

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 28th November, 2014

Present:

Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Nayan Mani Borah, Technical Member, (P&NG)

APPEAL NO.52 OF 2014

In the matter of:-

GAIL (India) Limited
Through its Chairman and Managing Director,
16, Bhikaji Kama Place,
New Delhi-110066

...Appellant(s)

Versus

1. Petroleum & Natural Gas Regulatory Board
1st Floor, World Trade Centre, Babar Road,
New Delhi-110001

2. Gujarat State Petronet Corporation Limited,
GSPC Bhawan, Behind Udyog Bhawan,
Sector-11, Gandhi Nagar,
Gujarat-382010

...Respondent(s)

Counsel for the Appellant(s) : Mr. Ramji Srinivasan, Sr. Adv.
Ms. Iti Aggarwal
Mr. Udit Seth

Counsel for the Respondent(s) : Mr. Piyush Joshi
Ms. Meghna Chandra for GSPCL
Ms. Sumiti Yadava
Ms. Sonali Malhotra

JUDGMENT

Per Hon'ble Mr. Nayan Mani Borah, Technical Member, (Petroleum & Natural Gas)

1. GAIL (India) Limited (GAIL) is the Appellant herein.

2. Petroleum and Natural Gas Regulatory Board (PNGRB, referred hereinafter as Petroleum Board) is the Respondent No.1 (R-1) while Gujarat State Petroleum Corporation Limited (GSPCL, referred hereinafter as Gujarat Petroleum) is the Respondent No.2 (R-2).
3. The Appellant has filed this Appeal being aggrieved by the Impugned Order dated 26.12.2013 passed by the Petroleum Board in Case No.68 of 2013 titled as GSPCL Vs. GAIL.
4. In the Impugned Order the Petroleum Board has allowed the complaint filed to the extent that denial of booking Common Carrier Capacity on Reasonable Endeavour (RE) Basis is discriminating and amounted to restrictive trade practices.
5. The short facts are as follows: -
 - (a) On 19.10.2012, the Appellant published an Expression of Interest (EoI) for booking Common Carrier Capacity in its various Natural Gas Pipeline networks.
 - (b) R-2 requested the Appellant to book Common Carrier Capacity in the DBPL-GRBP-DBNPL pipelines on Reasonable Endeavour (RE) Basis.
 - (c) The Appellant conveyed that the capacity available on the above mentioned pipeline is on Firm Capacity Basis with Ship

or Pay Commitment, and providing capacities in the aforesaid pipelines to R-2 on RE Basis is not possible.

- (d) On 25.06.2013, R-2 wrote to the Appellant stating that its requirement for gas is for less than one year, and in accordance with the Regulation 5 read with Regulation 6 of the Guiding Principles Regulations, the Appellant should consider as requested for providing access on RE Basis.
- (e) On 23.07.2013, the Appellant wrote to the R-2 that he is unable to provide capacity in the aforesaid pipeline on RE Basis. The Appellant further stated that the capacity available on the above mentioned pipelines is on firm capacity basis with a Ship or Pay commitment.
- (f) Aggrieved by the Appellant's conduct in the matter, R-2 has filed the Case No.68 of 2013 before the Petroleum Board seeking directions against the Appellant to provide capacity in the said pipeline on a RE basis and alleged unfair trade practices adopted by the Appellant.
- (g) The Petroleum Board passed the Impugned Order dated 26.12.2013 upholding the practice and system followed by the Appellant with regard to providing capacity in common carrier pipeline on Firm Basis/Ship or Pay Basis and further stated

that the said system/practice is in accordance with the PNGRB Act and Regulation made thereunder.

- (h) The Petroleum Board in the Impugned Order further held that the capacity on RE basis provided by the Appellant to its existing customers and refusal of the same to R-2 amounts to discrimination and, hence, the Appellant has indulged into unfair trade practice. Further, the Petroleum Board imposed the penalty of Rs.1,00,000/- (Rupees One Lakh only) on the Appellant as per Section 28 of the PNGRB Act.
- (i) Hence, the present Appeal.

