

OGRA-10-11(8)/2018

DECISION
August 03, 2018

In the matter pertaining to the determination of Transportation Tariff Pursuant to the order of the Hon'ble Lahore High Court, Lahore dated July 13, 2018 passed in WP No. 13720-04/2017 titled "Pak Arab Fertilizers Limited vs. Sui Northern Gas Pipeline Limited".

BEFORE:

Ms. Uzma Adil Khan, Chairperson
Mr. Noorul Haque, Member (Finance)
Dr. Abdullah Malik, Member (Oil)

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1. Background

- 1.1. Hon'ble Lahore High Court, Lahore (LHC) vide its order dated July 13, 2018, passed in Writ Petition No. 13720/04/2017/2012 titled "Pakarab Fertilizers Limited (PFL) Vs. Sui Northern Gas Pipeline Limited (SNGPL) etc", has disposed of the ibid case. The relevant extracts from the above order is reproduced as below;

"That in order to determine transportation tariff for import of RLNG cargoes by petitioner, the relevant decisions, correspondence between respective parties to this petition and negotiations between petitioner and SNGPL for the rate of transportation charges, shall be placed before OGRA for determination of rate of transportation charges and its approval after hearing to concerned parties.

Further agreed that as the transportation charges, of RLNG cargoes relates to regulated activity, therefore, in case of any dispute between the petitioner and SNGPL (licensee), the OGRA shall also resolve the dispute in view of section 6(2)(k) of the OGRA Ordinance, 2002.

Parties agreed that above proceedings before OGRA shall be time bond proceedings which are to be concluded in four weeks. However, before commencement of proceedings, two weeks time be given to parties to further negotiate the transportation charges and in case within those two weeks, parties reach to some consensus on transportation charges, the said agreement shall be placed before OGRA for its approval as required under letter dated 19.10.2015.

In view of above consensus developed between the parties, the petition is disposed of in the above terms. In order to facilitate the matter, let parties appear before OGRA on 27.7.2018 at 11.a.m. "

- 1.2. The facts leading to the issue is that PFL during March, May, October and November, 2015 respectively transported four cargoes of RLNG by accessing SNGPL's gas network under swap arrangement while there was neither any agreement between the parties to undertake such activity nor any legal framework was in place to govern the same. This was infact first of its kind a transaction between the parties based on the mutual understanding in the wake of some guidance by the Ministry of Energy (Petroleum Division). After the dispatch of consignment, SNGPL issued invoices to PFL on account of Transportation charges which has raised dispute and attracted round of litigation since PFL has not been agreed to pay the same and accordingly filed



writ petition in Lahore High Court Lahore. After the detailed proceedings, the Hon'ble Court has disposed of the case with the directions that parties shall appear before OGRA for approval of transportation charges being regulated activity, keeping in view of section 6(2)(k) of the OGRA Ordinance 2002 which provides, as under;

“without prejudice to the generality of the foregoing, the Authority shall – resolve disputes between licensees, between licensees and any other person regarding a regulated activity”

2. Proceedings

- 2.1. In pursuance of the order of the Hon'ble Lahore High Court, Lahore, the parties appeared before Oil & Gas Regulatory Authority (the Authority) on 27.7.2018 at 11.a.m. and stated that they have almost developed consensus on all the components of transportation tariff. The detail of the same shall be elaborated in the next hearing. The parties accordingly requested Authority to re-list the case for hearing on July 31, 2018 at OGRA office Islamabad. The Authority acceded the parties' request with the instruction to submit detail of the issue so agreed in the matrix form before the next date of hearing.
- 2.2. The hearing was held on scheduled date at 2.30 pm which was participated by representatives of the parties and Director Technical Ministry of Energy (Petroleum Division). PFL's team was led by its legal counsel Mr. Salman Akram Raja while SNGPL's team was led by Mr. Kamran Akram, General Manager (Regulatory Affairs).
- 2.3. OGRA, provided both the parties full opportunity to present their case. Accordingly, the parties made extensive discussions/deliberations and was resulted into consensus except on certain issues wherein OGRA role was sought. The detail of stance/discussion made by the parties is summarized in the subsequent paras.

