Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai - 400 005
Tel. No. 022 22163964/65/69 – Fax 022 22163976
E-mail: mercindia@merc.gov.in
Website: www.mercindia.org.in, www.merc.gov.in

Case No. 68 of 2012 and
Miscellaneous Application No. 4 of 2013 in Case No. 68 of 2012

In the matter of Petition of Adani Power Maharashtra Limited for adjudication of dispute under Section 86 of the Electricity Act, 2003 and for return of performance guarantee pursuant to the termination of PPA on 16 February, 2011

Shri V. P. Raja, Chairman

Smt. Chandra Iyengar, Member

Adani Power Maharashtra Limited…………………………...............................……Petitioner

Maharashtra Electricity Distribution Co. Ltd. ………………………………… Respondent

Present on behalf of the Petitioner: Shri Aspi Chenoy (Advocate)
Shri Sanjay Sen (Advocate)
Shri Kandarp Patel and Ors., APML

Present on behalf of the Respondent: Shri Kiran Gandhi (Advocate)
Shri Chirag Balsara (Advocate)
Shri. Rahul Chitnis (Advocate)
Shri A.S. Chavan, CE (PP) and Ors., MSEDCL

ORDER

Dated: 21 August, 2013

Adani Power Maharashtra Limited (hereinafter referred to as "APML") filed a Petition on 16 July, 2012 under Section 86 (1) (f) of the Electricity Act, 2003 (hereinafter referred to as "EA-2003") for adjudication of dispute and for return of performance guarantee pursuant to the termination of its Power Purchase Agreements (PPA) with Maharashtra State Electricity

Distribution Company Limited (hereinafter referred to as "MSEDCL") on 16 February, 2011. The said PPA was signed between APML and MSEDCL subsequent to the selection of APML as a successful bidder under Stage-I of the competitive bidding process conducted by MSEDCL as specified in the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees issued by Ministry of Power, Government of India as per the provisions of Section 63 of the EA-2003 (hereinafter referred to as "Competitive Bidding Guidelines").

2. The prayers of APML in this Petition are as given below:

"

a) Direct the Respondent to return the Performance Guarantee No. 007GM07082270001 dated 14.8.2008 to the Petitioner;

b) In the alternative, and without prejudice to prayer a), this Hon'ble Commission to:

i. direct the Respondent to consider revision of tariff and execution of a new PPA, substantially based on terms of the PPA dated 8.9.2008, which PPA has since been terminated;

ii. consider the revised fuel cost for generation and supply of power from the Petitioner's power plant in order to enable revision of tariff;

c) *Without prejudice to prayers (a) and (b) above, pending hearing and final disposal of the present petition, this Hon'ble Commission be pleased to allow the Petitioner to sell power, within or outside the State of Maharashtra;*

d) *Pass such and further orders, as the Hon'ble Commission may deem fit and appropriate keeping in view the facts and circumstances of the case "*

3. APML has also made an interim prayer in the Petition, which is as follows:

"a) Restrain the Respondent from invoking the Performance Guarantee of Rs. 99 Crores submitted by the Petitioner at the time of bid submission and from taking any coercive actions against the Petitioner;

b) Pass such and further orders, as the Hon'ble Commission may deem fit and appropriate keeping in view the facts and circumstances of the case"

4. Further, APML has made further prayers for interim relief in its submission dated 12 February, 2013, which are as follows:

"i) to direct the Respondent to procure the power at the mutually agreed tariff or such other tariff as this Hon'ble Commission may deem fit in the facts and circumstances of the present case till the time and subject to final disposal of the main petition;

ii) Any other or further relief(s) which the Hon'ble Commission may deem fit may be passed."

5. The summary of the Petition filed by APML is as follows:

5.1. APML is a Generating Company within the meaning of Sec 2(28) of the EA-2003 and a subsidiary of Adani Power Limited (hereinafter referred to as "APL"). MSEDCL is a Company incorporated under the provisions of Companies Act, 1956 and is one of the distribution licensees in the State of Maharashtra.

5.2. APML is implementing the Tiroda Thermal Power Station (hereinafter referred to as "Tiroda TPS"), which has a total installed capacity of 3300 MW. APML has contracted 1320 MW with MSEDCL from the Unit 2 and 3 of Tiroda TPS under the PPA dated 8 September, 2008 and 1200 MW from Units 4 and 5 through a separate PPA executed on 31 March, 2010 and 125 MW from Unit 1 through PPA executed on 9 August, 2010.

5.3. APML has made an investment of Rs. 15,000 Crore in Tiroda TPS, of which approximately Rs. 10,700 Crore, has been sourced from a consortium of lenders led by State Bank of India. MSEDCL is largely dependent on Tiroda TPS to meet the electricity shortage being faced by the State and to achieve the objective of zero load shedding. Tiroda TPS, being a green field project, is providing overall development of the area and generating employment opportunities there.

<u>Submissions of APML with regard to Force Majeure and termination of PPA</u>

5.4. APML submitted that MSEDCL initiated the process for procurement of power through Case 1 route of the Competitive Bidding Guidelines, by issuing the Request for Qualification (RfQ) in November 2006. As per the RfQ, the bidder was required to provide a letter of comfort for fuel linkage from the fuel supplier along with the

submission of response to Request for Proposal (RfP). APL, APML's holding company, submitted a response to the RfQ on 3 February, 2007, based on which MSEDCL shortlisted APL for the RfP stage.

