinative of the fact that the pipeline supplying gas to GAIL would not be a "common carrier". At this stage it would be apposite to state that:
- a. Under the PNGRB Act, while there is an exclusion to a pipeline supplying natural gas to a specific consumer from the purview of being a "common carrier", there is no usage/ definition of the term "dedicated pipeline". The term "dedicated pipeline" is a creature of the Regulations. As per its definition under Regulation 2(i)(f)(i) of the PNGRB Authorization Regulations, even though a "dedicated pipeline" has similarity with a pipeline laid to supply natural gas to a specific consumer, the definition of "dedicated pipeline" has another condition that such pipeline should not only be supplying gas to a specific customer, but that it should be to meet his requirement and not for resale. In that sense, the Regulations have to be interpreted keeping in mind that the PNGRB Act while excluding a pipeline laid to supply natural gas to a specific consumer, has not imposed any conditions.
 - b. Lastly, at the relevant time, Section 16 of the PNGRB Act had not been notified, in absence of which, the PNGRB did not possess the power to grant authorization nor reject authorization.
- iii. On 3 May 2011, the PNGRB conveyed its decision to ONGC of accepting the Central Government authorisation. At that stage it would be apposite to state as under:
- (a) This letter was sent by the PNGRB under Regulation 17 of the PNGRB Authorization Regulations, treating the subject pipeline as a natural gas pipeline. A "natural gas pipeline" is distinct from a "common carrier" under the PNGRB Act. A "natural gas pipeline" is defined under the PNGRB Authorisation Regulations as:
"a pipeline including spur lines for transport of natural gas", a common carrier means "such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity as the Board may declare or authorise from time to time on a non-discriminatory open access basis under sub-section (3) of section 20".
 - (b) Consequently, while any and all pipelines transporting natural gas would be a "natural gas pipeline", but to be a "common carrier" under Section 2(j) of the PNGRB Act, the pipeline had to be one in which natural gas is being transported "by more than one entity". Once that requirement stood fulfilled, then the pipeline had to be either authorised by Central Government or has to be declared as such by the PNGRB under Section 20(3) of the PNGRB Act.

- iv. ONGC had made its initial tariff submissions to the PNGRB (even before the grant of authorization) on 28 June 2010. However, ONGC was not charging any on-account amount towards the tariff. Subsequently, by way of a Provisional Tariff Order dated 30 December 2013, the PNGRB fixed the “provisional initial unit natural gas pipeline tariff” under the provisions of the PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008 as Rs. 5.70/MMBTU with effect from 20 November 2008. It is submitted that:
- a. Para 1.1 of the Tariff Order records that the Tariff Order is being issued under Section 22 of the PNGRB Act as if the said provision entitles the PNGRB to fix tariff of a natural gas pipeline, whereas the said provision only empowers the Board to fix transportation tariff for a "common carrier";
 - b. Para 1.3 of the Tariff Order records that the pipeline currently transports natural gas for one customer, namely, GAIL;
 - c. Para 3.6 of the Tariff Order records that there was no extra capacity mandated by the Central Government for "common carrier" usage;
 - d. This decision of the PNGRB was directly contrary to the decision of the APTEL in the case of Reliance Industries Limited v Petroleum and Natural Gas Regulatory Board, decided on 6 January 2014, where it was held that a natural gas pipeline tariff order has to be passed after following the principles of natural justice, which would involve issuance of a public notice inviting suggestions from public who were likely to be affected for participating in the Tariff determination process. The public may include entities or members of public or even customers. No opportunity was given to GAIL or MGL, the stakeholders, to present their case and/or give their representation(s).
- v. The PNGRB-fixed "transportation tariff" only applies to "Common carrier" or "contract carrier" and would not apply when the concerned pipeline is being used by the pipeline-owning entity for selling/marketing of its own gas. Even if ONGC is assumed to be declared as "common carrier", the PNGRB-fixed Transportation Tariff would not apply where the pipeline entity is undertaking marketing/selling its gas and in the course of such activity utilizing the ‘Own Requirement Capacity’ (Capacity A) of the pipeline.
- vi. A conjoint reading of the various provisions of the PNGRB Act and its Regulations would show that any Transportation Tariff fixed by the PNGRB under Section 22 of the PNGRB Act would only apply when ‘other’ entities use the pipeline for transportation of their gas while utilizing the ‘Contract Carrier Capacity’ (Capacity B) / ‘Common Carrier Capacity’ (Capacity C).
- vii. The following statutory provisions would be relevant:
- (a) The power of the PNGRB to determine and fix transportation rate/tariff for common carrier/contract carrier pipelines emanates from Section 22 of the

PNGRB Act, read with Section 11(e)(ii). However, before noting those sections, it would be relevant to note the definitions of a "common carrier" and "transportation rate".

- (b) In terms of Section 2(j) of the PNGRB Act, a "common carrier" means: *"...pipelines for transportation of petroleum, petroleum products and gas by more than one entity as the Board may declare or authorized from time to time on a non-discriminatory open access basis."* [emphasis added]
- (c) Therefore, for a pipeline to be termed as a "common carrier", it is essential for the said pipeline to be "used by more than one entity", i.e., for there to be a third-party entity utilizing that pipeline (separate from the entity owning the pipeline) on a non-discriminatory open access basis.
- (d) The words "non-discriminatory open access basis" in the definition of a "common carrier" cannot be read to mean the transportation rate is to be applicable on a non-discriminatory basis. The tariff cannot be applicable for all capacities, else there is no purpose of declaring a common carrier capacity as such. The "non-discriminatory" aspect is only limited/restricted to the access to the common carrier capacity, and as between third party shippers who are using the common carrier capacity, there should be no discrimination.
- (e) The definition of "transportation rate" is provided under Section 2(zn) of the PNGRB Act, in the following terms: *"in relation to common carrier or contract carrier or a city or local natural gas distribution network, means such rate for moving each unit of petroleum, petroleum products or natural gas as may be fixed by regulations"*
- (f) Section 21(2) of the PNGRB Act states that: "An entity other than an entity authorized to operate shall pay transportation rate for use of common carrier or contract carrier to the entity operating it as an authorized entity"

viii. After considering the provisions of the PNGRB Act, it would be relevant to note the PNGRB's own regulations in respect of the concepts of 'shipper', 'transporter' and 'marketeer' of gas, the utilization of the common carrier capacity and the applicability of transportation tariff in respect of such utilization.

- (a) The distinction between the meaning of terms "shipper", "transporter" and "marketeer" of gas can be clearly understood from Regulations 2(1)(p), 2(1)(s) and 2(1)(v) of the PNGRB (Access Code for Common Carrier or Contract Carrier Petroleum and Petroleum Products Pipelines) Regulations, 2016 which provides:
(p) "marketeer" means an entity dealing with the marketing or trading of natural gas; (s) "Shipper" means an entity and also includes a consumer who intends to utilize the capacity in the pipeline for transmission of gas."

(v) "transporter" means an entity authorized by the Board or authorized by the Central Government prior to the appointed date for laying, building, operating or expanding a natural gas pipeline;

(b) Further, the meaning of "marketing" is expressly provided under the PNGRB (Affiliate Code of Conduct for Entities Engaged in Marketing of Natural Gas and Laying, Building, Operating, or Expanding Natural Gas Pipeline) Regulations, 2008 ("herein after referred to as **Affiliate Code of Conduct**") as "the activity of selling or distribution of natural gas".

