

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
[APPELLATE JURISDICTION]**

APPEAL NO. 290 OF 2016

Dated: 28th February, 2019

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. B.N. Talukdar, Technical Member (P&NG)**

IN THE MATTER OF:

**GAIL (INDIA) LIMITED)
GAIL Bhawan, 16 Bhikaji Cama Place)
R.K. Puram, New Delhi-110066) ...Appellant**

AND

**1. PETROLEUM & NATURAL GAS)
REGULATORY BOARD (PNGRB))
First Floor, World Trade Center,)
Babar Road, New Delhi-110001) ...Respondent No.1**

**2. GUJARAT STATE PETRONET)
CORPORATION LIMITED)
GSPC Bhavan,)
Behind Udyog Bhawan,)
Sector-11, Gandhinagar-382010,)
Gujarat) ...Respondent No.2**

**Counsel for the Appellant(s) : Mr. Sanjay Jain, Sr. Adv.
Mr. Yogender Handoo
Mr. Adrija Thakur
Mr. Yuvraj Sharma
Mr. Nishant Kumar**

**Counsel for the Respondent(s) : Ms. Sonali Malhotra
Mr. Anant Bhardwaj
Mr. Amit Sanjuda for R-1**

Mr. M.G. Ramachandran
Mr. Piyush Joshi
Ms. Sumiti Yadava
Ms. Lalia Elizabeth Philip
Ms. Parminder Kaur
Ms. Aditi
Ms. Telma Raju for R-2

J U D G M E N T

PER HON'BLE MR. B.N. TALUKDAR, TECHNICAL MEMBER (P&NG)

1. In this appeal, the Appellant, GAIL (India) Ltd. has challenged under Section 33 of the Petroleum and Natural Gas Regulatory Board Act, 2006, (the Act) the order dated 30.08.2016 passed by the Petroleum and Natural Gas Regulatory Board (the Board) in Case No. 68 of 2013. The Board vide its order dated 30.08.2016 directed the Appellant to cease the alleged restrictive trade practice of preventing the Respondent No.2, Gujarat State Petroleum Corporation Ltd. (GSPCL) the access of common carrier capacity in the relevant common carrier pipelines and also imposed a civil penalty of Rs. 1 Lakh under Section 28 of the Act to be deposited within one month from the date of order. This order of the Board has been impugned by the Appellant.
2. The Appellant, GAIL (India) Ltd. (“**the Appellant**”), was incorporated in August, 1984 as a Central Public Sector Undertaking (PSU) under the

Ministry of Petroleum & Natural Gas (MoP&NG). This company is mandated to work in the hydrocarbon sector in the areas of exploration and production and processing, storage, transportation, distribution and marketing and also import of natural gas. The company was initially given the responsibility of construction, operation & maintenance of the Hazira – Vijaypur – Jagdishpur (HVJ) pipeline Project.

3. The Respondent No.1, the Petroleum and Natural Gas Regulatory Board, (“**the Board**”) is a statutory body constituted under the provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006 (“PNGRB Act”) to regulate “the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto”.
4. The Respondent No.2, Gujarat State Petroleum Corporation Ltd. (“**the GSPCL**”) was incorporated by Government of Gujarat in 1979. It was re-incorporated as Gujarat State Petroleum Corporation Limited in 1994 in order to establish a strong foothold in the entire hydrocarbon value chain.

Over the years, the GSPC Group has emerged as the only Oil & Gas conglomerate to be promoted by a state government of India and has been successful in fulfilling the endeavor envisaged by the Government of Gujarat. The GSPC Group, which has under its umbrella twelve companies and institutions, has established itself as one of the largest E&P entities with a commanding presence across the entire hydrocarbon value chain. The group employs innovation and new technologies to constantly better its operations in both upstream and downstream segments.

5. Brief facts of the matter are as under:

6. The matter pertains to two natural gas pipelines viz the Dahej Vijaypur (DVPL) – Vijaypur-Dadri (GREP) capacity augmentation, commonly known as DVPL-GERP and the Dadri-Bawana-Nangal (DBNPL) network operated by the Appellant.

7. The Board determined the initial unit tariff for the DVPL-GREP pipeline under the provisions of the Act and the Petroleum and Natural Gas Regulatory Board (Determination of Natural Gas Pipeline Tariff) Regulations, 2008 (Tariff Regulations), considering the pipeline as a common carrier pipeline vide its order dated 19.04.2010. On 14.02.2011, the Board issued a letter to the Appellant accepting the Central

Government's authorization for laying, building, operating and expanding the DVPL-GREP pipeline under Regulation 17 (1) of Authorization Regulations, 2008, spelling out the provisional terms and conditions of acceptance.