5.5. APML submitted that on 3 April, 2007, MSEDCL issued the RfP. MSEDCL filed a Petition with the Commission seeking approval of deviations in the SBD for finalising the bid documents to be used in the Case 1 Stage-I bid process. In the revised RfP, MSEDCL had sought Tariff bids based under different categories, i.e., whether the power supply is based on captive coal block, imported coal, domestic coal (i.e., linkage coal from CIL or its subsidiaries) or hydro power. On receipt of approval of Commission in its Order dated 24 January 2008, in Case No. 38 of 2007, the RfP documents were revised on 16 February 2008.

5.6. APL submitted its bid on 20 February, 2008 and specified Lohara (West) and Lohara (Extension) coal blocks (together referred hereinafter to as "Lohara coal blocks") allocated to it as one of the sources of fuel. APL also stated that the balance requirement of fuel will be met by coal supply from CIL or its subsidiaries and imported coal.

5.7. APML stated that as per paragraph 2.8.1.4 of the RfP, the bidder was permitted to quote, the fuel energy charges separately, in cases where imported fuel was used and where domestic fuel was used. The above aspect is clear from the format of financial bid given in the RfP, where fuel energy charges were to be quoted either in Dollar terms or on a Rupee basis, depending upon whether the fuel to be used by the Seller is imported or from domestic sources.

5.8. APML received the Terms of Reference (ToR) for Lohara coal blocks on 16 May, 2008, from Ministry of Environment & Forest (MoEF).

5.9. MSEDCL issued a Letter of Intent ("LoI") to APL for supply of 1320 MW power on 29 July, 2008. Thereafter, MSEDCL and APML entered into a PPA on 8 September, 2008. APML stated that during the intervening period, (before the signing of PPA), it had also achieved substantial progress with regards to the implementation and development of Lohara coal blocks and had already invested more than Rs. 200 Crore there.

5.10. On 25 November, 2009, MoEF decided to withdraw the ToR as Lohara coal blocks were identified to be within the proposed buffer zone of the Tadoba Andheri Tiger Reserve (TATR). MoEF took the above decision after considering the reports of Government of Maharashtra (GoM), National Tiger Conservation Authority (NTCA) and based on the recommendations of the Expert Appraisal Committee (EAC). MoEF further recommended to the Ministry of Coal (MoC) for allocation of an alternate coal block for Tiroda TPS in lieu of Lohara coal blocks.

5.11. APML submitted that after the withdrawal of ToR, it applied to MoC for allocation of an alternate coal block on 3 December, 2009. Vide letter dated 2 January, 2010. APML informed MSEDCL, that the ToR in respect of Lohara coal blocks had been cancelled and the same has resulted in conditions akin to "force majeure".

5.12. MoEF informed APL vide its letter dated 7 January, 2010, about its decision of not considering Lohara coal blocks for environmental clearance. In the same letter, MoEF also conveyed that it has written to the MoC recommending the allocation of an alternate coal block to the company.

5.13. APML submitted that subsequent to the above, it has written several letters to Ministry of Coal (MoC), Ministry of Power (MoP), MoEF, Hon'ble Prime Minister's Office (PMO) and Central Electricity Authority (CEA) requesting for expeditious allocation of an alternate coal block in lieu of Lohara coal blocks.

5.14. APML pointed out that Government of Maharashtra (GoM) in its letter dated 11 March, 2010, requested the MoP for allocation of an alternate coal block in lieu of Lohara coal blocks, under "special dispensation" for ensuring consistent and adequate supply of coal to the Tiroda TPS. GoM had also mentioned in its letter that unless an alternate coal block is allocated, it would not be possible for APML to supply power at the Tariff committed in the PPA, signed with MSEDCL due to an increase in the cost of fuel.

5.15. APML submitted, that considering the delay in allocation of an alternate coal block due to the absence of any provisions for allocation of an alternative coal block in the policy framework, it had also requested the MoEF to reconsider the restoration of

ToR for the environment and forest clearance, after redefining the boundary of Lohara coal blocks to avoid infringement of the proposed buffer zone of TATR.

5.16. APML submitted that vide its letter dated 22 May, 2010, it again informed MSEDCL of its inability to supply power under PPA in the absence of availability of an alternative coal block

5.17. Vide its letter dated 2 June, 2010, MSEDCL asked APML to complete the activities mentioned in Article 3.1.2 of the PPA unless such completion was affected due to the occurrence of a force majeure event.

5.18. APML submitted that the condition subsequent as per Article 3.1.2 (ii) of the PPA regarding execution of Fuel Supply Agreement (FSA) and providing the copy of the same to the procurer, was not fulfilled due to occurrence of a force majeure event. Accordingly, in response to the letter dated 2 June, 2010, APML appraised MSEDCL that in spite of the fact that its request to MoC for allocation of alternate coal block had received a favorable response, in the absence of any policy for allocation of an alternate coal block, the allocation is likely to take some time.