(c) Regulation 6 (a) of the PNGRB (Guiding Principles for Declaring or Authorizing Natural Gas Pipeline as Common Carrier or Contract Carrier) Regulations, 2009 (**hereinafter referred to as "Guiding Principles"**) provides the meaning and scope of common carrier pipelines and states that:

"A common carrier system implies that the capacity in a natural gas pipeline, over and above the entity's own requirement and capacity allocated on a contract carrier basis, shall be available to any other entity subject to the latter entering into a contract for transporting volume of natural gas normally for a period of less than one year, on such other terms and conditions as may be mutually agreed, and subject to the provisions of regulations notified from time to time under the Act and on payment of natural gas pipeline tariff as authorized under the Petroleum and Natural Gas Regulatory Board (Determination of Natural Gas Pipeline Tariff) Regulations, 2008".
[emphasis added]

(d) Regulation 5(6)(j) of the Authorization Regulations provides that:

"(i) the capacity of natural gas pipeline shall be an aggregate of the following, namely: (A) capacity requirements of the entity; (B) firm-up contracted capacity with other entities; and (C) at least thirty three percent of the sum of (A) and (B) as an extra capacity. (ii) the capacity mentioned at item (C) of sub-clause (i) shall be available for use as common carrier by any third party on open access and non-discriminatory basis..." [emphasis added]

(e) Therefore, it is at least 33% of capacity requirements of the entity + firm up contract capacity with other entities that would form the common carrier capacity of a pipeline. It is identified as Capacity (C) in terms of the Authorization Regulations. It is this capacity which was fixed by the PNGRB as common carrier capacity of 1.5 MMSCMD out of the 6 MMSCMD for UTNGPL by its letter dated 3 May 2011 in the present case.

(f) Regulation 14 of the Authorization Regulations reads as follows:

"(3) The authorized entity shall give wide publicity of the capacity available in the natural gas pipeline for use on common carrier or contract carrier basis to

encourage maximum utilization of the pipeline capacity and shall maintain information in this regard, on its official website, as specified in the relevant regulations on the access code."

(g) Under the PNGRB (Determining capacity of Petroleum, Petroleum products and Natural Gas Pipeline) Regulations, 2010 (**hereinafter referred to as “Determination of Capacity Regulations”**), using the methodology under Regulation 5 and the data generated thereunder, the PNGRB declares under Regulation 6 the ‘declared capacity’ of the pipeline to be available for shippers: *“The capacity so determined shall be declared by the Board as the declared capacity of pipeline system and specific sections and the same shall be available to the shippers or consumers”*. [emphasis added]

(h) Under Regulation 4(2) and 4(3) of the Determination of Capacity Regulations, under the heading "intent", the capacity so determined is used for declaring the pipeline as a common carrier and for determining the tariff of the pipeline in the following manner:

“4(2) - The capacity of the petroleum, petroleum products and natural gas pipeline so determined shall be used for- (a) declaring pipeline as common carrier or contract carrier under the relevant regulation on declaring pipeline as common carrier or contract carrier;

(c) determining the tariff for petroleum, petroleum products and natural gas pipeline as per the methodology or formulae defined under relevant regulations.

4(3) - The capacity of the petroleum, petroleum products and natural gas pipeline so determined shall be used for providing access to available capacity on non-discriminatory basis under the relevant regulations on access code.” [emphasis added]

(i) Under Regulation 4 of the PNGRB Access Code Regulations, it is stated that the available capacity of the pipeline that is available for use on common carrier or contract carrier basis in the following manner:

“Regulation 4(2) The transporter shall declare for each natural gas pipeline section, entry and exit point-wise design and available capacity of the pipeline and host the same on its web site on the 1st of every month in the prescribed manner and format specified at Schedule I and shall send this information to the Board and the same shall also be hosted by the Board on its website.

Regulation 4(3) The available capacity declared for the transporter under sub-regulation (2) shall be available for use on common carrier or contract

carrier basis or both and shall be allocated in line with the provisions under Regulation 12.”

- (j) Regulation 12 of the Access Code Regulations (Methodology for providing access) further elaborates this as follows:

"(1) The contracted capacity between a shipper and a transporter shall be for a gas quantity not exceeding the own firmed up capacity and aggregated volume contracted by the transporter for a period of more than a year.

(2) The excess 33% capacity shall be allocated on common carrier principle on first come first serve basis: Provided that in case any capacity out of the 33% excess capacity under sub-regulation (2) is available at any time due to non-existence of demand from any shipper, then, the same may be utilized either by the authorized entity itself or could be contracted for a period of more than a year subject to the stipulation that in the event of any requirement by another shipper for transportation of gas on a common carrier basis, the entity shall make available the required capacity to the shipper within a period of thirty days of such requirement."

Submissions of GAIL(India) Limited

- i. The pipeline i.e. Uran-Trombay Natural Gas Pipeline that has been in existence since 1978 is owned and operated by ONGC. This pipeline was upgraded replacing the original 18 inch line with a 20 inch line. Further, GAIL (India) Ltd. and ONGC had a Gas Sales Agreement dated 07.07.2006 valid till 7.07.2021. The gas sold by ONGC to GAIL is for onward further sale to designated five customers that includes MGL. In addition to sale of Gas, the GSA contemplates transportation charges. The price of Gas is not disputed. It is the applicability of transportation tariff that MGL is disputing in the present matter.
- ii. ONGC is not the Complainant in the present matter and the GSA dated 07.07.2006 signed between GAIL and ONGC is not the subject matter of issue in the present complaint.
- iii. The role of GAIL in so far as transportation charges is concerned is limited to that of an intermediary, who collects the transportation charges from the customers and reimburses the same to ONGC. This is unambiguously so stated and mutually agreed between GAIL and ONGC in the GSA dated 07.07.2006. The terms of the agreement are reproduced for convenience and ready reference:

"Article: 15 Price

“15.4 In addition to Price of Gas, Buyer shall pay transportation charges in respect of Gas supplies through pipelines owned, operated and maintained by the Seller as given in Schedule D.”

Article 17: Billing & Payment

17.3 In accordance with Article 15.4, all such transportation charges collected by the Buyer shall be paid to the Seller on a monthly basis within 10 days of the succeeding month....

.....Attached as Schedule D to the Gas Sales Agreement dated 7th July 2006 between Oil and Natural Gas Corporation Limited and GAIL...”

Details of pipelines owned, operated/maintained by ONGC on which transportation charges are being collected by GAIL and to be reimbursed to ONGC:

S1. No.	Asset/Plant	Line Segment
.....
4	Uran	Uran Trombay
.....