8. As regards the DBNPL, the Board on 13.02.2011 issued the final terms and conditions for acceptance of the Central Government's authorization for laying, building, operating and expanding the pipeline as a common carrier pipeline under Regulations 17 (1) of the Authorization Regulations, 2008 mentioning the common carrier capacity of the pipeline as 7.75 MMSCMD. The Board vide its order dated 12.07.2012 issued provisional initially unit tariff for this pipeline under the provisions of the Tariff Regulations, 2008.
9. For both the pipelines above, the Appellant challenged before the Delhi High Court vide W.P. (C) No. 1189 of 2016 the acceptance of the Central Government's authorization by the Board declaring as common carrier pipelines. The High Court subsequently on 17.05.2016 reserved the judgment.
10. The Appellant on 19.11.2012 published an Expression of Interest (EoI) for booking capacity in its various common carrier natural gas pipelines mentioning that the capacity would be available on Ship-or-Pay basis. As

per the Appellant, against this EOI, Respondent No.2 (R-2) expressed its desire on 04.05.2013 to book common carrier capacities in the DVPL-GREP and the DBNPL on Reasonable Endeavors (RE) basis. Subsequently on 19.06.2013, R-2 submitted its formal request for reserving the capacity in these pipelines on RE basis. On 20.06.2013, the Appellant replied to R-2 saying the capacity would be available on firm basis and requested R-2 accordingly to have to access to the pipelines. The R-2 again vide its letter dated 25.06.2013 requested the Appellant to give access on RE basis for less than 1 year period.

11. On advice of the Appellant, R-2 on 18.07.2013 wrote a letter to the corporate office of the Appellant on the same issue but on 23.07.2013, it received a letter from the Appellant saying again that the capacity available is on firm basis with a commitment of ship or pay and not on RE basis. The Appellant along with this reply, enclosed also a draft Gas Transportation Agreement (GTA) reflecting the above conditions.
12. Subsequently, the R-2 filed a complaint before the Board vide case No. 68 of 2013 dated 21.09.2013 seeking directions on the issue and also alleging unfair trade practices followed by the Appellant. On perusal of the submissions made by both the parties, the Board passed its order dated 26.12.2013 upholding the practice and system followed by the Appellant with regards to providing common carrier capacity stating that

the practice/system followed by the Appellant is in accordance with the Act and the Regulations.

13. The Board further held that the Appellant has indulged into restrictive trade practice by selling gas to its customers with 80% take-or-pay basis, and other flexibilities whereas for other customers like the R-2 in this case, it is 100% ship-or-pay on monthly basis amounting to discrimination. The Board further imposed penalty of Rs. 1 Lakh on the Appellant as per Section 28 of the PNGRB Act.
14. The Appellant subsequent to the above order of the Board, preferred an appeal being Appeal No. 52 of 2014 before the APTEL against the order of the Board dated 26.12.2013. APTEL thereafter on 28.11.2014, by an order dismissed the appeal of the Appellant.
15. The Appellant, thereafter preferred an appeal before the Supreme Court being Civil Appeal No. 11450/2014 against its order of the APTEL dated 28.11.2014.
16. The Supreme Court vide its order dated 13.01.2016 while not expressing any opinion on the merits of the matter disposed of the appeal by setting aside the order of the APTEL dated 28.11.2014 and the Board's order dated 26.12.2013 and remanded the matter to the Board for deciding the

issue within 6 months from the date of the order and framed the following issues to be decided by the Board.

“Issue_ To what extent, the Petroleum and Natural Gas Regulatory Board (Affiliate Code of Conduct for Entities Engaged in Marketing of Natural Gas and Laying, Building, Operating or Expanding Natural Gas Pipeline) Regulations, 2008 are applicable to the complainant....”

17. After the pleadings made by both the parties before the Board, the Board passed the impugned order dated 30.08.2016, inter alia, imposing a civil penalty of Rs. 1 Lakh under Section 28 of the Act on the Appellant and hence the present Appeal before this Tribunal.
18. We have heard Mr. Sanjay Jain, learned counsel appearing for the Appellant and also perused the submissions made by the Appellant. The gist is as under:-
 - (a) The Affiliate Code of Conduct Regulations applies only to an entity for maintaining code of conduct only in respect of the affiliates. The Appellant does not have any affiliate at this moment. It is unambiguously clear from Regulation 5A wherein the Board itself has given time till 31st March, 2017 to entities to separate the activity of transportation of natural gas from marketing of natural gas by mandating creation of a separate legal entity.