5.19. APML requested MSEDCL vide its letters dated 14 October, 2010 and 23 November, 2010, to impress upon GoM and GoI for early allocation of an alternate coal block or for restoring the ToR of Lohara coal blocks by redefining the boundary so as to enable APML to supply power to MSEDCL at the quoted Tariff as per the PPA.

5.20. APML averred that specifying the fuel source was a pre-requisite in the RfQ as well as at the RfP stage. As per the RfP, the price bids were to be quoted based on different sources of supply, i.e., whether the power supply is based on captive coal block, imported coal, domestic coal (CIL coal linkage) or hydro power. Therefore, the fuel source was pre-determined at the time of execution of the PPA, which, in its case was Lohara coal blocks. In the absence of such pre-identified fuel source, it is not possible to enter into a contract for supply of electricity.

5.21. APML submitted that fuel contributes to more than 60% of the cost of generation. There is no case for executing a long-term PPA through a Tariff based bidding process in cases where fuel availability is entirely linked to market, i.e., in cases

where the fuel is sourced through e-auction or import of coal. The withdrawal of ToR for Lohara coal blocks was a force majeure event, which has been accepted by MSEDCL and the very basis (i.e., Lohara coal blocks) on which APML had submitted the bid and quoted the Tariff is no more in existence for reasons beyond its control.

5.22. As per Article 3.1.2 of the PPA, the period for fulfillment of conditions subsequent is 18 months from the effective date of the PPA. Under the aforesaid circumstances, APML was left with no fuel supply arrangement, even after a period of 18 months from the effective date as per the PPA. Article 3.3.3 of the PPA provides for treatment in case of non-fulfillment of the condition subsequent due to force majeure events.

5.23. APML submitted that, there was substantial change in circumstances post execution of the PPA, which was entirely beyond its control. Therefore, it is commercially impossible for it to supply power at a Tariff that was quoted on the premise that it would receive coal from Lohara coal blocks, which would contribute to approximately 75% of the contracted capacity (i.e., 1000 MW out of 1320 MW). It is settled law that when the very basis or foundation of a contract between two parties undergoes a major and substantial change, the parties cannot be pinned down to perform the contract and the same needs to be considered as a force majeure event. Even the PPA recognises such an eventuality.

5.24. APML submitted that after taking all the steps to mitigate the force majeure situation for more than two years from completion of timeline for fulfilling the condition subsequent and failing to get an alternate coal block, it issued a seven days notice for termination of the PPA under Article 3.3.3 vide its letter dated 16 February, 2011.

5.25. APML submitted that no communication was received from MSEDCL in the seven days' notice period, i.e., till 23 February, 2011 and accordingly, the PPA was terminated. On 5 March, 2011, i.e., after the notice period for termination, MSEDCL replied to the termination notice sent by APML. In the said letter, MSEDCL responded that it does not agree with APML’s contentions and stated that it wishes to ascertain the facts and requested APML to submit certain information/documents,

i.e., new coal distribution policy, original allocation letter for Lohara coal blocks, letters of withdrawal of ToR for Lohara coal blocks, APML's application for tapering linkage, LoA for tapering linkage and status of tapering linkage. MSEDCL added that till such time that the above information is provided and MSEDCL replies to its termination notice, the PPA cannot be considered as terminated.

5.26. APML provided the information sought by MSEDCL vide its letter dated 15 March, 2011. APML had also stated in the same letter that since the occurrence of force majeure has continued for a period of more than 10 months, the affected party has the right to terminate the PPA giving a notice of seven days in accordance with Article 3.3.3 of the PPA. APML further suggested that without prejudice to the termination of PPA, if MSEDCL was ready to revise the Tariff based on mutual consent, in such a way that the impact of change in circumstances is mitigated, APML can supply power to MSEDCL at such revised Tariff. APML did not receive any reply from MSEDCL.

5.27. At the behest of GoM, MSEDCL requested APML through its letter dated 18 June, 2011, to provide information on the steps taken by APML for allocation of coal with various agencies, i.e., Western Coalfields Limited (WCL), CIL, MoC or private companies after withdrawal of ToR for Lohara coal blocks by MoEF. APML, vide its letter dated 20 June, 2011, informed MSEDCL about its efforts to mitigate the force majeure situation, which included its communications with PMO, MoEF, MoP, MoC, EAC, etc., for allocation of an alternate coal block or alternatively, redefining the boundary of Lohara coal blocks and re-considering the ToR. APML further stated that in the absence of policy to allocate an alternate coal block, no alternate coal block has been allocated.

5.28. APML submitted that it received a letter dated 17 March, 2012 from MSEDCL, after a period of more than a year from the notice of termination of PPA. In the said letter, MSEDCL stated that, based on GoM dated 18 February, 2012, to it, which included the opinion of Advocate General, Maharashtra on this issue, the force majeure clause cannot be invoked by APML. MSEDCL further mentioned in the letter that in accordance with the above, APML's request for revision in Tariff cannot be considered.