- iv. Article 15.4 begins with *“...In addition to Price of Gas, Buyer shall pay transportation charges ...”*. Thus, the transportation charges are payable in addition to the Price of Gas. Unlike the Price of Gas, for which ONGC has to raise an invoice on GAIL as per Article 17.1 to 17.2; transportation charges do not contemplate raising of invoices.
- v. A harmonious reading of the various terms/ Articles of the GSA leave no doubt that transportation charges have to be collected by GAIL and thereafter reimbursed to ONGC. Thus, insofar as transportation charges are concerned, GAIL is only an intermediary who collects the same from customers and reimburses the same to ONGC. Hence, the provisions of the GSA make it unambiguously clear that all such Transportation Charges are to be collected by the Buyer i.e. GAIL from the customers of gas namely M/s MGL, M/s. TPC, M/s. RCF, M/s. BPCL and M/s. HPCL and thereafter are reimbursable to ONGC. As stated, this GSA between GAIL and ONGC mentions that in addition to the Price of Gas, there shall be transportation charges in terms of Article 15.4, which were mutually agreed at Rs.12/per thousand SCM for the Uran Trombay pipeline segment.
- vi. Post passing of the PNGRB Tariff order dated 30.12.2013 by the Board, ONGC raised a debit note [i.e. on a retrospective basis] on GAIL for recovery of transportation tariff

with effect from 20.11.2008. GAIL, following its obligation to collect and reimburse raised a debit note on MGL.

- vii. MGL through various communications with GAIL kept protesting the debit notes raised by GAIL for payment of transportation tariff fixed by the Board w.e.f. 20.11.2008. While GAIL kept pursuing its demand for payment, MGL approached the Board in November 2014 seeking clarity on the issue. The Board, inter alia, conveyed that it could settle the dispute only on receipt of a complaint. Thereafter GAIL informed that it will encash the L/Cs of MGL leading MGL to file a complaint on 18.02.2015 with the Board.
- viii. By an interim order dated 04.03.2015, the Board had restrained GAIL from taking any coercive steps against MGL to enforce payment of the alleged outstanding amount provided the L/C was kept alive by MGL. The relevant portion of the interim order dated 04.03.2015 is reproduced hereunder:
".....In view of above, the GAIL (R-2) is directed not to take any coercive step to enforce payment of the said outstanding demand provided the petitioner (Complainant) maintains the value of the Letter of credit equivalent to this amount within a month from today and till then the party shall maintain status quo ..."
- ix. Thereafter, the Board passed an order dated 15.10.2015 dismissed MGL's complaint. Since the Appellate Tribunal was not functioning at that time, MGL filed a Writ Petition before the Hon'ble High Court of Delhi, being W.P (C) No. 10589/2015. During the pendency of the writ since the Tribunal was to become functional soon, the Hon'ble High Court vide order dated 30.11.2015 while sending the appeal to the Tribunal for deciding on merits; disposed of the petition, inter alia, with the direction that MGL will give an undertaking of its Board of Directors to pay GAIL the disputed amount if ultimately found due from MGL to GAIL. The relevant portion of the order is reproduced hereunder:
"..... D. The Petitioner to within three weeks submits to respondent no.2 GAIL (India) Ltd. An undertaking of its Board of Directors to pay to respondent no.2 GAIL (India) Ltd, the disputed amounts, if ultimately found due from the Petitioner to respondent no.2 GAIL (India) Ltd. ... "
- Thereafter the Appeal was decided and the matter was sent back to this Hon'ble Board. This Hon'ble Board then passed an order dated 18.03.2020, which was challenged in appeal.
- x. ONGC's contention that payment of transportation by GAIL is not dependent on charges that GAIL may receive from MGL or its other downstream customers is contrary to the terms of the GSA signed between ONGC and GAIL.
- xi. Moreover, ONGC is not the Complainant in the present matter. The subject matter of issues to be decided by the Hon'ble Board is the complaint filed by MGL and ONGC

(Respondent No.2) cannot seek to substitute itself to be the Complainant in the present case.

Submissions of ONGC Limited

- i. The Tariff determined by the Board through its Tariff Orders is squarely applicable on the Transportation of gas by ONGC from Uran Trombay for delivery to GAIL as the Uran Trombay Pipeline is declared as a Common Carrier/ Contract Carrier by the Board. Further, no objections have been raised by MGL or GAIL against the declaration of Uran Trombay Pipeline as Common Carrier within stipulated time period.
- ii. ONGC is not carrying gas for its 'own use or 'own requirement' and therefore, transportation charges are payable by GAIL.
- iii. In terms of Clause 15.4 of the GSA, GAIL is required to pay transportation charges in addition to gas price. The price of gas is fixed by the Ministry of Petroleum and Natural Gas (**hereinafter referred to as "MoP&NG"**) at the landfall point (which is Uran Plant in this case) and does not include transportation charges.
- iv. The Board vide letter dated 04.12.2009 clarified to ONGC that in terms of Regulation 2(f)(i) of the Authorisation Regulations, dedicated pipeline means "*dedicated pipeline laid to transport natural gas to specific customer to meet his requirement and not for resale.*" The Board further brought out that in case of Uran Trombay Pipeline gas is being resold further to downstream consumers by GAIL and therefore, ONGC was requested to apply in the category of Common carrier under Regulation 17 of the Authorisation Regulations. Accordingly, ONGC applied for authorisation of Uran Trombay pipeline as Common Carrier/ Contract Carrier pipeline on 30.06.2010. The Board vide decision dated 03.05.2011, declared the new 20" Uran Trombay Pipeline as a 'Common Carrier' under the Provisions of the PNGRB Act and no objection was raised by MGL and GAIL. Further, no complaint was raised by MGL for declaration of the Uran Trombay Pipeline as 'Common Carrier', thus the question of whether the Uran Trombay Pipeline is a 'Common Carrier' or not, cannot be raised by MGL and GAIL at this stage.
- v. The Hon'ble APTEL in its Judgement dated 20.09.2019 in Para 43, 46 has already taken note that the Uran Trombay Pipeline is a 'Common Carrier' as no party has contested this position.
- vi. The PNGRB Act and the regulations framed thereunder do not define the term 'own' gas with respect to Natural Gas Pipelines and there is no such separate class for the purpose of application of transportation rate/charges determined by the Board under PNGRB Act. Such transportation rate/charges are to be applied in a non-

discriminatory manner for transportation of gas, irrespective of ownership, through the gas pipeline of the nature such as Uran Trombay Pipeline.

- vii. The PNGRB Act does not define or use the term 'own' gas but the term used in the Act is own requirement. The proviso to Section 21 of the Act deals with Natural Gas Pipeline and there is no concept of Right of first use for its own requirement. The last part of the proviso to Section 21 of the PNGRB Act states that "shall have right of first use" and not "shall have right of first use for its own requirement". There is an important difference between the two expressions. The expression "for its own requirement" used in the main provision of sub section (1) of Section 21, is in addition to shall have right of first use and has a significance and need to be given some meaning. Further, another important differentiation between the main part of Section 21(1) and the proviso is the reference to condition of entities to comply with the affiliate code of conduct as may be specified by regulations applies to Natural Gas Pipeline dealt in the proviso and not entities under main part of Section 21(1) of the PNGRB Act. The Term Affiliate code of conduct is defined in Section 2(a) of the PNGRB Act as under:

"(a) "affiliate code of conduct" means the code of conduct governing entities engaged in storage, transmission, distribution, marketing and sale of natural gas under sub-section (1) of section 21"

