TARIFF AUTHORITY FOR MAJOR PORTS

NOTIFICATION

No.TAMP/2/2000-KPT - In exercise of the powers conferred by Section 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the application made by M/s. Petronet V.K. Limited for framing a Scale of Rates for Way Leave Charges for laying the pipeline in the land limits of the Kandla Port Trust, as in the Order appended hereto.

SCHEDULE

Case No. TAMP/2/2000 - KPT

M/s. Petronet V.K. Limited … Applicant

V/s

The Kandla Port Trust (KPT) … Respondent

ORDER

(Passed on this 11th day of May 2000 )

This case relates to an application submitted by M/s. Petronet V.K. Limited (PVKL) for framing a Scale of Rates for way leave charge for laying the pipeline in the land limits of the Kandla Port Trust (KPT).

2. In its submission, the PVKL has made the following points:-

(i). M/s. Petronet V.K. Limited is a company incorporated under the Companies Act, with majority equity participation by Petronet India Limited and M/s. Indian Oil Corporation Limited (IOC). The Company is a Special Purpose Vehicle incorporated under the directives of Government of India with the main object of laying, maintaining and operating a petroleum carrying pipeline from Vadinar / Jamnagar to Kandla (VK pipeline).

The VK pipeline will pass through,
- land belonging to or administered and controlled by the Gujarat Maritime Board;
- the sea bed within the territorial waters of India in the Gulf of Kutch;
- land vested in the KPT; and,
- land belonging to private owners.

(ii). The most optimal and cost-effective route for constructing the VK pipeline would pass through for a distance of about 9.3 km. in Kandla Port limit.

(iii). The Ministry of Petroleum and Natural Gas has requested the Ministry of Surface Transport (MOST) to expedite approval for laying the pipeline through the limits of the KPT.

(iv). On receipt of a communication from the KPT granting approval for laying and commissioning of VK pipeline with a proposal to charge Rs.18/- PMT of the throughput per annum as Facility compensation Charge (FCC). The Oil Co-ordination Committee conveyed it views against the concept of levying of FCC by the KPT.

(v). PVKL also represented to the KPT against any FCC citing the precedent of the MOU between KPT and M/s. Essar Oil Limited. In the case of the VK pipeline, neither is any facility required to be created in the KPT area nor is any regular port related service required to be provided.

(vi). PVKL requested the KPT to apply way leave charges as in the case of the Kandla-Bhatinda pipeline of the IOC (i.e., Rs.8.50 per sq. mtr. per annum), and not to levy FCC. If the KPT was unable to accede to their request on FCC, the PVKL requested the KPT that the issue and its quantum be referred to the TAMP for a final decision.

(vii). The KPT, instead of taking up the matter with the TAMP, informed of an enhancement of the FCC from Rs.18/- PMT to Rs.35/- PMT on the ground that the KPT would lose revenue after the pipeline was laid and commissioned. The KPT also restricted them to handle only products refined at EOL and RPL and insisted the PVKL to pay lease rent and premium as in the case of a regular lease although the pipelines would be laid underground.

(viii). If PVKL is compelled to pay the rates as demanded by the KPT, the pipeline will become economically unviable.
(ix). In view of the position, PVKL has made the following requests:

(a). The KPT may be directed and ordered not to prevent PVKL in any way from continuing with the works of laying the VK pipeline, its commissioning, maintenance, and use.

(b). The TAMP may frame a Scale of Rates for Way Leave Charges for laying the pipeline in the land limits of KPT.

(c). The KPT may be directed not to levy any FCC for laying, commissioning, and maintaining the pipeline facility within KPT limits.

3. The proposal of the PVKL was sent to the KPT for its comments. In its reply, the KPT has made the following observations:

(i). The draft MOU could not be finalised due to non-settlement of contentious issues.

(ii). The (Port Trust) Board’s discretion to frame the terms and conditions in accordance with the provisions of the MPT Act, 1963 in public interest and in the interest of the port is not hampered by any amendment to the Act. The Port Laws (Amendment) Ordinance 1997, while describing the role of the TAMP no way issues any direction in respect of TAMP’s role in execution of contract or permission to execute the work even before the contract is executed.