6. The Appellant has made the following submissions in the Appeal assailing the Impugned Order passed by the Petroleum Board: -

- (a) Under the regulatory regime provided in the PNGRB Act and Rules made thereunder, the capacity in Natural Gas Pipelines is classified in following three categories: -
 - (i) for own use/requirement;
 - (ii) for contract carrier; and,
 - (iii) common carrier
- (b) The relevant provisions of the Act/Regulations in this context are reproduced below for ease of reference: -

“Section 2 In this Act, unless the context otherwise requires

(j) ***“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 the section 20, but does not include pipelines laid to supply-***

(i) *Petroleum products or natural gas to a specific consumer; or*

(ii) *Crude oil;*

Explanation:- For the purposes of this clause, a contract carrier shall be treated as a common carrier, if-

(a) *Such contract carrier has surplus capacity over and above the firm contracts entered into; or*

(b) *The firm contract period has expired.*

(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 20 Declaring, laying, building etc of common carrier or contract carrier and city of local natural gas distribution network:

- (1) If the Board is of the opinion that it is necessary or expedient, to declare an existing pipeline for transportation of petroleum, petroleum products and natural gas or an existing city or local natural gas distribution network, as a common carrier or contract carrier or to regulate or allow access to such pipeline or network, it may give wide publicity of its intention to do so and invite objections and suggestions within a specified time from all persons and entities likely to be affected by such decision.*
- (2) For the purposes of sub-section (1), the Board shall provide the entity owning, the pipeline or network an opportunity of being heard and fix the terms and conditions subject to which the pipeline or network may be declared as a common carrier or contract carrier and pass such orders as it deems fit having regard to the public interest, competitive transportation rates and right of first use.*
- (3) The Board may, after following the procedure as specified by regulations under Section 19 and sub-Section (1) and (2), by notification-*

 - (a) Declare a pipeline or city or local natural gas distribution network as a common carrier or contract carrier; or*

- (b) *Authorise an entity to lay, build, operate or expand a pipeline as a common carrier or contract carrier; or*
 - (c) *Allow access to common carrier or contract carrier or city or local natural gas distribution network; or*
 - (d) *Authorise an entity to lay, build, operate or expand a city or local natural gas distribution network.*
- (4) *The Board may decide on the period of exclusivity to lay, build, operate or expand a city or local natural gas distribution network for such number of years as it may be order, determine in accordance with the principles laid down by the regulations made by it, in a transparent manner while fully protecting the consumer interests.*
- (5) *For the purpose of this section, the Board shall be guided by the objections of promoting competition among entities, avoiding in fructuous investment, maintaining or increasing supplies or for securing equitable distribution or ensuring adequate availability of petroleum, petroleum products and natural gas throughout the country and follow such principles as the Board may, by regulations, determine in carrying out its functions under this section.*

Section 21. Right of first use, etc:-

- (1) *The entity laying, building, operating or expanding a pipeline for transportation of petroleum and petroleum products or laying, building, operating or expanding a*

city or local natural gas distribution network shall have right of first use for its own requirement and the remaining capacity shall be used amongst entities as the Board may, after issuing a declaration under section 20, determine having regard to the needs of fair competition in marketing and availability of petroleum and petroleum products throughout the country: Provided that in case of an entity engaged in both marketing of natural gas and laying, building, operating or expanding a pipeline for transportation of natural gas on common carrier or contract carrier basis, the Board shall require such entities to comply with the affiliate code of conduct as may be specified by regulations and may required such entity to separate the activities of marketing of natural gas and the transportation including ownership of the pipeline within such period as may be allowed by the Board and only within the said period, such entity shall have right of first use.

- (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) An entity authorised to lay, build, operate or expand a pipeline as common carrier or contract carrier or to lay,*

build, operate or expand a city or local natural gas distribution network shall be entitled to institute proceedings before the Board to prevent, or to recover damages for, the infringement of any right relating to authorisation.