- viii. The Regulation 4(2) of the Affiliate Code of Conduct states that the Natural Gas transported us to be divided in two categories i.e. regulated activity, when gas is being transported on Common Carrier basis and unregulated activity when entity itself or its affiliate market the Natural Gas.
- ix. The definition of the term "Common Carrier" in Section 2(j) of the PNGRB Act deals with Common Carrier Pipeline and makes a specific exclusion only to the pipeline laid down to supply: (a) petroleum products or natural gas to specific consumer; and (b) crude oil. It is further encompasses in the explanation Contract Carrier capacity in certain eventualities. Accordingly, common carrier and Contract Carrier, apart from the two specific exclusions, are only recognised in the definitions in regard to Natural Gas Pipeline.
- x. The Uran Trombay Pipeline with 6 MMSCMD Capacity has been declared as common Carrier Pipeline with Common Carrier capacity of 1.5 MMSCMD in terms of Authorisation Regulations. Thus, as explained above, the remaining 4.5 MMSCMD capacity will consist of: (A) Capacity requirement of the entity i.e. ONGC (if any), and (b) firmed -up contracted capacity with other entities.
- xi. GAIL is required to pay transportation charges in addition to gas price in accordance with the clause 15.4 of the GSA. The GSA, inter- alia provides that the gas purchased by GAIL shall be transported from Uran to Trombay by ONGC and delivered to GAIL at Trombay. Clause 15.4 of the GSA provides as follows:

“Clause 15.4:

“In addition to Price of GAs, Buyer shall pay transportation charges in respect of Gas supplies through pipelines owned, operated and maintained by the Seller as given in Schedule-D.”

- xii. Prior to the declaration of the Uran Trombay Pipeline as ‘Common Carrier’, GAIL was paying ONGC the price of gas and in addition thereto, the transportation charges for transportation of the gas from Uran to Trombay for the old 18” pipeline, as agreed upon and recorded in the GSA. There was no objection raised at that time that such transportation charges were not payable in addition to the gas price.
- xiii. The Price of the gas produced from the nominated blocks of Natural Oil Companies has been notified from time to time by the Government of India.
- xiv. In terms of Section 22 read with the Regulations notified therein, the Board determines the Tariff with reference to the whole capacity of the Natural Gas Pipeline and with reference to part capacity of capacity of the Total Gas Pipeline minus the capacity for own use. If the own use is to be read outside the purview of the transportation rate determined by the Board in terms of Section 22 of the PNGRB Act, it will lead to complete distortion of non-discriminatory open access. The own use prices and extent can be manipulated to distort and implement discriminatory open access.
- xv. The Board determined provisional tariff on 30.12.2013 as INR 5.70/MMBTU (equivalent to INR 226/MSCM) with retrospective effect from 20.11.2008. Further, as per Regulation 5 of the Tariff Regulations, entity shall charge Initial Unit Natural Gas Pipeline tariff “on account basis” from the date of commissioning of Natural Gas Pipeline or date of authorisation by the Board of Natural Gas Pipeline or till the Board provisionally fixes the initial unit Natural Gas pipeline Tariff.

Issues framed by the Hon’ble APTEL

- i. **Issue: Whether the transportation tariff determined under Tariff Order dated 30th Dec. 2013 or any further tariff orders passed by PNGRB has any application to Gas by ONGC from Uran to Trombay for delivery to GAIL at Trombay, as it is the transportation of ONGC's "own" Gas;**

Contentions of the parties:

- 21. It is contended by the Complainant that, the "transportation tariff" fixed by the Board only applies to "Common carrier" or "contract carrier" and would not apply when the concerned pipeline is being used by the pipeline-owning entity for selling/marketing of its own gas. There is no third-party “shipper” of gas in the present situation which may be utilizing the UTNGPL for transporting its gas i.e. gas owned by the shipper. Therefore, the common carrier pipeline

capacity of the UTNGPL is not being utilized by any third-party shipper. The common carrier capacity declared by the Board [which is minimum of 33% of own requirement and contract capacity identified as Capacity (C)] is available for use by third parties on a non-discriminatory open access basis. Consequently "transportation tariff" will apply only for the usage by a third-party shipper of the "common carrier capacity" of the pipeline.

22. It is submitted by Respondent No.1 that the role of the GAIL (India) Ltd. in so far as transportation charges is concerned is limited to that of an intermediary, who collects the transportation charges from the customers and reimburses the same to ONGC. This is stated and mutually agreed between GAIL and ONGC under Article 15 and Article 17 of GSA dated 07.07.2006.
23. On the contrary, the Respondent No. 2 submitted that, the Regulation 4 of the Tariff Regulations makes it clear that for determining the tariff, both the entity's requirement and firmed up capacities are considered and the same tariff shall be determined as per Schedule A of Regulation 4 Tariff Regulations. The natural gas which is produced by ONGC at its offshore fields is being supplied by ONGC to GAIL in terms of Government allocation for further supplies by GAIL to its downstream customers as per the Gas Sales Agreement dated 07.07.2006. Thus, gas is moving beyond Uran in terms of Government allocation and ONGC is entitled to charge from GAIL a contractual transportation charge, in addition to the price of gas in terms of article 15.4 of the GSA.

Deliberations and Analysis

24. We have pursued the definitions of "Common Carrier," "Contract Carrier" and "Transportation Rate" as well Section 20, Section 21 and Section 22 of the PNGRB Act, 2006, which are extracted hereunder:

"Section 2(j) of the Act: *"common carrier" means such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity as the Board may declare or authorise from time to time on a non-discriminatory open access basis under sub-section (3) of section 20....."*

"Section 2(m): *"contract carrier" means such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity pursuant to firm contracts for at least one year as may be declared or authorised by the Board from time to time under sub-section (3) of section 20."*

“Section 2(zn):”*transportation rate”, in relation to common carrier or contract carrier or a city or local natural gas distribution network, means such rate for moving each unit of petroleum, petroleum products or natural gas as may be fixed by regulations.”*

“Section 21:

21. Right of first use, etc :

(1).....

(2) 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.

(3).....”

“22. Transportation tariff:-

(1) Subject to the provisions of this Act, the Board shall lay down, by regulations, the transportation tariffs for common carriers or contract carriers or city or local natural gas distribution network and the manner of determining such tariffs.

.....”

- 25. The term ‘own gas’ has not been defined either in the PNGRB Act or the Regulations and the only term referred to in the Act is ‘right of first use’ under Section 21 of the Act. The term ‘own gas’ may be referred to in relation to the ownership of gas from the perspective of sale and purchase of gas and in the context of transportation. It is further pertinent to mention that the transportation tariff is determined by the Board in terms of the Tariff Regulations 2008 and the methodology of determination of tariff is laid down in Schedule A of the Tariff Regulations which clearly demonstrates that the tariff is determined by the Board in respect of the entire pipeline after taking into account various parameters like Return on Total Capital Employed, Operating Costs (over the entire economic life of the pipeline) and the volumes of natural gas (sum total of firmed up contract capacity and booked common carrier capacity or seventy five percent of declared capacity of the natural gas pipeline whichever is higher, is considered for the determination of tariff).
- 26. The Regulation 4 of the Tariff Regulations makes it clear that for determining the tariff, both the entity’s requirement and firmed up capacities are considered and the same tariff shall be determined as per Schedule A of Regulation 4. Therefore, it is incorrect to say that tariff determined by PNGRB would be applicable only for transportation of third-party gas and not on transporter’s own marketed gas.