5.29. Through its letter dated 19 March, 2012, APML denied the contents of MSEDCL's letter dated 17 March, 2012 and sought the copy of the opinion of Advocate General, Maharashtra. APML submitted that the same had not been provided to it by MSEDCL till date of submission of the present Petition. Subsequently, through its letter dated 11 April, 2012, APML reiterated the above facts and requested MSEDCL to return the performance guarantee of Rs. 99 Crore submitted at the time of bidding, if MSEDCL is not revising the Tariff as requested by APML. APML also enclosed an opinion taken from a retired Judge of the Hon'ble Supreme Court to corroborate the stand taken by APML. APML reiterated that MSEDCL has neither replied to the said letter nor has it returned the performance guarantee till date. Article 3.5 of the PPA provides for the return of performance guarantee in the event the PPA is terminated under Article 3.3.3 due to occurrence of force majeure event.

5.30. APML submitted that it has made substantial investment in the development of the power project and would face huge financial losses in case it is not relieved from the PPA on the grounds of frustration and/or force majeure. However, due to the withdrawal of ToR for Lohara coal blocks, it has been exposed to unforeseen circumstances. APML submitted that this situation has made the performance of the PPA commercially unviable. APML submitted that due to the above circumstances, it has been compelled to file the present Petition invoking adjudicatory power of the Commission under section 86 (1) (f) of the EA-2003 for return of performance guarantee in view of the termination of PPA.

5.31. The chronology of events as submitted by APML in its Petition is as given below.

Table 1: Sequence of events as submitted in the Petition

Date	Event
17 November, 2006	MSEDCL initiated a two-stage bid process for procurement of 2000 MW power under Case 1 route of the Competitive Bidding Guidelines
3 February, 2007	APL submitted response to RfQ issued by MSEDCL
3 April, 2007	APL was shortlisted for RfP stage based on its response to RfQ
6 November, 2007	MoC allocated Lohara West & Lohara Extension coal blocks to

Date	Event
	APL
24 January, 2008	The Commission issued an Order in Case No. 38 of 2007 in the matter of Petition of MSEDCL seeking approval for deviations in the bid documents to be used for procurement of power through competitive bidding process under Case 1 route being conducted by MSEDCL
16 February, 2008	MSEDCL issued final RfP after revising the same based on the Commission's Order
20 February, 2008	APL submitted its bid for supply of power to MSEDCL mentioning Lohara captive coal block as fuel source and also attached the copy of the allocation letter for the coal blocks along with its bid
16 May, 2008	MoEF granted the ToR for Lohara coal blocks
23 June, 2008	Mining plan was approved
21 August, 2008	Rapid Environment Impact Assessment (EIA)/ Environment Management Plan (EMP) report was submitted
29 July, 2008	MSEDCL issued Letter of Intent (LoI) to APL based on the bid submitted by the latter in response to the RfP
8 September, 2008	APML, a subsidiary of APL, executed PPA with MSEDCL for supply of 1320 MW power from Tiroda power project based on the bid submitted by APL in response to RfP issued by MSEDCL
11 September, 2008	Public hearing for environmental clearance of Lohara captive coal block concluded
21 October, 2008	APL submitted application for forest clearance for Lohara coal blocks
27 October, 2008	APML requested for tapering linkage in view of delay in forest clearance of Lohara West and Lohara Extension block
25 November, 2009	After considering the reports of the Government of Maharashtra (GoM) and of the National Tiger Conservation Authority, the EAC of MoEF, in its meeting held on 25 November 2009, decided to withdraw the ToR granted for the coal block, as Lohara coal mine project is located within the proposed buffer

Date	Event
	zone of the TATR. EAC also suggested for allocation of new coal block to APL.
3 December, 2009	APML applied to Ministry of Coal for allocation of an alternative coal block in lieu of Lohara coal blocks for which the ToR has been withdrawn by MoEF
2 January, 2010	APML informed MSEDCL that the ToR in respect of Lohara coal blocks had been cancelled and this has resulted in conditions akin to "force majeure"
7 January, 2010	MoEF informed APL regarding its decision of not considering Lohara coal blocks for environmental clearance and it has asked MoC to consider the allocation of an alternate coal block
Between January 2010 and February, 2011	APML made all possible efforts to avail an alternate coal block or to reinstate the allocation of Lohara coal blocks by redefining the boundary. APML kept MSEDCL updated on the same from time to time. However, allocation of an alternate coal block has not been made by MoC as there is no policy in place for allocation of alternate coal block in lieu of cancellation of original coal block for environmental reasons
29 January, 2010	Standing Linkage Committee (Long Term) (hereinafter referred to as "SLC(LT)") authorised issuance of Letter of Assurance (LOA) by Coal India Limited (CIL) on tapering basis for the capacity of 660 MW in accordance with provisions of New Coal Distribution Policy (NCDP) subject to the special milestones approved in the meeting in November 2008 and also conditions applicable in respect of projects recommended in the meeting
8 April, 2010	SLC(LT) authorised issuance of additional tapering linkage for 140 MW by CIL as per provisions of NCDP
22 May, 2010	APML again informed MSEDCL of its inability to supply power under the PPA in the scheduled time due to the withdrawal of ToR for Lohara coal blocks
14 June, 2010	APML intimated MSEDCL regarding the occurrence of force majeure under Article 12.3 of the PPA on account of withdrawal of ToR for Lohara coal blocks