- (b) The complaint of R-2 in regards to affiliate code of conduct against the Appellant is premature since the affiliate code of conduct regulations have also been challenged by the Appellant by way of a Writ Petition, being W.P. No. 2245 of 2014 and the same is pending before the High Court of Delhi.
- (c) Marketing of gas is a non-regulated activity whereas the transportation of gas through a common carrier pipeline is a regulated activity. So far the Appellant is concerned, there is no evidence of cross-subsidization of costs between these regulated and non-regulated activities which could have affected the fair trade.
- (d) Regulation 4 of the Affiliate Code of Conduct Regulations merely sets out the scope and objective of the affiliate code of conduct regulations, the actual regulation is carried out in Regulation 5 onwards which only are meant for compliances. In fact, the object of Regulation 4 (2) (b) cannot be correlated with Regulation 5A, which has not yet come into force.
- (e) Once the affiliate code of conduct is not applicable, there is no necessary to examine the scope of Section 21 of the Act.

- (f) There has been no evidence or material before the Board for saying that the Appellant has violated the affiliate code of conduct. Board has premised this finding merely on the basis of an allegation made by R-2 of giving privileged treatment to its own customers for sale of natural gas on a presumption of an alleged bundled contract. The Appellant does not offer any by bundled contract on common carrier.
- (g) The Gas Sales Agreement (GSA) entered between the Appellant and its gas customers is not a contract for both transportation and sale of natural gas. There is no obligation imposed on the entities to levy transportation charges as determined by the Board on customers.
- (h) The Board has directed the Appellant to stop the restrictive trade practice (RTP) without giving any findings/reasonings, the Board has failed to appreciate that RTP as defined in Clause 2 (zi) of the Act means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular,-
- (a) Which tends to obstruct the flow of capital or resources into the stream of production, or

- (b) Which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to petroleum, petroleum products or natural gas or services in such manner as to impose on the consumer unjustified costs or restrictions.”
- (i) In regards to the exact meaning of RTP, it is relied on the Supreme Court’s order in *Rajasthan Housing Board Vs. Parvati Devi (Smt)* (2000) 6 SCC 104 which in turn refers to the judgment in *Mahindra and Mahindra Ltd. Vs. Union of India* (1979) 2 SCC 529, which has unambiguously stated:

“It is now settled law as a result of the decision of this Court in the Telco case that every trade practice which is in restraint of trade is not necessarily a restrictive trade practice. The definition of restrictive trade practice given in section 2(o) is a pragmatic and result oriented definition. It defines 'restrictive trade practice' to mean a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner and in clauses (i) and (ii) particularizes two specific instances of trade practices which fall within the category of restrictive trade practice. It is clear from the definition that it is only where a trade practice has the effect, actual or probable, of restricting, lessening or destroying competition that it is liable to be regarded as a restrictive trade practice.....”

- (j) On the issue of RTP, the Board in its impugned order dated 30.08.2016 merely re-iterated its earlier order dated 26.12.2013, demonstrating a complete non-application of mind by the Board. Once the Supreme Court remanded the matter to the Board, the Board ought to have given reasons to arrive at its finding of RTP.

- (k) If R-2 is allowed to reserve capacity on RE basis, R-2 will pay when it uses the capacity and not pay when not used. This will amount to RTP. Blocking capacity on RE basis will lead to potential losses to the Appellant and also non-utilization of the important national asset.
- (l) There has been no evidence cited by R-2 alleging the Appellant to have given discriminatory treatment to entities while giving access to the common carrier pipelines.
- (m) RTP is provided under Section 11 (f) of the Act and is applicable only in respect of 'notified' petroleum, petroleum products and natural gas. The natural gas is not a notified product.
- (n) Take-or-pay clause is applicable for GSAs signed between a marketer of gas and a customer of gas whereas ship-or-pay clause is applicable in GTA signed between two different entities and not between a customer and an entity. The Board has equated R-2 with that of a customer of gas, which goes contrary to the scheme of the Act.
- (o) Pipeline investment is a sunk investment and, pipeline capacity booked/reserved for a particular day, if not used during that day,

can never be adjusted/made up because at the end of that day, the booked capacity ceases to exist. The next day, it will be a fresh booked capacity for that day. Whereas gas volumes committed to be purchased within a particular tenure, if not off-taken during that contracted tenure, can be adjusted/made up in a future date as per mutual agreement between the parties.

- (p) On the issue of whether common carrier capacity can be reserved/booked on RE basis, the Board in para 56 of its order dated 26.12.2013 unambiguously held that the complaint of R-2 has failed. The R-2 also did not challenge this finding of the Board.

- (q) On the issue of imposition of civil penalty, the Board has first to arrive at a finding of restrictive trade practice and thereafter has to quantify the unfair gains by the entity in restrictive trade practice and only then can a civil penalty be imposed on the entity. It is submitted that without quantifying the unfair gains, no civil penalty can be imposed on the entity. The imposition of civil penalty of Rs. 1 Lakh by the Board is arbitrary, unreasonable and also goes beyond the provisions of Section 28 of the Act. The said civil penalty clearly deserves to be set aside by the Tribunal.

19. We have heard Mr. M.G. Ramachandran, learned counsel appearing for Respondent No.2 and also perused the written submissions made by R-2.