(iii). Substantial revenue as well as turn-over for the KPT comes from handling of POL products at its jetty specially created for this purpose; out of the total operating income of Rs.171.45 crores, as much as 52.11% comes out of handling of POL products at Kandla. Once the pipeline facility is available, the POL cargoes will move through the pipeline; and, the five jetties of the KPT created at a huge cost will remain idle to quite an extent, since the other liquid cargoes constitute only a small proportion of the traffic. Therefore, this revenue accruable from the PVKL is of utmost importance. If the PVKL had, at the time of asking for provisional permission, mentioned that they could not give any Facility Compensation Charges, the KPT would not have given permission for laying of pipeline in its water and land limits.

(iv). As per the Guidelines issued by the TAMP, the prayer sought by the PVKL does not actually fall under its purview. The TAMP’s basic function is to hear the concerned parties and, after taking into consideration the prevailing circumstances in a Port, determine the
actual rates or charges for the services to be rendered by the Port and for the Port’s properties. In view of the above, the prayer made by PVKL seeking direction against the KPT is untenable.

(v). There is no need to frame a separate Scale of Rates for Way Leave Charges for laying pipelines in the land limits of the KPT; the rates applicable for allotment of land can be adopted for the purpose. There is no other alternative for the KPT than to charge the appropriate rate as Way Leave Charges and PVKL may by requested to pay the Way Leave Charges as per the Government guidelines.

(vi). The KPT has invested substantial amount for creation of facilities for handling POL products and is incurring substantial amount for up-keeping, maintenance and operation of above said facilities.

(vii). Whatever quantity is going to be handled through PVKL is a direct loss of traffic to the KPT. POL imports which were to the tune of 115.03 lakh tonnes in 1998-99 are estimated to be at 20 lakh tonnes only, during 1999-2000, showing a reduction of approximately 82.61%. At present, the income pattern for handling POL products is at the rate of Rs.68/- per tonne. To compensate the loss of revenue for providing all the above facilities and the opportunity loss to be suffered by KPT, the KPT proposes to charge only Rs.35/- per tonne for transporting the oil through PVKL.

(viii). The submission made by the PVKL is that the FCC is being envisaged to recover for the right of way granted in the waters of Kandla Port Trust is incorrect. The charges are to be recovered for the opportunity loss to the KPT by way of royalty (termed as FCC).

(ix). The KPT has always been maintaining that the FCC has to be settled between the parties; and, the TAMP has no role in fixing such charges as per the guidelines issued by itself.

(x). Private investors / operators will be required to approach the TAMP only for tariffs; matters relating to royalty and upfront payment will have to be mutually settled between them and the Port Trust concerned.

4. A joint hearing in this case was held at the KPT. During the joint hearing Shri. M.K. Aswani, President, Kandla Port Karmachari Sangh (KPKS) made a written submission and wanted to join the proceedings on behalf of the KPKS, to protect the interests of the KPT. This request was rejected.
5. Shri. M.K. Asvani was subsequently included as a Member of the KPT team. He has given a written submission in his capacity as a Trustee of the KPT. In his written submission, he has made the following points:

(i). The facility compensation charges sought for by the KPT from M/s. PVKL is fully justified. In the case of PVKL, whatever product they evacuate through the proposed pipeline is being handled at the KPT; that much quantity will, therefore, be reduced from the present volume of traffic being handled by the KPT.

(ii). The KPT will also lose the traffic of petroleum products as the pipeline will carry the entire petroleum products from Jamnagar Refineries. Consequently, the Oil Jetties and allied facilities created by the KPT may remain idle. Thus, in lieu of loss of revenue, the PVKL is liable to pay the compensation.

(iii). In this case, because of the unique facility, the user will be benefited. That being so, there should be a periodical escalation clause of upward revision to fetch income for the KPT to meet its expenditure.

6. During the joint hearing the PVKL has submitted their reply to KPT’s comments. The PVKL has requested that pending final disposal of this dispute, the KPT may be directed to permit them to resume work on the laying and operations of the pipelines.