Date	Event
14 October, 2010	APML requested MSEDCL to impress upon the GoM for allocation of an alternate coal block
23 November, 2010	APML intimated MSEDCL regarding its continuous efforts with PMO, MoEF, MoP as well as MoC for the request to consider the restoration of ToR by redefining the boundary of Lohara coal blocks and requested MSEDCL to impress upon GoM and GoI for allocation of alternate coal block or restoring ToR by redefining the boundary of Lohara coal blocks
16 February, 2011	APML issued notice to terminate the PPA citing the occurrence of "force majeure" on account of withdrawal of ToR for Lohara coal blocks and non-allocation of an alternate coal block despite all possible efforts
5 March, 2011	MSEDCL sought information against the Petitioner's letter dated 16 February, 2011. MSEDCL contended that the PPA cannot be considered to be terminated till the information sought is furnished by APML
15 March, 2011	APML clarified the queries raised by MSEDCL. APML also suggested reinstating the PPA with revision in quoted Tariff in such a way that impact of change in circumstances is mitigated
18 June, 2011	MSEDCL, at the behest of GoM, requested APML to provide information about efforts made to resolve the force majeure condition
20 June, 2011	APML informed MSEDCL about the various efforts made with PMO, MoC, MoP, GoM, MoEF, etc., for providing an alternate coal block in lieu of withdrawal of ToR for Lohara coal blocks or redefining the boundary of Lohara coal blocks
30 August, 2011	Considering the communications made by APML, MSEDCL sought comments regarding benefits of using imported coal with higher GCV for evaluating the impact on Tariff
4 October, 2011	APML furnished the details sought by MSEDCL for representing to GoM
17 March, 2012	By referring to the letter of GoM dated 18 February, 2012, MSEDCL stated that based on the opinion given by Advocate

Date	Event
	General, Maharashtra, force majeure clause cannot be invoked and hence, the request for revision in Tariff made by APML cannot be considered
19 March, 2012	In reply to MSEDCL's letter, APML sought the copy of the letter dated 18 February, 2012 by GoM along with the opinion of Advocate General, Maharashtra and conveyed that it would reply in detail in this matter after it has received the above
11 April, 2012	APML contended that the PPA stands terminated from 23 February, 2011 and MSEDCL has accepted the occurrence of force majeure event all along. APML requested MSEDCL to return the performance guarantee of Rs. 99 Crore submitted along with the bid

5.32. APML reiterated that while executing the PPA, the fuel was pre-determined based on the clauses in the RfP. The pre-identification of fuel is necessary in view of the fact that coal is nationalized and that there cannot be any long-term arrangement for supply of power unless there is a clear commitment from the Central Government in terms of the National Coal Development Policy, 2007 (NCDP) to supply coal to the power generating company. Unless such a commitment is made by the Central Government either on the basis of allocation of coal blocks or assurance of coal linkage, it will not be possible for any party to bid and/or enter into a long-term PPA. Also, unless there is an allocation or linkage, the supply of coal will either be based on coal procured through e-auction or imported coal. Both the above mentioned options of procuring coal are unviable and cannot be the basis of any bid under the present competitive bidding regime.

5.33. APML submitted that Article 12.3 of the PPA is inclusive in nature and covers any events and circumstances or a combination thereof not within reasonable control, directly or indirectly, of the Affected Party (defined by Article 12.2 of the PPA) and which also wholly or partly prevent the Affected Party in the performance of its obligations under the Agreement.

5.34. APML submitted that although Article 12.4 of the PPA excludes "non availability" or "change in cost of fuel" as force majeure events, the same is applicable only in

case such "non-availability" or "change in cost of fuel" is not due to the consequence of a force majeure event. APML contended that as in the present case, non availability or change in cost of fuel is due to occurrence of a force majeure event, i.e., cancellation of ToR issued for Lohara coal blocks, the said event is not excluded from force majeure as per Article 12.4.

5.35. APML submitted that Article 12.6 of the PPA deals with the duty of the Seller to perform the contract and duty to mitigate the circumstances leading to the occurrence of force majeure event. As per these requirements, it has made several attempts to mitigate the circumstances leading to occurrence of the force majeure event. In spite of its numerous efforts, it has not been allotted an alternate coal block in lieu of Lohara coal blocks from MoC. APML submitted the details of its communications with various agencies in this matter, as shown below. APML submitted that it has conveyed all the efforts outlined in table given below to MSEDCL through its letter dated 20 June, 2011.

Table 2: Communications regarding requests for an alternate coal block or reinstating Lohara coal blocks

Date	From	Letter(s) to	Particulars
3 December, 2009	APML	i. Hon'ble Union Minister of Power, GoI ii. Hon'ble Minister of State for Coal iii. Principle Secretary to Hon'ble Prime Minister iv. Secretary (Power) v. Chairperson, CEA	Requested MoC for expeditious allocation of alternate captive coal block so that development of power project within 11th Plan is not jeopardised
23 January, 2010	APML	Secretary, Ministry of Power	Requested MoP to take up the issue of expeditious allocation of alternate coal block with MoC
25 January, 2010	Secretary (Power)	APML	Referring to letter dated 23 January, 2010 of APML regarding allocation of alternate coal block, stated that the matter has been taken up with MoEF and Hon'ble MOS for Environment and Forest, Dr. Jairam Ramesh will be visiting TATR site to review the issue
2 February, 2010	Secretary (Power)	Secretary (Coal)	Stated that after the site visit, the Hon'ble MOS for Environment and Forests has decided not to reconsider the matter of permission for coal mining at Lohara coal blocks. Accordingly, he requested to consider allocating an alternate