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3. The Crux of PFL's Submissions / Pleadings

- 3.1. Pakarab Fertilizers Limited (PFL) advanced their submission as under;
- 3.1.1. The tariff determination provisions contained in the OGRA Natural Gas (Regulated Third Party Access) Rules, 2012 stood suspended and inapplicable. Hence the transportation tariff for the four cargoes of RLNG procured by PFL and transported through SNGPL system was to be negotiated between the parties and submitted for approval by OGRA. Further, pursuant to the suspension of the tariff determination provisions contained in the Third Party Access Rules, no tariff components pertaining to fixed cost components prescribed by the said rules are applicable for the purpose of determinations of the Transportation Tariff in respect of four cargoes procured by PFL.
- 3.1.2. The tariff determination envisaged in the Third Party Rules is based on the presumption of capacity allocation of at least one year. On this presumption Rule 15 read with Schedule IV contained in the Third Party Rules prescribes a Transportation Tariff component under the head Capacity Charge. The key reason for the suspension of the Third Party Rules was to enable transportation of gas by third party shippers such as PFL without allocation of capacity on the SNGPL system for any prescribed length of time exceeding one year. It is admitted fact that the RLNG procured by PFL was supplied on a swap basis through the SNGPL system from April 2015 to February 2016. No capacity allocation for a period exceeding one year was made.
- 3.1.3. The Pakarab Fertilizers (PFL) took delivery of four cargoes of LNG imported by PSO between the months of March 2015 and November 2015. The import of the aforesaid cargoes and their purchase by PFL was in accordance to an ECC decision dated 14-3-2015.
- 3.1.4. Despite the suspension of the tariff provisions contained in the Third Party Rules, SNGPL wrongly and unilaterally determined and claimed a transportation Tariff based on erroneous application of suspended provisions of Third party Rules. Further SNGPL's demand of \$.57/MMBTU as so called gas transportation charges are arbitrary, unilateral and disproportionate because these costs were already recovered by the Sui companies through its annual revenue requirement

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determined by OGRA. As such SNGPL has not provided any justifiable basis and grounds for the imposition of gas transmission charge \$.57/MMBTU. Furthermore, PFL is entitled to the delivery of the commissioning cargo on the basis of the all-Inclusive price stated in term sheet executed between PFL and PSO. PFL has contended that SNGPL may not be permitted to impose and fix the rate of gas transportation charges at an irrational and disproportionate manner.

- 3.1.5. PFL has submitted that the actual transmission cost for the four cargos worked out at Rs. 7.29 per MCF is applicable. This is equivalent to Rs. 7.907/MMBTU. There is no legal basis for the further imposition of any amount by way of depreciation or return on assets. As regards the commissioning cargos, only all-inclusive price stated in the term sheet between PSO and PFL is applicable. Alternatively, PFL submitted that the transmission cost of Rs. 7.0907/MMBTU may alone be recovered with respect to commissioning cargos.
- 3.1.6. Regarding late payment surcharge (LPS) no amount is recoverable since no lawful claim has been established by SNGPL against PFL. The claim made on the basis of illusory tariff of 57 cents/mmbtu was clearly not liable. Further, 18%/24% LPS could only be recovered if there had been an agreement between the parties. In the recent past, LPS @ Kibor (one month) plus 2 percent has been charged from the consumers in power, fertilizer and cement sector.
- 3.1.7. PFL has submitted that lawfully recoverable tariff is not more than Rs. 7.907/MMBTU (Rs. 7.29 per MCF). Consequently if any LPS is to be levied, it may be based on the lawfully recoverable tariff as of Rs. 7.907/mmbtu. Consequently, the concession made by PFL whereby figure of Rs. 22.94 /mmbtu in respect of three cargos, as specified in SNGPL's letter to OGRA dated July 4,2018, has been accepted as payable, shall be without prejudice to the legal rights of the PFL and the same may not be made the basis for the calculation of LPS, if any. Precisely, PFL has submitted that LPS be applied on the lawful claim @ Kibor + 2% if the transportation charges for commissioning cargos is determined at Rs. 7.9/mmbtu and the remaining three at Rs. 22.94/MMBTU.

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4. GIST OF SNGPL's defense reply

- 4.1. SNGPL emphasized that very basis of suspension of TPA Rules 2012 was the complexity in the determination of Transportation tariff since under the ibid suspended TPA Rules, the fixed cost inter-alia the computation of return and depreciation was referring the replacement value of the assets which were not available. Therefore, PFL plea that it is not obligated to pay fixed cost since SNGPL was not in position to make the capacity allocation is not correct.
- 4.2. There has been no contractual agreement between the parties while the relevant rules were also suspended. In this situation, the rational was to adopt prevalent industry practices. Accordingly, transportation tariff has been computed in line with Zamzama and Hassan Gas Transportation Agreement (GTA) signed between SSGC and SNGPL in 2004. This GTA is approved by OGRA at the time when TPA Rules did not exist. The transportation tariff in the said approved GTA is based on the aggregate of the cost on account of (i) Transmission O&M cost; (ii) Depreciation; and (iii) ROA.
- 4.3. Rule 3 of TPA Rules, 2012 deals with the adjustment of gas of the shipper against System Usage Gas (SUG) and Transmission Loss (TL) and the same was not suspended. Accordingly, in the revised working of Transportation tariff on actual basis, SUG and TL has been adjusted in kind.
- 4.4. Regarding stance of PFL that commissioning cargo is exempt from transportation tariff, SNGPL is of the firm view that it has no authority to exempt the transportation tariff to any party. As regards the correspondence of D.G (Gas) office on exemption of the commissioning cargo, SNGPL is of the view that Federal Govt. can advise OGRA on such matters through policy guidelines approved by the Federal Cabinet. Since no such guidelines have been issued to OGRA therefore, there is no question of exemption of any cargo from transportation tariff.
- 4.5. Regarding the reconciliation of RLNG of the shipper, SNGPL is only obliged to transport the RLNG of the shipper which it has received from SSGC after adjustment of 1.5% quantity on account of retainage and the balance quantity is further subject to adjustment on account of SUG and TL. Any amounts with-held