27. The proviso to Section 21 (1) of the Act makes it mandatory on the part of the entities, which are engaged in both marketing of natural gas and laying, building, operating or expanding a pipeline for transportation of natural gas, to comply with the Affiliate Code Regulations. The Regulations 4 (1), 5, 8 and 11 of the Affiliate Code Regulations are pertinent for the present case and they are being reproduced hereunder:

“Regulation 4: Scope of affiliate code of conduct

1) The affiliate code of conduct referred to in these regulations and hereinafter referred to as the “code” sets out the manner of the-

(a) Interactions between the entity and its affiliate for the purposes of carrying out the activities of both transportation and marketing of natural gas based on the principle of “at an arm’s length”, or

(b) Engagement in both the activities of transportation and marketing of natural gas by the entity on its own by following the principle of “at an arm’s length.”

“Regulation 5: Degree of accounting separation

(1) The entity shall ensure accounting and financial separation by maintaining separate financial records and books of accounts in respect of the regulated activity in cases where-

(a) the affiliate of the entity is engaged or proposes to engage in the marketing of natural gas; or

(b) the entity on its own or proposes to engage in both the activities of transportation and marketing of natural gas; or

(2) The entity shall ensure that while undertaking the accounting and financial segregation in respect of the regulated activity under sub- regulation (1), both direct and indirect costs are fully allocated to the regulated activity in a transparent manner and without any cross- subsidization of costs with any other non-regulated activity.

(3) The entity shall adhere to the accounting standards and guidelines of the Institute of Chartered Accountants of India as well as the Companies Act, 1956 and the Board may, if it deems fit, examine the appropriateness of the basis of cost allocation followed by the entity.”

“Regulation 8: Non-discriminatory access to services

(1) The entity shall treat all other entities engaged in natural gas marketing on the same non-discriminatory basis as it treats its own affiliate.

(2).....

(3) The entity shall apply the natural gas pipeline tariff authorized under the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand

Natural Gas Pipelines) Regulations, 2008 to an affiliate in the same manner as is applicable to similarly placed non-affiliates.

(4).....

(5).....

(6).....”

“Regulation 11: Consequences of default and termination of authorization procedure.

The entity shall abide by all the provisions under these regulations and any failure in doing so may lead to termination of the authorization in the manner specified in the Petroleum & Natural Gas Regulations (Authorizing Entities to Lay, build, Operate, or Expand Natural Gas Pipelines) Regulations 2008 including any other penal action under the Act.”

28. In addition to the above, we have also examined the scope of Article 15.4 and 19.1 of GSA dated 07.07.2006 entered between Respondent No. 1 and 2, which are extracted as under:

***Article 15.4** “In addition to Price of Gas, Buyer shall pay transportation charges in respect of Gas supplies through pipelines owned, operated and maintained by the Seller as given in Schedule-D.”*

***Article 19.1: Title and Risk:** Title and risk in the Seller’s Gas shall pass from Seller to Buyer at the offtake pipeline flange at inter-connection of seller’s Gas gathering and delivery system and Buyer’s pipeline at the **Delivery Point**. Upon delivery at the Delivery Point, Buyer shall be deemed to be in **exclusive control and possession** of Seller’s Gas and shall be fully responsible for and shall indemnify Seller against any damages or injury **resulting from the transportation, handling or use of the Seller’s Gas.**”*

29. In terms of Article 15.4, the Respondent No. 1 shall have to pay the transportation charges in addition to the price of Gas. Further, the price of the aforesaid gas is fixed by MoP&NG and is fixed at landfall point at Uran. As per Article 19.1 the title and risk in the Seller’s Gas shall pass from Seller to Buyer at the offtake pipeline flange at inter-connection of seller’s Gas gathering and delivery system and Buyer’s pipeline at the Delivery Point. Therefore, the title and risk of the gas are explicitly passed from Respondent no. 2 to Respondent no. 1 at the delivery point at Trombay.

30. Further, upon delivery at the delivery point, GAIL is deemed to be in exclusive control and possession of seller’s gas. The crucial point which we observe is that the Buyer i.e. Respondent No. 1, upon delivery shall be fully responsible for and shall indemnify Seller against any damages or injury resulting from the transportation, handling or use of the Seller’s Gas. The said clause is an indemnity clause which is infused in the Contract through which the

Respondent No. 1 shall be indemnifying the damages and injury resulting from the actions of the Respondent no. 2 in the cases of transportation, handling or use of the Seller's Gas. The clauses of the said GSA are pre-determined and agreed clauses between the Respondents constituting a contractual obligation between GAIL and ONGC.

31. The Article 5 of the aforesaid GSA states that, the delivery of seller gas is to be made at the buyer's delivery point and Article 7.1 makes it clear that the buyer shall make all the efforts "to accept" all the seller's nomination and deliveries. Thereafter, Article 8 further prescribe that GAIL shall take the above quantity or pay for 90% of the adjusted annual quantity. In Article 8.3 it is prescribed that if GAIL does not take the aforesaid 90% of the adjusted annual contract quantity, then GAIL as the buyer should pay the average price of gas in that financial year on the quantity of seller gas calculated. Therefore, the aforesaid gas is brought and sold on the date of the contract and ONGC merely transmits the pre-purchased gas through its pipelines from Uran to Trombay, the price of which is fixed by MoPNG and is fixed at landfall point i.e. Uran.
32. In view of the above, it is an established fact that apart from MGL, there are 5 more customers to whom gas is being supplied through UTNGPL and out of them, four (4) are paying the transportation tariff as applicable tariffs. The Complainant is the only entity resisting to pay the transportation charges for the gas being supplied by GAIL. However, as the gas supply is necessary for the CGD customers, the Respondent No.1 continued to supply the gas to the Complainant despite the fact that the Complainant was only paying the gas prices and not the pipeline tariff charges.
33. We have observed that, if we look into the entire perspective of the case, ONGC did not amend the agreement after the authorisation of the UTNGPL as a Common Carrier. Even though, the demand note was raised by ONGC to GAIL and forwarded by GAIL to MGL in the year 2014. Neither GAIL nor ONGC had taken any serious/concrete efforts to recover the tariff from MGL. There were sufficient contractual obligations, which can be enforced by the parties, however due to lack of seriousness and idle approach of the parties, this dispute has led to cumulation of huge amount on part of MGL, which could have been avoided by ONGC and GAIL at the initial stage. Further, we have also observed that, in order to resolve the dispute between GAIL (India) Limited and M/s Rashtriya Chemicals & Fertilizers Ltd. regarding UTNGPL charges from 20.11.2008 till 31.01.2016, a committee of Secretaries under Administrative Mechanism for Resolution of Dispute (AMRD) comprises of Secretary (Law), Secretary (Department of Fertilizer) and Secretary (P&NG) had been constituted. The Committee in its meeting held on 17.06.2021, concluded the matter and directed RCF to pay to GAIL within one month UTNGPL Tariff as per the PNGRB's Tariff Order for the period from 30.12.2013 to 31.01.2016.