7. In their written submission, PVKL highlighted the following points:

(i). MOU between any party and the KPT for use of land at rates and conditions not prescribed by the Authority (TAMP) is legally impermissible. PVKL have been consistently requesting the KPT to refer the matter to TAMP. However, the KPT declined to do so stating that the matter has to be settled only between KPT and PVKL.

(ii). The powers to fix rates are quasi judicial, which the amended statute has taken away from the Board. The rates proposed to be charged by the KPT are those said to have been prescribed for lease of land and not for mere right of way. No statement of conditions in respect of these rates was prescribed by the KPT or approved by the Central Government. A statement of conditions is pre-requisite statutorily prescribed.

(iii). The mere fact that the KPT is charging such rates from other pipelines cannot made the practice legally correct, fair or proper. The
reference of TAMP Regulations made by the KPT is relevant in the context of private investors building new jetties etc. or taking existing jetties on long term lease. These guidelines have no application to the facts of this case as PVKL is not developing any port related ship-berthing facility.

(iv). Laying of the pipeline is in the larger public interest as it will transport oil products at low cost by which the common consumer will stand to benefit. The KPT as Trustees of public property must use their property in a manner calculated to sub-serve the larger public good rather than be driven by profit motive.

(v). The KPT is not entitled to receive any FCC whatsoever and their demand for FCC is without any authority and sanction of any law.

(vi). KPT’s stand seeks to completely protect them from competition not only from ports but, from all mode of transporting of oil and oil products.

(vii). FCC is not charged from pipeline owners anywhere in the world.

8. During the joint hearing the following arguments were advanced by the different parties:

**M/s. Petronet V.K. Limited**

(i). Reference to FCC was first noticed by them in the minutes of a December 97 meeting with the OCC. The pipeline laying started after December 97.

(ii). Terms and conditions have not yet been finalised by the KPT or Gujarat Maritime Board (GMB). PVKL went by the Kandla – Bhatinda pipeline for the purpose of feasibility studies.

(iii). A reputed international expert (J.P. Kenny), PVKL Consultant has said that such FCC for crossing channels / waters is not levied anywhere else.

(iv). Draft MOU was prepared subject to difference on 2 issues. The matter was referred to MOST. PVKL wanted the disagreements to be resolved by TAMP. In December 98, PVKL asked for permission to lay the pipeline. The KPT gave conditional permission in January 99.

(v). The KPT Board Note of December 97 refers to probable loss of business. But KPT did not raise the issue until 16.11.98. On
14.12.98, the KPT asked for an undertaking; the PVKL gave an undertaking on 16.12.98 to abide by the TAMP’s Orders.

(vi). KPT’s reply dated 28 February 2000 to TAMP covers only three of the PVKL’s prayers. PVKL assumes that KPT accepts other points.

(vii). Cost of oil jetties must have been recovered long back. The KPT have quoted today’s value of the asset whereas the original investment must have been much less. Going by notified tariff and traffic, the KPT must have earned at least Rs.60 crores to Rs.70 crores per year. The investment of Rs.3.5 crores on pipeline, which has outlived its life must have earned a lot of profit since 1989. IOC Terminal will remain unaffected, so maintenance cost will not be wasteful.

(viii). Because of two new refineries (Reliance and ESSAR) – additional traffic at Vadinar will be available. (KPT say that traffic at Vadinar will come irrespective of PVKL). If there is to be any FCC at all, it shall be nominal and not connected, to ‘per MT’. It can be ad-hoc – limp sum – something that the PVKL can bear.

(ix). Kandla – Bhatinda pipeline model is available for way leave charges or TAMP may fix any reasonable updated amount.

(x). They have given the environmental clearance. The KPT must be asked to permit them to complete the laying and commissioning of the project.

(xi). The PVKL’s traffic projection is only 5.5 MT per annum for the first five years. The KPT need not project their losses on 9 MT per year.

**The Kandla Port Trust**

(i). It is only a one-metre wide corridor; and, the rate of Rs.16/-, the annual liability will be nominal.

(ii). Two parameters are to be considered in support of FCC:

(a). Expenditure already incurred by the KPT on the whole infrastructure.

(b). Recurring O&M cost annually (about Rs.11.5 crores).