Explanation:- For the purposes of this sub-section, "Infringement of any right" means doing of any act by any person which interferes with common carrier or contract carrier or causes prejudice to the authorised entity.

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."

- (c) As per relevant regulations, the capacity of natural gas pipeline shall be aggregate of the following, namely: -
- (i) capacity requirement of the entity;
 - (ii) firmed up contracted capacity;
 - (iii) at least 33% of the sum of (i) and (ii) above as extra capacity.

- (d) The capacity mentioned at item (c) (iii) above shall be available for use as common carrier by any third party on open access and non-discriminatory basis.
- (e) The very intent of declaring a pipeline as a common carrier pipeline is because laying down a pipeline is highly capital intensive and it results in natural monopoly. So the legislature mandates a part of the pipeline to be kept vacant for use by other Shippers without again having to invest huge sum of money in laying another pipeline as it would lead to infructuous investment. This arrangement enables Shippers to book common carrier capacity and transport their gas unlike R-2 who only wants to book capacity without any firm commitment, thereby blocking the way for others to utilise the pipeline.
- (f) From the perusal of the various relevant provisions in the Act/Regulations the following are evident in case of a common carrier pipeline: -
- (i) the terms and conditions for use of own capacity are not defined;
 - (ii) contracts for booking capacity on contract carrier basis have to be necessarily on firm basis; and,
 - (iii) booking of capacity on common carrier basis can be purely on mutually agreed terms and conditions;

- (g) In consonance with the Act/Regulations, the Appellant has been consistently following the practice of booking common carrier capacity on firm basis with add-on Reasonable Endeavour (RE) basis depending strictly upon the mutually agreed terms and conditions between the parties to the contract.
- (h) It is only the common carrier capacity and not the capacity for own use which has been reserved on a non-discriminatory First-Come-First-Served basis. The same non-discriminatory practice has been followed by the Appellant in the present case for R-2 while denying booking capacity solely on RE basis.
- (i) The Petroleum Board itself in its Impugned Order states that it is not appropriate to direct the Appellant to book capacity on RE basis, which only goes to reaffirm that booking capacity solely on RE basis as requested by R-2 would not be within the ambit of the PNGRB Act and Regulations made thereunder.
- (j) The practice of booking capacity on common carrier on firm basis with add-on RE basis has been followed by the Appellant without any unfair treatment between the Shippers and it is always on mutually agreed terms and conditions.
- (k) Methodology followed by the Appellant in terms of providing "Open Access and Non-discriminatory" basis booking of

common carrier capacity through an Expression of Interest (EoI) on first-come-first-serve basis, displayed in public domain, strictly complies with the provisions of the Act and Regulations thereunder.

- (l) If the Appellant had allowed the system of booking common carrier capacity solely on Reasonable Endeavour (RE) basis, the Appellant would not have been able to calculate realistic value of excess available capacity for booking for other consumers and, consequently, the Appellant would not have been able to provide other consumers their right to book common carrier capacity in the pipeline. This could lead to very poor utilization of pipeline capacity.
- (m) The Appellant states that it has not in any manner prevented, distorted or restricted competition by following the practices of entering into contracts for booking capacity on common carrier basis with add-on RE basis.
- (n) In the present case, the matter relates to denial of access to common carrier capacity solely on RE basis to R-2 by the Appellant. Evidently, there is no question of any unfair gain made by the Appellant under these circumstances. Accordingly, the penalty imposed by the Petroleum Board on the Appellant is unwarranted and misconceived.