34. Further, we have observed that, initially ONGC was charging the Tariff from GAIL @ Rs. 12/KSCM for old Uran Trombay for transporting gas from Uran (land fall point) to Trombay (delivery point) for onward supply to end consumers. On replacement of the old pipeline with a new pipeline which was commissioned on 30.05.2008, ONGC worked out the transportation tariff of Rs. 636/KSCM considering the economic life of pipeline as 10 years. However, ONGC continued billing @ Rs.12/KSCM to GAIL till 2014. ONGC was continued to raise the debit note @ Rs. 12/KSCM and which was forwarded by GAIL to MGL. Therefore, cost recovery including transportation charges was presumed to be recovered from MGL's CNG and PNG Customers.
35. Thereafter, in year 2012, ONGC in terms of Tariff Regulations submitted the details to the Board and accordingly, the Board in accordance with the provisions of the Act and extant Regulations vide the Tariff Order dated 30.12.2013, determined the tariff of UTNGPL as Rs.226/MSCM w.e.f. 20.11.2008. The Respondent No.2, accordingly, raised the debit note of the revised tariff of Rs.226/KSCM to be paid with effect from 20.11.2008, which was disputed by the Complainant.
36. In view thereof, we are of the considered view that ONGC kept raising invoices on old tariff and never claimed revised tariff i.e. Rs. 636/KSCM or Rs. 226/KSCM till February 2014, which if raised timely MGL would have collected the same from their customers or made provisions for the said amount till the time tariff was decided by the Board. This backdrop on part of ONGC, led to the cumulation of huge outstanding amount, which could have been avoided by ONGC. However, due to this MGL could not have raised and recovered the same from its customers for the period from December 2008 to March 2014. Therefore, ONGC now estopped for making the claim, based on the Invoice raised for the period from 20.11.2008 till March 2014 without even raising invoices on revised tariff and having continued raising invoices on old tariff. The claim for the said period is not tenable as it will be unjust or unfair for GAIL/MGL to pay revised tariff from 2008 till March 2014 being irrecoverable from the Customers.
37. It is further observed that, the revised agreement has been executed in the year 2021 between ONGC and GAIL wherein Uran is shown as a delivery point in place of Trombay and there is no dispute between the parties to the case in this regard.
38. A conjoint reading of the above provisions makes it abundantly clear that no cross-subsidization or discrimination or preferential treatment is permitted in so far as applicability of transportation tariff, determined by the Board. The same transportation tariff is payable irrespective of the capacity (common/carrier/contract carrier/own gas) in which the gas being

transported through the natural gas pipeline. We have also perused the submissions made by all the parties, we are of the view that the nature of the gas, whether own gas/common carrier/contract carrier has got no relevance to the determination of tariff and the entire capacity of the pipeline (irrespective of the nature of gas) is taken into consideration for the purpose of determination of tariff. The tariff is an ongoing process, determined by the Board in terms of Tariff Regulations 2008 after taking into consideration the entire capacity of the pipeline and the same is applicable to the entire volume of gas being transported through the natural gas pipeline, irrespective of the fact whether the gas is being transported in the capacity of common carrier/contract carrier/own gas.

39. In view thereof, we are of the considered view that, the Board empowered to regulate the transportation rate for common and contract carriers for transportation of petroleum, petroleum products and natural gas. Thus, the PNGRB Act provides fixation of transportation rate for the entire pipeline basis and does not distinguish between any ownership of the gas. Accordingly, the tariff fixed by PNGRB is applicable for any gas transported through the pipeline. In view of the above context, it can be concluded that the tariff is determined by the Board in exercise of its statutory powers and the authorized entity becomes bound to charge the tariff for transportation that takes place through that natural gas pipeline. There is catena of Judgements which supports the fact that, any contract, that may have been entered into between the entities, must give way to the tariff determined by the Board.

ii. Whether the PNGRB fixed transportation tariff can be imposed retrospectively with effect from 20 November 2008;

Contention of the parties:

40. It is the contention of the Complainant that ONGC cannot raise the demand for transportation tariff for UTNGPL retrospectively with effect from 20.11.2008 and in terms of Regulation 5 of the Tariff Regulations, ONGC was required to charge the initial pipeline tariff on an “on account basis” from 2008 (i.e. from the commission of the UTNGPL) and then the same was to be adjusted after fixation of provisional tariff by the PNGRB. In the present case, ONGC failed to charge the initial unit pipeline tariff from 2008. When ONGC never charged that transportation tariff on an “on account basis”, it had waived its right to retrospectively charge the tariff when it was provisionally fixed by the Board in the Tariff Order.

41. On the other hand, the Respondent No. 2 submitted that as per Regulation 5 of the Tariff Regulations, entity shall charge Initial Unit Natural Gas Pipeline tariff “on account basis” from the date of commissioning of Natural Gas Pipeline or date of authorisation by the Board or till the Board provisionally fixes the initial unit Natural Gas pipeline Tariff. In accordance with the proviso to the Regulation 5 of the Tariff Regulations, ONGC sought “on account basis” tariff of UTNGPL at the rate of INR 650.46/MSCM (INR 19.75/MMBTU) from GAIL.

However, GAIL neither paid “on account basis” tariff nor raised any objections to ONGC’s application before the Board.

Deliberations and Analysis

42. Before proceeding further to decide the issue, it is pertinent to mention that the Board in its Order dated 10.08.2022 passed in the matter of *Assam Gas Company Limited (Legal/12/2022)* has already dealt with the above said issue. The relevant provisions of the PNGRB Act, 2006 and extant Regulations examined, are extracted as under:

Section 11(e) regulate, by regulations,- (i) access to common carrier or contract carrier so as to ensure fair trade and competition amongst entities and for that purpose specify pipeline access code; (ii) transportation rates for common carrier or contract carrier; (iii) access to city or local natural gas distribution network so as to ensure fair trade and competition amongst entities as per pipeline access code;”

“22. Transportation tariff:-

(1) Subject to the provisions of this Act, the Board shall lay down, by regulations, the transportation tariffs for common carriers or contract carriers or city or local natural gas distribution network and the manner of determining such tariffs.

(2) For the purposes of sub-section (1), the Board shall be guided by the following, namely:- (a) the factors which may encourage competition, efficiency, economic use of the resources, good performance and optimum investments;

(b) safeguard the consumer interest and at the same time recovery of cost of transportation in a reasonable manner;

(c) the principles rewarding efficiency in performance;

(d) the connected infrastructure such as compressors, pumps, metering units, storage and the like connected to the common carriers or contract carriers;

(e) benchmarking against a reference tariff calculated based on cost of service, internal rate of return, net present value or alternate mode of transport;

(f) policy of the Central Government applicable to common carrier, contract carrier and city or local distribution natural gas network.”

Regulation 2 Definitions.

(e) “initial unit natural gas pipeline tariff” means the unit natural gas pipeline tariff determined for a period commencing from-

(i).....

(ii) the date of coming of the natural gas pipeline within the purview of these regulations in any financial year and ending on the last day of that financial year in

case the natural gas pipeline is commissioned before the notification of these regulations;

.....”

(g) “natural gas pipeline tariff” means the unit rate of tariff for a natural gas pipeline (excluding statutory taxes and levies) in rupees per million British Thermal Units (Rs. /MMBTU) for transport of natural gas;

“Regulation 3 of the Tariff Regulations:

These regulations shall apply to an entity-

(1) authorized by the Central Government under regulation 17 of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build Operate or Expand Natural Gas Pipelines) Regulations, 2008 for laying, building, operating or expanding a natural gas pipeline before the appointed day;.....”

“5. Form for data submission by entity for determination of natural gas pipeline tariff.