Date	From	Letter(s) to	Particulars
			coal block to APML. It was also mentioned that entire power from Phase-I has to go to Maharashtra, which is facing acute power shortage
4 February, 2010	APML	Secretary (Coal)	Stated that the price of the power may go up if alternate coal block is not allotted to APML. Requested allocation of an alternate coal block at the earliest
15 February, 2010	APML	Secretary (Coal)	Requested consideration of the appeal for an early allotment of alternative coal block
11 March, 2010	APML	i. Secretary (Coal) ii. Secretary (Power)	Requested MoC to allocate alternate captive coal block at the earliest through special dispensation pending policy decision
11 March, 2010	Secretary (Energy)	Secretary, Ministry of Power	Referring to the discussion during the meeting with Principal Secretary to Hon'ble Prime Minister held on 10 March, 2010, requested allocation of an alternate coal block in lieu of Lohara coal blocks under a "special dispensation" pending policy decision
22 April, 2010	APML	Hon'ble Minister of State for Coal	Requested intervention of considering the allocation of alternate coal block to APML as a special dispensation, pending policy decision.
6 July, 2010	APML	Joint Secretary to Hon'ble Prime Minister	Appraised the difficulty faced by APML and requested to expedite the forest and environment clearance or allocate a coal block in lieu of Lohara West and Lohara Extension blocks
14 August, 2010	APML	i. Principal Secretary to Hon'ble Prime Minister ii. Secretary (Coal)	Referring to the MoEF recommendation to MoC to consider allotting alternate coal block and MoP requesting MoC for allocation of the said coal block. Stated that as per the directions from PMO, technical team has visited the project and have submitted the report regarding the progress made by APML at the site. Also referred that Planning Commission is reviewing the guidelines, which shall frame the policy for allotment of alternate coal block. Stated that as formation of policy may take time, requested consideration of the appeal for allotment of an alternate coal block
29 September, 2010	APML	Hon'ble Minister of State (Independent Charge), MoEF;	Requested consideration of restoring ToR for the environment and forest clearance after redefining the boundary of Lohara coal blocks
30 September,	APML	Minister of Power, GoI	Enclosing the letter written to Hon'ble Minister of State (Independent Charge),

Date	From	Letter(s) to	Particulars
2010			MoEF, requested his assistance so that the issue of allotment of coal block is resolved amicably avoiding any derailment in the commissioning of this important and prestigious project for the MoP as well as for the State of Maharashtra
29 October, 2010	APML	Principal Secretary to Hon'ble Prime Minister	Requested intervention in the matter and consider the restoration of ToR for the environment and forest clearance, after redefining the boundary of the Lohara coal blocks

5.36. APML submitted that in spite of making the above efforts to mitigate the force majeure event, the alternate coal block in lieu of Lohara coal blocks has not been allocated by MoC due to absence of policy to allocate an alternate coal block where original coal block is cancelled due to environmental reasons. As a consequence, it has been exposed to unforeseen circumstances of non-availability of adequate quantity of coal, its quality and prices of coal.

5.37. APML submitted that bids invited were initially of the Case 1 type. Subsequent to this, MSEDCL approached the Commission and received the approval to revise the bid documents. Based on these facts, the PPA signed by APML and MSEDCL is in the nature of Case 2 type, for which, MSEDCL was specifically permitted to revise the same to be used for Case 1 bidding.

5.38. APML submitted that the major difference between Case 1 and Case 2 processes is that in Case 1 type bidding process, it is the responsibility of the bidder (APML in the present case) to arrange for fuel, whereas in case of Case 2 type bidding, the Procurer (MSEDCL in the present case) offers the predetermined fuel source to the bidder. Irrespective of the above fact, the responsibility of the bidder to arrange fuel cannot be absolute and inflexible, since coal is a controlled/nationalized commodity and the availability of the same depends on several factors, most of which are beyond the control of the generating company. In Case 1 route of competitive bidding, once the fuel is selected by the Bidder, Tariff is quoted based on the fuel source and the PPA is entered into based on the same. Once the fuel source is identified in the bid and the PPA is signed on the basis thereof, the distinction between Case 1 and Case 2 is irrelevant and ceases to exist. After entering into a PPA, the rights and duties of the parties are governed by terms of the PPA and the

laws of contract. APML added that Case 1 and Case 2 are two different routes as per bidding guidelines and once the fuel source is identified, the differential obligation under Case 1 route does not exist any longer. Therefore, after the above stage, once the PPA is executed and the identified fuel source fails, the provisions of force majeure and frustration become applicable.

5.39. APML averred that unless there existed the intent to identify a pre-determined fuel source for the supply of power from a PPA, certain provisions of PPA such as fulfillment of conditions subsequent, force majeure, change in law, etc., would not have existed in the PPA. The above provisions cannot be made operational unless the PPA clearly defines the specific location, technology of generation and source and type of fuel proposed to be used for power supply.