- (o) It is important to note that the PNGRB Act and Regulations thereunder themselves do not provide for RE basis for booking common carrier capacity.
- (p) Any entity desiring common carrier capacity solely on RE basis would encourage distortion in the market and increase the cost for consumers in general.
- (q) The demand of the R-2 that it should be allowed to book capacity in the pipeline on RE basis, if conceded, could lead to a situation where other consumers would also similarly express a desire to book capacity on RE basis in common carrier pipeline. Such a chain of events would be disastrous for the industry as whole.
- (r) In the light of the above submissions, the Appellant is of the firm view that the reasoning of the Petroleum Board with regard to the Appellant resorting to discrimination and restrictive trade practices is erroneous and baseless. Further, the levy of penalty on the Appellant by the Petroleum Board is unjustified and unwarranted.

7. In reply to the Appellant's above submissions, the Respondents have put forward the following arguments: -

- (a) The Impugned Order does not hold, contrary to what has been claimed by the Appellant, that booking of common carrier capacity on RE basis is not appropriate. Instead, the

Impugned Order has only held that the Expression "Reasonable Endeavour" basis has nowhere been defined under the PNGRB Act or Regulations. Para 44 of the Impugned Order states: -

"It may be clarified that the expression "reasonable endeavour basis" has nowhere been defined under the Act or the Regulations, framed thereunder. The Complainant is interpreting this expression as could be advantageous to him whereas the Respondent claims that Regulation 6 (a) of the Guiding Principles Regulation empowers him to float its terms and conditions prior to entering into any contract; and the "ship or pay' charges is accordingly being asked for. The action of the Respondent of offering common carrier capacity to the complainant on entering into a contract for a period of less than 12 months subject to "ship or pay" charges does not appear to be violative of any statutory provision."

- (b) The Impugned Order clearly identifies the restrictive trade practices and basis for discrimination. In this context, para 45, 46, 47 and 50 to 55 of the Impugned Order may please be referred to.
- (c) Access on RE basis does not require blocking capacity in any manner in a RE contract. Neither shipper nor transporter is

under any obligations to Ship or Pay/Liquidate Damages for not using or not providing the transportation services.

- (d) RE contract merely implies that opportunity be given to a Shipper for transporting its gas if capacity is available in the transporter's pipeline. In case, capacity is not available in a transporter's pipeline at the point when Shipper is desirous of transporting its gas, then the transporter is not obliged to transport the same.
- (e) The Appellant is unfairly blocking access of R-2 to the gas market for delivery of gas on RE/without Ship or Pay basis through its pipeline by insisting access to R-2 only on firm/Ship or Pay basis.
- (f) Covering the track of the route of interest of R-2, the Appellant's is the only pipeline network available which is a common carrier pipeline.
- (g) By blocking R-2's access to market for supply of gas on RE basis, Appellant has ensured that the Appellant is the only entity which is capable of supplying gas to that market.
- (h) The Appellant, thus, is clearly resorting to restrictive trade practice with an intent to preventing competitive access to gas market serviced by the said common carrier pipeline.
- (i) R-2 had written to the Appellant on 04.05.2013 seeking to book only common carrier capacity in various pipelines of the

network of the Appellant on RE basis without any reference to the Expression of Interest (EoI) published by the Appellant.

- (j) The EoI route for allocation of common carrier capacity being followed by the Appellant is a violation of law as it seeks to limit an otherwise statutory mandate to offer access on common carrier basis to specific EoIs only.
- (k) The Appellant has argued before this Tribunal that allowing reservation to common carrier capacity on RE basis as requested by R-2 may block such capacity for other Shippers, as R-2 may eventually not utilise such booked capacity. R-2 has strongly opposed this averment made by the Appellant as completely erroneous.
- (l) The "concept of own use" being propounded by the Appellant is void of any statutory basis and it will negate the obligation of non-discriminatory open access enshrined in PNGRB Act and related Regulations.
- (m) The Appellant's arguments and grounds raised in the Appeal have already been duly considered by the Petroleum Board and have been held to be restrictive trade practices. The actions of the Appellant are in clear violation of the regulatory framework governing common carrier and common carrier pipeline.
- (n) The actions of the Appellant as above are clearly discriminatory and restrictive trade practices as "(i) The

Appellant transports its own gas to its customers without charging itself Ship or Pay charges/fixed charges and (ii) the Appellant is seeking to protect its gas sales market, and not allowing competition, thereby defeating the objective of the common carrier obligations.