Every entity shall submit to the Board the financial costs and other data in the form at Attachment 1 of Schedule A, if, as on the day of the notification of these regulations, the natural gas pipeline –

(1) is not in operation, then at least six months before the likely date of commissioning of the natural gas pipeline, or within ninety days of the date of notification of these regulations, whichever is later;.....”

(2).....

[Provided further that the initial unit natural gas pipeline tariff shall be provisionally fixed by the Board within six months of receipt of the relevant tariff data from the entity after which the entity shall carry out adjustments with a retrospective effect with the customers for the difference between the initial unit natural gas pipeline tariff that the entity had so charged and that provisionally fixed.]”

6. Miscellaneous. *If any question arises as to the interpretation of these regulations, the same shall be decided by the Board.*

43. Section 11 (e) (ii) the Act empowers and mandates the board to regulate, by regulations, inter alia transportation rates for common carriers or contract carriers. Further, Section 22 of the Act, *inter alia*, empowers and mandates the Board to lay down by regulations, the transportation tariff for common carriers and contact carrier, and the manner of determining such tariff.

44. In pursuance to the above, the Regulation 3 of the Tariff Regulations stipulates that the Tariff Regulations shall apply to “*an entity authorized by the Central Government under regulation 17 of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008 for laying, building, operating or expanding a natural gas pipeline before the appointed day.*” Further, Regulation 1(2) of the Tariff Regulations stipulates that the Tariff Regulations “*shall come into force on the date of their publication in the Official Gazette*”.
45. The stated legislative object in enacting the Act was to bring all entities that refine, process, store, transport, distribute, market and sell notified petroleum, petroleum products and natural gas within the purview of the Board. The fixation of tariff under the Tariff Regulations is undertaken with specific reference to the pipeline in issue, and accords appropriate weight to the circumstances of the specific pipeline whose tariff is being determined. The Act and the Tariff Regulations promulgated thereunder do not envisage or prescribe differential treatment for pipelines designed and commissioned prior to the coming into force of the PNGRB Act and/or the Tariff Regulations (i.e., prior to 01.10.2007/20.11.2008) and pipelines commissioned thereafter. To the contrary, the Act was enacted to inter alia establish a statutory body to regulate the refining, processing, storage, transportation, distribution, marketing and sale of notified petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country. The Act empowers the Board to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to promote competitive markets and for matters connected therewith or incidental thereto. The main objective of Tariff determination is to ensure that the consumer interest is protected while the carrier/transporter gets back its rate of return.
46. The PNGRB Act was enacted with a power to fix transportation rates and accordingly entities required to submit their data for fixation of tariff. The Board fix initial tariff for entire economic life based upon the future capex and opex to be incurred during the period and capacity/ volumes flows in pipeline. During subsequent review after 5 years, the Board again review these numbers and true up these numbers as per actuals, accordingly the tariff fixed for subsequent years is adjusted. It is worthwhile to mention that, in present case, the Commercial activities for transportation of Gas have been continuing since inception and therefore the Tariff has already accrued to be paid to the transporter.
47. It is a settled proposition of law that all laws are deemed to apply prospectively unless either expressly specified to apply retrospectively or intended to have been done so by the

legislature. The latter would be a case of necessary implication and it cannot be inferred lightly. Therefore, the contention of the Complainant that the Tariff so determined cannot be applied retrospectively is devoid of any merit. Further, there is always a presumption in favour of a statute that, a law passed by the legislature is good law till it is declared as unconstitutional and struck down by a competent Court or till it is repealed.

48. As per the discussion in foregoing paras, it may be concluded that the Tariff Regulations, 2008 succinctly provides for a procedure where the Board has the power to determine the tariff from the date of notification of Tariff Regulations, 2008. Further, the Regulations provides that in case of dispute or interpretation of the Regulations, the Board will be the final arbiter to decide the same. There is no mention in the said Regulations that the Tariff will be applicable only after the date of authorisation accepted in favour of the entity. The Regulations having been framed under Section 61 of the Act, which came into force on 01.10.2007. The Act nowhere restrict the power of the Board to determine the Tariff from the date of the notification of the Tariff Regulations. It is needless to say that there are many laws which have retrospective operation and same is held to be valid as long as they don't interfere with Justice and fair play.
49. Therefore, in view of the above deliberations, it can be concluded that the Transportation Tariff can be levied from the date of notification of Regulations. However, in present case, we are of the view that, since the tariff invoices were never raised to the customers and considering the facts and circumstances of the case, we opine that it is not just and fair to collect the transportation charges from customers w.e.f. from 2008 for the period 2008-2013, as discussed in foregoing paras 34, 35, 36 while deliberating the issue no.1, as it will affect the interest of the customers and against the spirit and object of the PNGRB Act.

iii. Did the Uran to Trombay pipeline be declared by way of a notification to be a Common Carrier in terms of the Act and the Regulation.

Contention of the parties:

50. It is alleged by the Complainant that under the PNGRB Act, there is no power given to the PNGRB to regulate a "dedicated pipeline" or a pipeline laid to supply natural gas to a specific consumer, much less to declare a pipeline as such. Hence, the requirement introduced in the Regulations *de hors* the PNGRB Act for a declaration would essentially be void.

Deliberations and Analysis

51. In order to decide the said issue, it is important to highlight the background of the case. The subject pipeline was commissioned in 1978-1979. The Respondent No.2 initially applied before the Board for declaration of UTNGPL as a dedicated pipeline. However, the Uran-

Trombay pipeline did not conform to the requirement of being a dedicated pipeline, as contained in Section 2(f) of the Authorization Regulations and fell in the category of a Common Carrier pipeline. As in the case of UTNGPL, the gas being transported by ONGC to GAIL from Uran to Trombay which was being further transported and resold by GAIL to other customers.

52. Subsequently, on the basis of application dated 30.06.2010 received from ONGC, the Board, in accordance with Regulation 10 (3) of the Guiding Principles Regulations and Regulation 17 (5) of the Authorization Regulations, declared the UTNGPL as a common carrier, vide decision dated 03.05.2011. It is pertinent to mention that, neither MGL nor GAIL has challenged the said declaration of UTNGPL as a Common Carrier. In this regard, the Hon'ble APTEL in its Judgement dated 20.09.2019 passed in Appeal No. 147/2019, has also observed that:

“46. The Uran-Trombay pipeline is a common carrier pipeline owned and operated by ONGC which no party has contested to. ONGC is entitled to claim transportation tariff from the shippers/customers of the gas as fixed by the Regulator Board for carrying the shippers'/customers' gas. The PNGRB Act, 2006 also entitles ONGC to transport its own gas for its own requirement as the first right user. Since the Uran-Trombay pipeline is declared as Common Carrier, there needs to be at least one more entity to use the pipeline as shipper/customer while the transporter remains the ONGC. It is also understood that while ONGC can claim the transportation tariff from a third party user of its common carrier line, it cannot fix or claim the price that the shipper collects from its customers.”