The gist is as below:

- (i) By the impugned order, the Board has held that the Appellant has indulged in restrictive trade practice (RTP) of preventing shippers like GSPL, the R-2, access to the common carrier capacity in its pipelines – DVPL-GREN and DBNPL.
- (ii) The PNGRB Act has been enacted by the Parliament by establishing the Board, inter alia, with the objective to protect the interest of consumers and entities engaged in specified activities including transportation of gas and to provide competitive market.
- (iii) The affiliate code of conduct is notified in terms of Section 21 (1) – proviso of the PNGRB Act and is in existence since 2008. The exception is Regulation 5A which came into force subsequently by effective 19.02.2014 but has been stayed by the High Court of Delhi. Independent of Regulation 5A, Regulations, 3,4, 6 etc. provide for the Appellant not to mix up the marketing of gas and transportation of gas. The Respondent No.2 is not seeking to enforce Regulation 5 A which is sub-judice before the High Court of Delhi. Regulation 3, 4, & 6 apply to the Appellant who is

carrying both the activities of transportation and marketing of gas.

There is no need to have an independent affiliate for application of the above affiliate code regulations.

- (iv) The affiliate code of conduct regulations cover both the Appellant and its Affiliates, if any, and is not restricted to cover only the Appellants' affiliates and not the Appellant. The amendment to the affiliate code by incorporation of Regulation 5A is an additional regulatory measure requiring the Appellant to create an Affiliate if the Appellant is carrying out two activities. This does not mean that the Appellant is entitled to engage in unfair trade practices till 5A is enforced.

- (v) The common carrier capacity created needs to be made available to persons seeking to use the pipeline on first come first serve basis so long the surplus capacity is available. As per Regulations 5 and 6 of Guiding Principles Regulations, the capacity available under common carrier is to be given to the person seeking to use the capacity on contract carrier for a period of one year or more. If any capacity still remains, the same is to be given for a period less than one year on RE basis. The entity laying down the pipeline decides on the availability of the surplus capacity and intimates such availability and the same is offered on RE basis.

- (vi) As per the standard GTA provided by the Appellant to R-2, there is a provision for two categories – one being the firm category with ship-or-pay clause and the other on Reasonable Endeavor basis without the clause of ship-or-pay. The Reasonable Endeavors, accordingly is the scheme of the Appellant.
- (vii) R-2 sought to use the Appellant's pipeline on RE basis and this request was not in pursuance of the Expression of Interest issued by the Appellant to book capacity on contract basis.
- (viii) The Appellant followed a discriminatory approach in terms of use of the pipeline for marketing its gas by the Appellant vis-à-vis the use of the pipeline by others like R-2 for transportation of gas to be marketed by them to their customers. The Appellant's intention has been to put R-2 in disadvantageous position by imposing ship-or-pay condition to ship the gas for less than one year in terms of cost with no corresponding ship-or-pay obligation for transportation for the Appellant. In other words, the Appellant will use the pipeline without imposing any obligation on the purchasers of gas to meet any part of the charges of ship-or-pay in the price of gas, which R-2 is required to pay the ship-or-pay charges for supplying gas in the same market.

(ix) It is not disputed that Section 11 (f) applies to only notified Petroleum, Petroleum Products and Natural Gas. The transportation of gas in a common carrier gas pipeline, is however, governed by Section 11 (e) read with Section 11 (a) of the PNGRB Act. As per the Appellant, the RTP is mentioned only in Section 11 (f) and therefore, it cannot be applied to non-notified product like natural gas. It is to be noted that RTP is defined in Section 2 (zi) with reference to Petroleum, Petroleum Products and Natural Gas in the PNGRB Act and is not limited to only notified product.

(x) The definition of the term 'entity' as spelt out in Section 2 (p) of the Act is with reference to the person engaged in the services or sale. In respect of gas pipeline, which is the subject matter of the present appeal, the entity is the Appellant. In regard to transportation services availed, R-2 and such others are users of such services and they have been interchangeably named as customers, users, sellers of gas etc.

20. We have also heard Mr. Sonali Malhotra, learned counsel appearing for the Board, R-1. The counsel, however insisted upon the contentions of the Board as expressed in the impugned order dated 30.08.2016, the finding of which reads as under.

“A careful consideration of the additional pleadings/evidence do not depict any such ground/circumstance which could persuade us to recall or modify our earlier findings and as a consequence, we adhere to our earlier findings and dispose of the matter finally as under:-

ORDER

On giving careful consideration to all the facts and circumstances, we hereby direct the Respondent to immediately cease its restrictive trade practice of preventing the shippers like complainant, the access of common carrier capacity in its common carrier pipeline and also impose civil penalty of Rs. 1.00 Lakh under Section 28 of the PNGRB Act, 2006 to be deposited with a month from today.”