8. In the light of the foregoing in terms of the rival contentions raised by the parties, the following key question, in our opinion, would arise for consideration: -

Whether or not the denial of access to common carrier capacity on RE basis to its pipelines by the Appellant to R-2 is discriminatory amounting to restrictive trade practices.

9. We will now proceed to discuss the above issue/question.
10. The party, R-2 in its complaint before the Petroleum Board contends that denial of access to common carrier capacity on RE basis by the Appellant is, inter alia, a glaring example of restrictive trade practice and abuse of its dominant position.
11. While discussing the rival contentions, the Impugned Order, inter alia, states: -

"8. The complainant lastly, contended that insistence of the Respondent to reserve the common carrier capacity only on firm basis with "Ship or Pay"

Commitment is discriminatory, restrictive and unfair and creates restriction on other gas suppliers, while it offers bundled service to its customers without requiring them to execute its standard GTA on ship or pay basis. The Complainant also alleged that in order to further incentivize its customers, Respondent provides flexibilities such as 80% take or pay which is more flexible than terms being offered in the draft of standard GTA i.e. 100% ship or pay on monthly basis. The Respondent also offers gas sales agreement for one month to its customers while through its standard GTA as offered to complainant it was forcing the complainant to reserve capacity for longer period with a view to avoid the creation of a level playing field.

9. The Complainant, by making above submissions and contentions, has requested the Board to issue a direction to the Respondent for allowing the Complainant to access and reserve common carrier capacity in DVPL-GREP and DBNPL on a reasonable endeavour basis and also to direct the Respondent to immediately cease its restrictive trade practices of preventing the Complainant

(consumers) the access of common carrier capacity and by forcing it to reserve capacity only on firm basis with Ship or Pay Commitment.

10. The allegations and the contentions as made by the Complainant, have emphatically being refuted by the Respondent by filing a written reply but pointed out that the Expression of Interest referred to in the complaint, had clearly specified that interest was to be expressed by every prospective consumer/entity on the basis of "Ship or Pay" and no Expression was permissible on reasonable endeavour basis and the Complainant, by extending request to reserve capacity on reasonable endeavour basis, had thus made ineligible to itself and moreover, the request was extended by it on zonal office of the Respondent.

11. The Respondent, however, admitted the factum of exchange of correspondence, as disclosed in the complaint, and added that the Respondent has always been ready and willing to provide the common carrier service to the Complainant on a "Firm Capacity Tranche (CT)/Ship or Pay (CT) basis but simultaneously contended that there is no statutory provision for booking of capacity in a

pipeline on reasonable endeavour basis and such a demand of booking a particular amount of gas for 11 months by owing the liability to pay for the amount of gas utilized by him would be an unreasonable and unviable situation because, the person (complainant) would not be liable to pay for the unutilized amount which could have not been diverted to any other shipper.

12. The Respondent further added that such a request of the Complainant would block other shippers who may be willing to book capacity in the pipelines on a 'firm CT/ship or pay CT' basis even if, the Complainant does not utilize the booked capacity for itself. Moreover, this would set a dangerous precedent in the pipeline business wherein all the shippers/entities will start booking common carrier pipeline capacities on "Reasonable Endeavour" basis and the actual user, who wants to book the common carrier capacity on Ship or Pay basis shall be deprived of the pipeline capacity because the capacity has been blocked by the shippers on "Reasonable Endeavour" basis which is without any commitment of transportation of gas. The

Respondent apprehends that the contracts on Reasonable Endeavour basis would reduce investments in pipelines business at it would not be viable from financial perspective for any entity to establish pipeline because it is only possible in "firm CT/ship or pay CT" basis.