5.40. APML submitted that in an identical case, the Commission, in its Order dated 20 July, 2011 in the matter of Petition of MSEDCL seeking approval of deviations in the Standard Bidding Documents issued by MoP, has ruled that the disallowance of environmental clearance by MoEF may be considered as a natural force majeure event.

5.41. APML pointed out that the Chhattisgarh State Electricity Regulatory Commission (hereinafter referred to as "CSERC") in its Order dated 31 December, 2011 in the case of M/s Indiabulls CSEB Bhaiyathan Power Limited (hereinafter referred to as "Indiabulls-Bhaiyathan") vs. Chhattisgarh State Power Holding Company Limited and others (hereinafter referred to as "CSPHCL"), has ruled that the situation of not getting forest and environmental clearance for the coal mine on account of allocated coal blocks being in a no-go area is a situation of force majeure because it is beyond the control of CSPHCL to fulfill this obligation as per the PPA.

5.42. APML submitted that the substantial change in circumstances post execution of PPA are beyond its control and have led to the very basis and foundation of the PPA undergoing a major change. It is commercially unviable for APML to supply power at the quoted Tariff in view of the withdrawal of ToR for Lohara coal blocks and non-allotment of an alternate coal block.

5.43. APML submitted that it has entered into PPA with MSEDCL on 9 August, 2010 for 125 MW from the 1st unit of the Tiroda TPS and the balance capacity of this unit of 660 MW has been offered to MSEDCL for which, negotiations are under process. The PPA for 1,320 MW dated 8 September, 2008, which is the subject matter of the present Petition, was entered into with MSEDCL for supply of power from Unit-2 and 3 of Tiroda TPS. APML has entered into a third PPA with MSEDCL dated 31 March, 2010 to supply power from Units 4 and 5 of Tiroda TPS.

5.44. APML submitted that vide its letter dated 23 November, 2007, it applied for coal linkage to meet the fuel requirement for Units 1, 2 and 3 of Tiroda TPS, which have an aggregate capacity of 1980 MW. APML submitted that two LoAs dated 1 June, 2009 and 6 June, 2009 from WCL and SECL respectively were issued as against the above mentioned application. APML submitted that considering Lohara coal block to meet the requirement of 1000 MW and the two LoAs to meet the balance requirement, it had secured coal for 1980 MW before the withdrawal of ToR of Lohara coal blocks.

5.45. APML further submitted that through a press release on 15 February, 2012 the PMO has directed CIL to sign FSAs with power generation companies whose power projects have been commissioned or would get commissioned on or before 31 March, 2015. The PMO further directed that FSAs will be signed for full quantity of coal mentioned in the LOAs for a period of 20 years with a trigger level of 80% for levy of disincentive and 90% for levy of incentive. Till date, APML has not received any LoA or entered into any FSA with CIL or any of its subsidiaries in relation to the PPA, which is the subject matter of the present Petition.

5.46. APML submitted that the Hon'ble Supreme Court has also observed that Section 56 of the Indian Contract Act, 1872 is broad enough to exhaustively include all events which may be construed as force majeure events and as a result, frustration can be claimed in view of the aforesaid facts and circumstances. APML quoted the Section 56 of the Indian Contract Act, 1872, that deals with the doctrine of frustration of a contract, which is reproduced below:

"An agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event

which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

5.47. APML submitted that the interpretation of the term impossibility has not been restricted to merely physical or literal impossibility. It submitted that in the above context, the following aspects need to be considered carefully:

a) Even the performance of acts which may be possible but are impracticable commercially and which materially affect the formulation of the contract itself would be liable to be held void, under the doctrine of frustration;

b) An untoward event or change of circumstance which completely upsets the foundation of the bargain can make it impossible for the promisor to act on his or her promise; and

c) The impossibility of performance should be inferred from the nature of the contract and the surrounding circumstances in which the parties must have entered in to an agreement.

5.48. APML submitted that in the present Case, the withdrawal of ToR for Lohara coal block is an unforeseen event which is outside its control and the same leads to the performance of the PPA becoming impossible, subsequently leading to the termination of PPA.

5.49. APML highlighted that in the present case, it is neither responsible for the withdrawal of ToR for Lohara coal blocks nor is it responsible for non-allocation of an alternate coal block. It added that the withdrawal of ToR for Lohara coal blocks has disrupted the very basis of the PPA, and the present situation is radically different from that which was prevalent at the time of bid. It further submitted that the PPA stands frustrated due to the above reasons and hence, unless the PPA conditions are amended in such a way that they mitigate the impact of the above changed circumstances, APML should be relieved from the performance of the PPA.

5.50. APML submitted that that Article 13.2 of the PPA clearly envisages restitutive remedy by the Regulator to restore the party affected by the consequence of change in law through monthly Tariff payments to the same economic position as if such change in law has not occurred. It is essential that the Tariff under the present PPA

be suitably revised so as to bring APML back to the position it would have been if the escalation in fuel price never occurred for APML to effectively perform its obligations under the PPA.