21. Since this Tribunal’s last order dated 28.11.2014 was set aside by the Supreme Court vide its order dated 13.01.2016, we are dealing with the matter afresh along with the impugned order of the Board dated 30.08.2016.
22. The instant matter pertains to two common carrier pipelines of the Appellant viz DVPL-GREP and DBNPL network in regards to giving access to the available common carrier capacity of the pipelines to the third party shippers like in this case the Respondent No. 2.
23. Before going into details of the case for discussion, it is necessary to understand the following definitions of related pipeline system/scheme.

24. Definition of common carrier pipeline as per Section 2 (j) of the PNGRB

Act:

(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 nondiscriminatory open access basis under subsection (3) of 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 –

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

(ii) *the firm contract period has expired.*

25. Definition of contract carrier pipelines as per Section 2 (m) of PNGRB

Act:

“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 authorized by the Board from time to time under subsection (3) of section 20;

26. While authorization is granted to an entity by the Board to lay a new common carrier pipeline, provision is kept in terms of volume capacity to be used as common carrier capacity. Similarly, while converting the existing pipeline to a common carrier pipeline by the Board, here again

the capacity to be used as common carrier capacity is mentioned in the authorization which is 25% of the installed capacity. The DVPL-GREP & DBNPL network of the Appellant comes under this category.

27. The common carrier capacity as we have understood is the capacity available for a third party shipper after taking care of the capacity requirement of the owner/operator of the pipeline and the capacity allocated on a contract carrier basis. In a contract carrier system, the capacity over and above the entities' own requirements becomes available to any other shipper entity subject to the latter entering into a firm contract to transport a volume of gas for a period not less than one year. In a common carrier capacity system, the capacity over and above the entities own requirement and capacity allocated on a contract carrier basis, becomes available to any other shipper entity subject to the latter entering into a contract to transport a volume of gas normally for a period less than one year.
28. We have been made to understand that in such a pipeline like the one under reference, during the lifetime of the pipeline, the following situations may arise:-
- The requirement for own use by the entity laying down the pipeline may reduce or increase.

- The contract carrier capacity i.e. the contract entered into on firm basis for more than 1 year expires and there may not be any other person booking the capacity on firm basis contract leading to increase in common carrier capacity.
 - There may be more persons seeking to take capacity on firm contract basis leading to reduction in common carrier capacity.
29. The DVPL-GREP & DBNPL network laid by the Appellant has the installed capacity of 54 MMSCMD with common carrier capacity available as 13.5 MMSCMD leaving 40.5 MMSCMD for the Appellant's own use and the contract carrier capacity amount as per the authorization issued by the Board.
30. The main issues involved in the instant case are as follows:-
- (a) The Respondent No.2, Gujarat State Petroleum Corporation Ltd. is insisting on its request to have access to the common carrier capacity of the DVPL-GREP & DBNPL network of the Appellant on Reasonable Endeavour (RE) basis without any clause on 'ship-or-pay' whereas the Appellant is ready to offer R-2 access to the pipeline network on firm basis with 'ship-or-pay' clause and not on RE basis without the clause of 'ship-or-pay'.

(b) The Board vide its order dated 30.8.2016 has directed the Appellant to cease the restrictive trade practice (RTP) of preventing shippers like R-2 to have access to the pipeline network on common carrier capacity and imposed a penalty of Rs. 1 Lakh under Section 28 of the PNGRB Act, 2006 which the Appellant has challenged in the instant case.

31. The guiding regulation that has direct relevance on the present matter on the issue of ‘access to a common carrier pipeline’ is the Petroleum and Natural Gas Regulatory Board (Access Code for Common Carrier or Contract Carrier Natural Gas Pipeline), Regulations, 2008. Regulation 4 of this Regulation reads as under:-

“4. Declaration of capacity.

(1) The capacity of a natural gas pipeline shall be as authorized by the Board for new pipelines under The Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008 or as determined by the Board under relevant regulations for declaring natural gas pipelines as common carrier or contract carrier or under the Petroleum and Natural Gas Regulatory Board (Determination of Natural Gas Pipeline Tariff) Regulations, 2008 or as determined by the Board under the relevant Regulations.

(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.

(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.*

Regulation 4 (2) and 4 (3) above are relevant in the instant case.

32. Regulation 12 as referred above reads as under:-

“12. Methodology for providing access.

(1) *The contracted capacity between a shipper and a transporter shall be for a gas quantity not exceeding the own firming 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:*

²Provided 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 contracted for a period of one year or more subject to the stipulation that in case another entity seeks booking of the same for a period of less than one year, the request shall be accommodated after pro-rating the same from the common carrier capacity already contracted to other entities for a period of one year or more.

Provided further that pro-rating the common carrier capacity shall not exceed ten per cent of the total common carrier capacity.