(iii). The KPT has given 400 acres of prime land to the IOC on the expectation of increasing traffic. All that is being nullified now.
(iv). FCC is based on notified rates. Wharfage alone in Rs.35/- PMT. If pilotage, port due and berth hire are added, it comes to Rs.68/- PMT. The Port is asking only for Rs.35/- PMT as FCC.

(v). The original quotation of KPT of Rs.18/- PMT as FCC was with respect to ESSAR MOU. Besides FCC, ESSAR pays Rs.110 lakhs towards composite charge for lease rent for waterfront and way leave charge. Apprehension about GMB charging the same rate is not valid as it is not going to lose any traffic.

(vi). Petronet is as good as a private company. Still, they have been given permission on a nomination basis.

(vii). There are many Petronet subsidiaries. They want to get concessions at Kandla so that elsewhere they can cite these as precedents.

(viii). When PVKL pipelines are used to the full capacity, the company will make plenty of profit but the KPT will not ask for increase in FCC.

(ix). The spin-off loss to Gandhidham / Kandla areas are substantial (loss of employment in transportation etc.).

(x). MOU should be signed first. Once the pipeline is commissioned, the KPT will have no hold at all.

9. With reference to the totality of information collected during the processing of this case, the following position emerges:-

(i). This case relates to fixation of rates for the use of KPT properties to lay a pipeline from Vadinar to Kandla by PVKL and decide on the demand of the KPT for a facility compensation charges (FCC) to compensate the possible loss of revenue, once the pipeline is commissioned.

(ii). The pipeline passes through the seabed in the KPT waters and through the lands of the KPT.

(iii). There is no dispute regarding using the seabed in the KPT waters. The KPT has not demanded any charge for allowing right of way to the submarine pipelines passing through the seabed. This is reported to be in accordance with the Geneva Convention of Territorial Sea and Contiguous Zones, 1958, and related Statutes.

(iv). The Applicant-Firm contends that for laying shore pipeline (underground), the KPT should charge for “mere right of way” and
not for “lease of land”. They have requested the Authority to frame a Scale of Rates for Way Leave Charges for laying the pipelines in land limits of the KPT.

The KPT maintains that land allotted for laying pipelines to various agencies is always on the basis of the corresponding lease rent applicable to the land and its lease rent has already been approved by the Government / TAMP.

The KPT’s arguments is that no separate Scale of Rates for Way Leave Charges need to be framed and the existing rates applicable for allotment of land should be applied.

The Authority has already decided that no concession on Way Leave Charges for laying underground cross-country pipelines passing through the Port Trust’s land need be granted. This decision was taken in a case relating to the Hindustan Petroleum Corporation Limited’s pipelines passing through the Visakhapatnam Port Trust land and has already been notified.

That being so, in the instant case also, there is no need to frame a separate scale for Way Leave Charges. The existing rates in the schedule of rents for the KPT lands will apply to the land allotted for laying the underground pipeline.

(v). As regards levy of Facility Compensation Charge (FCC), the KPT’s argument is that the charge is to be recovered for the opportunity loss to them by way of ‘royalty’. That being so, the KPT’s stand is that FCC shall be settled between the parties and the TAMP has no role in fixing such charges.

The KPT justifies its demand for FCC on the following grounds:

(a). The quantity of POL handled through VK pipeline is a direct loss of traffic to the KPT.

(b). The KPT’s investments on four oil jetties and other related infrastructure will be under-utilised on commissioning of the VK pipelines.

(c). If cargo related charges and vessel-related charges on POL products are taken together, the average revenue will be Rs.68/- per tonne. However, they are demanding a compensation for loss of revenue on account of wharfage along, which is at present Rs.35/- PMT.
(vi). As clarified by the KPT, the FCC is a royalty payment and has no nexus with the services rendered by the KPT or for use of properties of the KPT.

(vii). The facility compensation charge (FCC) is being raised in this case in the nature of a ‘royalty’ with reference to the ‘opportunity cost’ of the traffic that will be diverted because of this pipeline. It can be argued, as indeed has been contended by the PVKL, that way leave charge for a pipeline does not depend, anywhere in the world, upon the quantity of throughput passing through it. But, as has been stressed by the KPT, the extraordinary circumstances governing this case deserve to be singled out for specific recognition. In on other pipeline case, possibly, there is such a definite diversion of assured (almost ‘dedicated’) traffic. It is noteworthy that, as has been contended by the KPT, all traffic generated from the two refineries at Vadinar has in any case to pass through the KPT. That being so, the KPT contends, asking it to give the way leave permission without any ‘compensation’ will be like asking it to commit hara-kiri!