53. Since it was the entity itself that had *suo-moto* applied for having the natural gas pipeline declared as a common carrier, the Board resorted to the procedure envisaged under Regulations 10(3) and 17 (5) of the NGPL Authorizing Regulations and declared UTNGPL as a common carrier natural gas pipeline vide its decision dated 03.05.2011. Thus, UTNGPL validly and legally been declared as a Common carrier by the Board in accordance with the provisions of the PNGRB Act and extant Regulations.
54. In view of the above arguments and deliberations, all the issues answered accordingly. The transportation charges from Uran to Trombay is to be payable in accordance with the Tariff fixed by the Board from time to time, however considering the facts and circumstances of the case as discussed in foregoing paras, we opine that it is not just and fair to collect the transportation charges from customers for the period 2008-2013, as it will affect the interest of the customers and against the spirit and object of the PNGRB Act.

Conclusion

55. To sum up, the issue raised is answered as follows:

- a. The pipeline Uran-Trombay Natural Gas Pipeline has been in existence since 1978 and is owned and operated by ONGC. This pipeline was upgraded replacing the original 18-inch line with a 20 inch line. The Board vide decision dated 03.05.2011, declared the new 20” Uran Trombay Pipeline as a ‘Common Carrier’ under the provisions of the PNGRB Act and no challenge was made to it by anyone the least by MGL and GAIL, parties to the case. By this Act, MGL and GAIL are now estopped from challenging the declaration of the Uran Trombay Pipeline as ‘Common Carrier’.
- b. The transportation tariff is determined by the Board in terms of the Petroleum and Natural Gas Regulatory Board (Determination of Natural Gas Pipeline Tariff) Regulations, 2008 (**hereinafter referred to as the “Tariff Regulations”**). The methodology of determination of tariff is laid down in Schedule A of the Tariff Regulations which reflects the manner of determination of the tariff in respect of the entire pipeline after taking into account various parameters like Return on Total Capital Employed, Operating Costs (over the entire economic life of the pipeline) and the volumes of natural gas (sum total of firmed up contract capacity and booked common carrier capacity or seventy five percent of declared capacity of the natural gas pipeline whichever is higher, is considered for the determination of tariff).
- c. The comments of stakeholders were not invited at the stage of determination of the provisional unit natural gas pipeline tariff [determined vide Tariff Order dated 30.12.2013] for the Uran-Trombay pipeline as there was no provision for public consultation provided at that time under Regulation 4 of the Tariff Regulations, 2008 [dealing with the determination of natural gas pipeline tariff].
- d. The Board pursuant to the judgment dated 06.01.2014 passed by Hon’ble Tribunal in Appeal No. 222 of 2012 titled as *Reliance Industries Limited vs PNGRB*, whereby the Board was directed by this Hon’ble Tribunal to frame necessary Regulations providing a fair opportunity to the consumers and the public to participate in the tariff determination proceedings, the Tariff Regulations, 2008 were amended on 27.02.2014, vide the PNGRB (Determination of Natural Gas Pipeline Tariff) Second Amendment Regulations, 2014, whereby Regulation 4 of the Tariff Regulations, 2008 was amended to specifically provide for and incorporate a public consultation process, prior to the determination of tariff, as part of which a public notice, containing a public consultation document (PCD), is webhosted on the website of PNGRB and an opportunity is provided to all the stakeholders (including the entity concerned) to submit their comments, which

are then forwarded to the entity and the entity is provided an opportunity to respond to the comments received. The Amendment Regulations, 2014, further provide that the Board may, if required, also invite all stakeholders, who have offered their comments, for discussions, and makes it incumbent for the Board to consider the comments of the stakeholders and the responses of the entity concerned before issuing the tariff order. The post-amendment procedure, requiring public consultation, was duly adhered to at the time of determination of the final unit natural gas pipeline tariff for the Uran-Trombay pipeline and it was after consideration of the comments received from the stakeholders, including Mahanagar Gas Limited and GAIL, that the Board passed the Final Tariff Order dated 01.11.2018. The main objective of Tariff determination is to ensure that the consumer interest is paramount while the carrier/transporter gets back its cost as well as reasonable rate of return on such cost. Further, the Regulation 3(1) read with Regulation 1(2) of the Tariff Regulations makes it clear that an entity authorized by the Central Government for laying, building, operating or expanding a natural gas pipeline before the appointed day comes within the purview of the Tariff Regulations upon regulations being notified by publication in the Official Gazette. The Regulation 6 of the Tariff Regulations, 2008 states that, any question arises as to the interpretation of Tariff Regulations, the same shall be decided by the Board. It is also pertinent to mention that, the Methodology for the determination of Tariff as prescribed under the Tariff order dated 30.12.2013 has not been challenged by the Complainant.

- e. As per the information made available by the parties, fresh agreement(s) have been entered between the parties for supply of gas and MGL has been paying the transportation charges fixed by the Board in terms of Tariff Regulations. Thus, the disputed period of Tariff is from 2008 to 2013 for the parties.
- f. The Gas is being supplied by GAIL to the MGL, TPC, RCF, BPCL and HPCL, the transportation charges are to be collected by the GAIL from the customers and thereafter reimbursed to ONGC.
- g. The Board has on various occasions directed the management of all involved entities to explore the possibility of a settlement, however, the parties failed to amicably settle the dispute despite the Dispute Resolution Mechanism had been therein the Agreements entered between the parties. It was also pointed out to the Board that the Tariff dispute in relation to the UTNGPL qua other parties have been resolved for all other entities except the Complainant/MGL herein.
- h. The term 'own gas' has not been defined either in the PNGRB Act or the Regulations and the only term referred to in the Act is 'right of first use' under Section 21 of the Act. The term 'own gas' may be referred to in relation to the ownership of gas from the

perspective of sale and purchase of gas and in the context of transportation. It is further pertinent to mention that the transportation tariff is determined by the Board in terms of the Tariff Regulations 2008 and the methodology of determination of tariff is laid down in Schedule A of the Tariff Regulations which clearly demonstrates that the tariff is determined by the Board in respect of the entire pipeline after taking into account various parameters like Return on Total Capital Employed, Operating Costs (over the entire economic life of the pipeline) and the volumes of natural gas (sum total of firmed up contract capacity and booked common carrier capacity or seventy five percent of declared capacity of the natural gas pipeline whichever is higher, is considered for the determination of tariff).

- i. The proviso to Section 21 (1) of the Act makes it incumbent upon the Board to make the entities, which are engaged in both marketing of natural gas and laying, building, operating or expanding a pipeline for transportation of natural gas, to comply with the affiliate code of conduct, as may be specified by regulations. The nature of the gas whether own gas/common carrier/contract carrier has no bearing to the determination of tariff and the entire capacity of the pipeline (irrespective of the nature of gas) is taken into consideration for the purpose of determination of tariff.

In view of the findings above, the following order is passed.

Order

In view of the above facts, circumstances and deliberations, we hereby direct the Complainant/MGL to pay the transportation charges as per the transportation tariff fixed by PNGRB for UTNGPL vide Tariff Order dated 30.12.2013 for the period from 1st January 2014 onwards, which shall be paid within two months of passing of this Order, failing which interest shall be paid by MGL at interest rate mentioned in the Gas Sales and Transportation Contract.

No order as to costs

All the issues are answered accordingly.

The copy of this order be sent to the Hon'ble APTEL.

PRONOUNCED IN THE OPEN COURT ON THIS 30TH DAY OF SEPTEMBER 2022.

Sd/-
Gajendra Singh
(Member-I)

Sd/-
Anjani Kumar Tiwari
(Member-II)

Sd/-
Ajit Kumar Pande
Member (Legal)