33. The 33% capacity mentioned above in 12 (2) refers to a new pipeline to be laid. In case of an existing pipeline this capacity is 25% of the installed capacity of the pipeline.

34. Let us first discuss the issue of Affiliate Code of Conduct which has been under controversy between the rival parties. The Affiliate Code of Conduct regulations were notified by the Board in pursuance to the proviso to Section 21 (1) of the PNGRB Act, 2006. The Section 21 (1) of the Act deals with right of first use etc. which reads as under:-

“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 require 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.

.....”

35. Regulation 4 of the Petroleum and Natural Gas Regulatory Board (Affiliate Code of Conduct for Entities Engages in Marketing of Natural Gas and Laying, Building, Operating or Expanding Natural Gas Pipeline)

Regulations, 2008 describes the scope of affiliate code of conduct as follows:

“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".*

(2) *The objectives of this code are to ensure-*

(a) *Protection of the interests of the consumers and other entities against the actions of an entity while dealing with its affiliate as also when the entity on its own is engaged in both the activities of transportation and marketing of natural gas;*

(b) *Prevention of cross-subsidization of the costs between the regulated activity and any other non-regulated activity including the activity of marketing of natural gas either by the entity on its own or through its affiliate which adversely affects or has the potential of adversely affecting fair trade and competition between the entities;*

(c) *That there is no preferential access allowed by the entity to itself or its affiliate for the regulated activity; and*

(d) *Development of a fair and competitive natural gas market.*

36. Regulation 5 of the said Regulations, 2008 deals with the Degree of accounting separation which reads as under:-

“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.”*

37. Regulation 5A deals with the Degree of Legal separation which reads as under:-

“¹5A. Degree of Legal separation.

An entity engaged in both marketing of natural gas and laying, building, operating or expanding pipelines for transportation of natural gas on common carrier or contract carrier basis, shall, on or before the 31st day of March, 2017, create a separate legal entity so that the activity of transportation of natural gas is carried on by such separate legal entity and the right of first use shall be available to the affiliate of such separate legal entity.”

38. Mr. Sanjay Jain, senior counsel appearing for the Appellant has contended that the Affiliate Code of Conduct regulations apply to an entity for maintaining this conduct in respect of its affiliate only; but the Appellant does not have any affiliate as on date and as per Regulation 5A, 31st March, 2017 is the deadline for the entities to separate the activity of transportation of natural gas from marketing of the same by creating a separate legal entity. Moreover, these regulations have also been challenged by the Appellant itself in W.P. No. 2245 of 2014 before the High Court of Delhi and the same is pending before the Court.
39. The counsel also contends that Regulation 4 of the Affiliate Code of Conduct Regulations merely sets out the scope and objective of the conduct regulation, the actual regulations to be complied with are in Regulation 5 which is still sub-judice. Mr. M.G. Ramachandran, counsel appearing for Respondent No.2 has contested this view of the Appellant contending that the Affiliate Code of Conduct has been in vogue since 2008, only the Regulation 5A came into existence much later which has been stayed by the Delhi High Court. Regulation 5A deals with only separation of the two activities of an entity i.e. transportation of gas and marketing of gas. The Appellant is admittedly carrying out both the activities of transportation of natural gas and also marketing and it is required to comply with the code of conduct regulations as per

Regulation 3,4 and 6. Regulation 3 of the Affiliate Code of Conduct talks of the application of this code which reads as under:-

“3. Application.

These regulations shall apply to an entity-

- (1) *Which proposes to lay, build, operate or expand natural gas pipeline and is authorized to do so under the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate pr Expand Natural Gas Pipelines) Regulations, 2008;*
- (2) *Which is laying, building, operating or expanding natural gas pipeline and has been authorized to do so under the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008;*
- (3) *Which is authorized by the Central Government before the appointed day for laying, building, operating, or expanding natural gas pipeline; or*
- (4) *Which is either authorized or is directed by the Board for conversion of a dedicated pipeline into a common carrier or contract carrier under the relevant regulations;*

Provided that the entity is either engaged or proposes to engage in the activity of marketing of natural gas:

- (a) *either on its own;*
- (b) *Through a division, business unit or such other categorization made for different business segments by the entity but without separating the ownership and management control of the same into another entity; or*
- (c) *Through its affiliate.*

40. As per Respondent No.2, the Appellant is covered under the proviso (a) above.
41. From the pleadings of the rival parties and also considering the Affiliate Code of Conduct Regulations as referred above, on the face of it, it may appear that the Affiliate Code of Conduct Regulations are applicable to the Appellant since Appellant is engaged in both the activities of transportation of gas and also marketing of gas. The Board in its impugned order has dealt with this matter and held that the Affiliate Code of Conduct Regulations are applicable on the Appellant (Respondent in Case No. 68 of 2013 before the Board) and any submission made by the Appellant contrary thereto is devoid of any merit. However, we also at the same time, observe that the Board did not elaborate the specific reasons to hold that the Appellant's (Respond in case No. 68 of 2013 before the Board) submissions made in this regard were devoid of any merit. Specifically in respect of Regulation 4 of the Affiliate Code of Conduct Regulations, whether these are only scope and objective of the Code and not for compliance as claimed by the Appellant, or these are also for compliance. Clarity specific to this question needs to be given by the Board as the statutory Regulator. As per the Appellant, neither the Board nor the R-2 has cited any specific evidence or material for saying that the Appellant has violated the affiliate code of conduct.