13. The Respondent at last, denied of violating the terms and conditions of authorization or of any statutory provisions and contended that the Regulations and other statutory provisions which have been relied upon by the Complainant appeal to have been mis-construed and mis-interpreted and the complaint, on account of being devoid of any merit, deserves to be dismissed."

12. The Petroleum Board, in its Impugned Order, has also delved into the "True sense and meaning of the terms 'firm basis' and 'reasonable endeavour basis' which are commonly used for booking capacity in the pipelines." The Petroleum Board's discussion/observations in this context vide paras 20 through 30 of the Impugned Order are of particular interest which summarise various perspectives on the bone of contention.

13. The core issue before this Tribunal is whether the Petroleum Board is right in coming to the conclusion that the Appellant had indulged in restrictive trade practices within the meaning of Section 11 of the PNRGB Act, 2006.
14. If this Tribunal comes to the conclusion that the allegations regarding restrictive trade practices have not been established, then the Impugned Order passed by the Petroleum Board would be liable to be set aside.
15. In this context, the meaning and definition of the term “restrictive trade practices” and a few applicable ratios involving the issue of alleged indulgence into restrictive trade practices by various parties have been dealt with in detail by this Tribunal in its judgment dated 18.12.2013 in Appeal No.1, 2 and 5 of 2012 in the matter of IOCL Vs. GSPCL and Ors; BPCL Vs. GSPCL & Ors; GAIL Vs. GSPCL and ors.
16. It has been established that the Appellant offers bundled services to its customers without requiring them to execute its standard Gas Transmission Agreement (GTA) on Ship or Pay basis and imposes such restriction only on other gas suppliers. Further, the Appellant also offers flexibility to its long-standing and regular customers which is based on mutually agreed commercial prudence.

17. On perusal of all the pleadings, written submissions and response to our queries by all the concerned parties we are of the opinion that the conclusion drawn by the Petroleum Board in para 53 of the Impugned Order is proper and rational. The said para 53 of the Impugned Order is quoted below for ease of reference: -

“.....The practice adopted by the Respondent on the one hand reveals discrimination towards the customer like complainant and on the other hand, results in additional burden for the shippers who are not the regular and long standing customers of the Respondent and such practices also discourage fair competition in the market.”

18. It is also noted that various entities seek to procure Spot RLNG on Reasonable Endeavour basis as can be seen from various tenders issued by the entities. The perusal of these tenders suggests that these tenders are usually for a time period less than one year, and require that the Spot RLNG should be procured on RE basis.
19. To cater to requirement of such Spot RLNG on RE basis for period of less than one year, the Appellant as per the provision in PNGRB Regulations will have to book capacity in its natural gas pipeline for such supply to its customers in a common carrier system.

20. It has been claimed by the R-2 that the Appellant has itself participated in many of such tenders, and has, in fact, emerged as the sole bidder. The R-2's claim that this has so happened primarily owing to the Appellant's imposing a condition of accessing its common carrier pipeline only on Ship or Pay basis and consequently, blocking access, of other sellers (including R-2) to the gas market does not appear to be void of merit.
21. In the light of the foregoing, we, therefore, agree with the Petroleum Board while it holds that the practice being adopted by the Appellant, while booking common carrier capacity, is not only discriminatory, but it also amounts to restrictive trade practice.
22. **Summary of Our Findings:-**

On giving careful consideration to the facts and circumstances of the Appeal, including the pleadings and submissions made by the parties, we are of the opinion that it has been established that the Appellant, in the instant case, while booking common carrier capacity in its pipeline, has acted in a discriminatory manner leading to restrictive trade practices and as such, the Appellant is liable to pay the penalty of Rs.1 lakh to the Board. Thus, the Impugned Order is upheld. Consequently, the Appeal is hereby dismissed.

There is no order as to costs.

(Nayan Mani Borah)
Technical Member (P&NG)
Dated: 28th November, 2014

(Justice M. Karpaga Vinayagam)
Chairperson

√Reportable/~~Non-Reportable~~