The PVKL is of course not obliged to accept such a proposition if it does not want to. It could have chosen a different route for its pipeline without involving the KPT. For whatever reason, this option was not exercised. The PVKL was asked to proceed with execution of the Project even before these fundamental financial issues were settled. It will be relevant here to recognise the fact that the intention of the KPT to levy a FCC was known to the PVKL before commencement of the pipeline-laying. It may be possible for the PVKL to shift the burden or responsibility for this development either to the OCC or (Even) to the Government. But, that will be of little avail in respect of the dispute relating to the FCC. Having forced a fait accompli on the KPT, the PVKL cannot, at this stage, argue only as a carrier or a pipeline manager.

If the ‘royalty’ is being claimed to ‘compensate’ for loss of an ‘opportunity cost’, it can be argued that the KPT ought properly to raise this with the real beneficiary and not with the ‘carrier’. The beneficiary in this case can be either the refineries in Vaninar or, better still, the IOC in Kandla. But, once the pipeline is laid and commissioned, the KPT will have no hold over either the refineries, or the PVKL, or the IOC in respect of movement of the cargo. It is for this reason that, as was explained at the joint hearing, the KPT has stopped construction of the last stretch of the pipeline. Given the extraordinary circumstances of this case, it may not be reasonable to expect the KPT at this stage to start negotiating with the refineries or the IOC. Even if they did, in the event of a negative response from
both, what option can the KPT have? In fairness to the KPT, it has to be appreciated that the complication (and, the anomalous position) in this case has been caused by the execution of the Project in anticipation of agreements of the details. It may be idle to fix responsibility for what has happened. In any case, it may not be within the purview of this Authority to go into such issues. The only relevant issue may be to consider whether the KPT will be put to any (avoidable) loss by the project.

Viewed in this perspective, the balance of convenience will be seen to lie in favour of the KPT to demand a ‘royalty’ by way of compensation for an opportunity cost.

(viii). The question to be settled is whether the Authority will look into the matters relating to royalty and upfront payment in a BOT / BOOT contract. In the cases of privatisation of port facilities, the payments made by the private operator towards royalty and upfront payment form a part in the cost of rendering services at the private terminal and will have implications on tariffs. The Authority cannot remain as a mute spectator in such cases and take such costs as granted in the tariff. The Authority must go into the royalty and upfront payments before a concession is awarded.

(ix). In the present case, however, PVKL is not a provider of port facility. The FCC, if admissible and paid by the PVKL, will have implications in its cost structure for rendering its service. However, this Authority cannot go into the rates to be charged by the PVKL to its users. On this reckoning, this Authority will not like to examine the merit and quantum of the FCC. The issue regarding the FCC may be mutually settled between the PVKL and the KPT.

(x). During the joint hearing, the PVKL pointed out that the KPT’s comments on its representation covered only three of the issues raised by it and argued that it would accordingly presume KPT’s acceptance of the other issues raised by it in the representation. A perusal of the PVKL’s representation and the KPT’s comments thereon clearly shows that the KPT’s letter to the TAMP is specifically focused on three main issues raised by the PVKL seeking the intervention of this Authority. The other issues made by the PVKL about viability of the project, alternate route of the pipeline and its financial implications, etc., are not relevant to the KPT and hence not commented upon by it. That being so, this argument of the PVKL cannot be of any consequence to these proceedings.
10. With reference to the analysis given above, and based on a collective application of mind, the Authority hereby decides as follows:

(i). There is no need to frame a separate Scale of Rates for Way Leave Charges. The existing rate and conditions for lease of KPT lands shall apply for the lands allotted to the PVKL to lay underground pipelines in the land limits of the KPT.

(ii). The Authority cannot interfere in the matter of levy of Facility Compensation Charge, which is a royalty payment. This issue may be mutually settled between the KPT and the PVKL.

S.SATHYAM, Chairman