42. As regards the question whether common carrier capacity can be booked on Reasonable Endeavour (RE) basis, the Board in the impugned order dated 30.08.2016 has not dealt with this issue afresh and has only quoted its finding in its previous order dated 26.12.2013 in Case No. 68 of 2013 which reads as under:-

“In view of above, it would not be appropriate for us to direct the Respondent for booking common carrier capacity on reasonable endeavour basis but we hold that the practice being adopted by the Respondent, while booking common carrier capacity, is not only discriminatory, it also amounts to restrictive trade practice and must follow the consequences under Section 28 in the light of the provision of Section 11 (a) read with Section 12 (1) (b) (v) of the Petroleum and Natural Gas Regulatory Board Act.”

43. In the above context we also note the Regulation 10 (2) in the Regulation for pipeline capacity booking which gives the modality of bookings. The Regulation 10 of the PNGRB (Access Code for Common Carrier or Contract Carrier Natural Gas Pipeline), Regulations, 2008 reads as under:-

“10. Pipeline capacity booking.

- (1) More than one shipper can hold capacity at any entry or exit point.*
- (2) The booked capacity shall be through a contract between shipper and transporter under "Access Arrangements" in the form of MDQ.*
- (3) When a transporter receives a request for access from a shipper it shall respond within three days after receiving the request from the shipper-*

- (a) *confirming that spare capacity exists to satisfy the request and specifying the charges and terms and conditions upon which it will make the service available;*
- (b) *advising that spare capacity does not exist to satisfy the request;*
- (c) *advising that the data provided by the shipper require technical study to accommodate his request and such study shall be completed within seven days from the date of receipt of request; or*
- (d) *advising that it is not technically or operationally feasible to provide access.*

- (4).....
- (5).....
- (6).....
- (7).....”

44. Regulation 10 (2) above states that the capacity to be booked by a shipper shall be executed through a contract between the shipper and the transporter. In the instant case, the contract has to be between the Appellant and Respondent No.2. The Regulation does not talk about any mode of booking as to whether it should be on firm basis or RE basis. The only thing mentioned in the Regulation is the form of MDQ. Hence, we also do not find any reason why we should comment on this issue. But the question remains whether inclusion of ship-or-pay clause in the contract could lead to RTP on the part of the Appellant while giving access to the Respondent No.2 to book contract carrier capacity for a period less than one year.

45. In respect of the Appellant's restrictive trade practice (RTP) as held by the Board, there are a few issues which need to be resolved.

(i) Whether the Board has arbitrarily held that the Appellant has resorted to restrictive trade practices by not allowing the shippers like the Respondent No.2 to book capacity on RE basis in its common carrier pipeline network and whether there has been any actual instance where RTP conditions have been violated by the Appellant.

(ii) Whether RTP is applicable in the case of natural gas which is admittedly not a notified product.

(iii) If, say, RTP is allowed, whether the civil penalty of Rs. 1.00 Lakh that has been imposed on the Appellant has been as per the Scheme of RTP.

46. The Respondent No.2 has alleged that the Appellant is trying to push the Respondent No.2 to a disadvantageous position by asking it to sign the contract with the Appellant for booking the common carrier capacity for less than 1 year period with a condition of 100% ship-or-pay. This is because the Appellant is transporting its gas through the same pipeline and finally selling the gas to its customers with a condition of take-or-pay where the offtake % age is not kept at 100% but at 80%. It means, the

Appellant could effort to sell its gas to its customers at a cheaper price than the Respondent No.2 who has to go through the condition of 100% ship-or-pay with Appellant and then compete the same market to sell its gas. The Appellant does not have to bear the condition of 100% ship-or-pay for transporting its gas. The Appellant has refuted it very strongly arguing that the Appellant has the right to transport its own gas through the pipeline as a first right as per Section 21 of the PNGRB Act, 2006. Moreover, the Appellant has taken a risk by investing a huge amount of money in constructing and laying the pipeline which obviously would need to be recovered during the economic life of the pipeline and accordingly, the Act has provided for it in Section 21.