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- by PFL against SNGPL RLNG invoices on account of retainage and SUG must be released by them.
- 4.6. While it is relied on the Term Sheets, PFL has failed to disclose the complete terms wherein there is no mention "all inclusive delivered price". Nevertheless, this term sheet is between PSO and PFL. SNGPL is not a party to the same. Further, this term sheet caters for the consideration to be provided to SNGPL for the services rendered in the form of transportation of PFL cargos.
- 4.7. SNGPL is independent in its functions and decisions carried out through its Board of Directors. SNGPL as such is not directly controlled by the Federal Government. No entities therefore commit the transportation of gas under TPA arrangement on behalf of SNGPL.
- 4.8. Suspension of TPA Rules was only to the extent of certain rules. The Rules as whole were still in effect and their purpose and spirit were to be applied to Third Party Arrangement. Suspension of Rule 15 in respect of approval and calculation of transportation only had the effect of bypassing the requirement to obtain the approval of the transportation tariff from OGRA. It did not pronounce that there would be no transportation tariff or absolve PFL for payment in consideration of such services.
- 4.9. Regarding LPS SNGPL is of the view that any default in payment of Transportation Charges are subject to LPS @ 18% and 24% p.a for default within one and over one year respectively and this rate is in line with the agreement signed by PFL in respect of purchase of RLNG from SNGPL. SNGPL further emphasized that LPS should be applicable from the respective due dates of the invoices till the date of payment.

5. Consensus between the Parties based on the negotiation

- 5.1. SNGPL through its letter dated July 30, 2018 has submitted a matrix on the transportation components agreed/not agreed between the parties. The same was also presented during the hearing held on July 31, 2018, which reflects following position;

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- 5.1.1. In respect of three cargos, the parties agree to pay/receive transportation tariff @ Rs. 22.94 per MMBTU while adjustment of SUG and TL shall be in kind.
- 5.1.2. In respect of commissioning cargo, PFL is willing to pay Rs. 7.9 per MMBTU while SNGPL claim is equal to other cargo i.e; Rs. 22.94 per MMBTU.
- 5.1.3. In respect of LPS, PFL is willing to pay the maximum at Kibor + 2% on the lawful claim if the transportation tariff of first commissioning cargo is determined at Rs. 7.9 per MMBTU.

6. Discussion & Decision by the Authority

- 6.1. The Authority has considered the matter of Transportation Tariff between the PFL and SNGPL at length and has accordingly decides as follows;
- 6.2. The impugned Transportation Tariff is neither based on the legal backing nor it is based on the mutual agreement. As a matter of best regulatory practices, there should have been a mutual agreement between the parties duly approved by the Authority, thereafter, PFL, the shipper, should have access to the SNGPL network for the transmission of gas. At this point of time, based on the logic and rationale, the transportation tariff agreed between the parties qua SNGPL and SSGCL in respect of Zamzama gas field, may be the applicable model to adopt for the instant tariff determination. Accordingly, the Authority observes that Transportation Tariff determined by SNGPL @ Rs. 22.94 per MMBTU and accepted by the PFL as well, has been made on actual data and on the reasonable basis. The same shall be applicable to settle the impugned issues between the parties.
- 6.3. The Transportation Tariff @ Rs. 22.94 per MMBTU shall also be applicable on the commissioning cargo as well since SNGPL is not under any binding contract. Also, no decision of the Federal Government under the legal framework provides PFL any exception in this respect.
- 6.4. Regarding LPS, the Authority observes that the same is applicable on the valid/undisputed amount. Accordingly, SNGPL shall not be entitled to charge or claim LPS on the amount relating to period the matter remained under

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adjudication before Hon'ble Lahore High Court, Lahore till the date of this decision.

- 6.5. In view of above, the instant case, in compliance to the order of Hon'ble Lahore High Court, Lahore, is disposed of.

**Dr. Abdullah Malik
(Member Oil)**

**Noorul Haque
(Member Finance)**

**Uzma Adil Khan
(Chairperson)**

The Islamabad,
August 03, 2018

**REGISTRAR
Oil & Gas Regulatory Authority
Islamabad**