47. As per the Appellant, transportation of gas and marketing of gas are two different activities Marketing of gas is not a regulated activity whereas transportation of gas is a regulated one. The marketers can sell their gas in the market at any condition as they can afford like 100% or 80% take-or-pay condition etc. The Respondent No.2 itself is selling its gas in the market with 80% take-or-pay condition. The Respondent No.2, however, contends that the market of the Appellant and Respondent No.2 for selling the gas after transporting gas through the pipeline under reference is the same and hence the Respondent No.2 lands into a disadvantageous

position by signing a contract with 100% ship-or-pay condition with the Appellant.

48. The Appellant further submits that the Board failed to appreciate that a discriminatory practice may arise where there is real life situation where the Appellant has allowed booking of the common carrier capacity with softer terms and conditions to some other party. The Respondent No.2 did not adduce any record or evidence to prove the allegation of RTP. The impugned order to cease the RTP being resorted to by the Appellant is without evidence and bereft of any reasonings.
49. The Appellant also contends that the Board's order on RTP is not in conformity with the definition of RTP which is given in Section 2 (zi) and also has cited the Supreme Court's order in ***Rajasthan Housing Board Vs. Parvati Devi (Smt.) (2000) 6 SCC 104*** which in turn refers to the judgment in ***Mahindra and Mahindra Ltd. Vs. Union of India (1979) 2 SCC 529***. The Appellant has also alleged that the Board in its impugned order dated 30.08.2016 merely reiterated its earlier order dated 26.12.2013 demonstrating a complete non-application of mind by the Board. Once the Supreme Court remanded the matter after setting aside the matter, the Board ought to have gone into details and given reasons to arrive at its finding on RTP.

50. We have gone through the impugned order dated 30.08.2016 and observe that the Board did not deal with this issue of RTP afresh after setting aside the previous order of the Board and remanding it to the Board by the Supreme Court. After going through the impugned order as well as pleadings and arguments made by both the rival parties (Appellant and R-2), we feel the matter of RTP needs to be re-examined in detail taking into account all the arguments/pleadings of the Appellant and Respondent No.2 and to do so, the appropriate authority is the statutory Board, the Respondent No.1.
51. The second issue linked to the issue of RTP is the civil penalty imposed by the Appellant on Respondent No.2. The Appellant contends that the RTP resorted to by any entity/person needs to be established/quantified in terms of the gain that the entity/person has enjoyed by resorting to the RTP. This aspect, if applicable, is also not addressed by the Board in its impugned order dated 30.08.2016.
52. Now coming to the issue of application of RTP in respect to a non-notified product like natural gas, the Appellant contends that RTP is not applicable in the instant case since natural gas is not a notified product. The Section 11 (f) of the PNGRB Act, 2006 in this connection reads as under:-

“11. Functions of the Board :-

The Board shall-

- (a).....
- (b)
- (i)
- (ii)

(f) in respect of notified petroleum, petroleum products and natural gas-

- (i) ensure adequate availability;*
- (ii) ensure display of information about the maximum retail prices fixed by the entity for consumers at retail outlets;*
- (iii) monitor prices and take corrective measures to prevent restrictive trade practice by the entities;*
- (iv) secure equitable distribution for petroleum and petroleum products;*
- (v) provide, by regulations, and enforce, retail service obligations for retail outlets and marketing service obligations for entities;*
- (vi) monitor transportation rates and take corrective action to prevent restrictive trade practice by the entities;*

53. The Respondent No.2, however, contended that even if natural gas is not a notified product, the RTP is still applicable as per Section 11 (e) of the Act which reads as under:-

“11. Functions of the Board

The Board shall-

- (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;

54. The above contradictions made out by the Appellant and Respondent No.2 definitely need clarity. The Board, in its impugned order dated 30.08.2016 has not dealt with this issue of contradiction, but from the order, it is implied that RTP is applicable even if natural gas is not a notified product. The issue, however, needs to be resolved with clarity and the appropriate authority to give the clarity is the statutory Board, the Respondent No.1.

55. Based on our observations and discussions as above, our considered opinion is the Board should review its order dated 30.08.2016 which has been impugned by the Appellant taking into account all the factors/issues inter alia our queries framed as above.

56. In the light of the foregoing, we hold that the best course of action would be to remand the matter to the Petroleum and Natural Gas Regulatory Board to re-examine the matter in totality considering the relevant Sections of the PNGRB Act, 2006 as well as the regulations prevalent

particularly at the time of the impugned order. The impugned order dated 30.08.2016 is set aside and the matter is remanded to Respondent No.1 i.e. the Board. The Board will hear the parties again and pass the final order independently and in accordance with law within 90 (ninety) days from today the date of this order. We make it clear that we have not expressed any opinion on the matter. With these observations/order, the Appeal is disposed of.

57. Pronounced in the Open Court on this **28th** day of **February, 2019**.

B.N. Talukdar
[Technical Member (P&NG)]

Justice Manjula Chellur
[Chairperson]

√ **REPORTABLE/~~NON-REPORTABLE~~**