5.51. APML submitted that it had quoted non-escalable capacity charges and non-escalable energy charges in its bid during the Case 1 Stage-I bid process. It had quoted non-escalable energy charges for 25 years. APML added that it had quoted the charges under the non-escalable category on the basis of expectation of receiving fuel from the captive coal blocks. APML further submitted that while quoting the energy charges based on the fuel from captive coal blocks, it had followed the CERC guidelines and adopted the evaluation ratio notified by MSEDCL (Procurer). It is evident from the LoA dated 6 November, 2007, that Lohara coal blocks were allocated to meet the coal requirement of 1000 MW. APML added that it had proposed to procure the planned quantity of coal for supply of power over and above 1000 MW by either procuring domestic coal from CIL or through imports. APML submitted that although it submitted a single bid, it had quoted three separate Tariffs for 100 MW, 660 MW and 660 MW aggregating to a total capacity of 1420 MW offered from the planned capacity of 1980 MW of Tiroda TPS.

5.52. APML submitted that out of the total offered capacity of 1420 MW, 100 MW offered by it did not qualify based on the price bid. Based on negotiations with MSEDCL, the price was further negotiated and the parties agreed to a unified levellised Tariff of Rs.2.64 per kWh for both 660 MW units and accordingly, the PPA was signed at the above rate for supply of 1320 MW. APML submitted that in the quoted Tariff which results in the levellised Tariff of Rs. 2.64 per kWh, the energy charge for the first five years is Rs.1.44 per kWh and there is a minor escalation in the energy charge for the subsequent years. APML clarified that in calculating the energy charges, it assumed that it would get coal supply for 1000 MW from Lohara coal blocks and for the balance 320 MW, it would procure the coal from CIL as per the coal policy of GoI. As per the above explanation, the Tariff quoted by it was based on supply of coal from the domestic market. Much after the PPA was entered into, the GoI withdrew the ToR of Lohara coal blocks did not get alternative coal blocks from the MoC. APML further submitted that there does not

seem to be any chance of allocation of alternative coal block which can be developed and mined on or before the scheduled commercial operation date under the present PPA at this stage.

5.53. APML submitted that the withdrawal of ToR of coal blocks is a force majeure event for the reason that the withdrawal of ToR for Lohara coal block and usage of imported or any other alternative coal will impact the cost of the generation to such an extent that its entire equity will be eroded. Apart from the above, any default in debt service obligations will result in recall of debt and default in performance by APML in respect of contracts executed by it apart from the PPA. In addition to the above, the failure of PPA will also adversely affect public at large, financial institutions, banks and investors. APML averred that while Maharashtra is currently facing an acute shortage of power, failure of operational power projects like the Tiroda TPS on account of such issues, will not only deprive the consumers of electricity but will also aggravate the present electricity shortage in the country.

5.54. APML submitted that it is willing to supply the power under the PPA, provided that it is suitably compensated by making the revision in Tariff, by which the situation of force majeure can be mitigated. Based on these arguments, it seeks the intervention of the Commission for review of or adjustment in Tariff to enable it to recover the price of coal and thereby ensure the sustenance of operations and to enable APML to continue with the supply of power to MSEDCL.

Submissions of APML with regard to revision in Tariff

5.55. APML submitted that the EA-2003 was implemented with the following objectives: (a) to take measures conducive to development of electricity industry; (b) to promote competition; (c) to protect interest of consumers; and (d) to rationalise the electricity Tariff.

5.56. APML submitted that the Commission has the jurisdiction to revise the Tariff for the PPA that has been executed. It submitted that Section 61 of EA-2003 is relevant in this regard and from the reading of the same, it can be conclusively stated that Tariff for sale of power by a generating company to a distribution licensee has to necessarily be determined on the basis of commercial principles, which safeguards

the interests of consumers and ensures a reasonable recovery of costs. In the present case, the generating company (APML) is unable to recover its costs on account of the cancellation of coal blocks, which were the basis of the Tariff quoted under the bid. It added that in case either the PPA is not terminated or the Tariff is not revised for continuation of the PPA, the PPA would be commercially unviable and will lead to the bankruptcy of APML. Thus, the essence of EA-2003 and particularly Section 61, to promote the generation of electricity will stand defeated.

5.57. Quoting Paragraph No. 2, 4, 5.5.1, 5.8.2 and 5.8.4 of the National Electricity Policy and Paragraph 4(b) and 5.3(a) of Tariff Policy, APML submitted that the above mentioned policies emphasise the recovery of cost of service, appropriate return on investment to attract investment in the sector and ensuring financial viability of the sector.

5.58. APML submitted that the Tariff under the PPA has become unviable for the Petitioner and can be enhanced considering the principles of Section 61 read with the powers available with the Commission under EA-2003. There are precedents to suggest that the Tariff under a PPA can be reconsidered because the Tariff for sale of power to a distribution licensee is a Regulatory function over which the regulatory body will continue to exercise jurisdiction under the prevailing laws. APML quoted the excerpts from the following Judgments to emphasise its point:

a) ATE Judgement in Appeal No. 35 of 2011 in the matter of Konark Power Projects Limited;

b) ATE Judgement in Appeal No. 29 of 2011 in the matter of Tarini Infrastructure Limited vs. GUVNL and others; and

c) ATE Judgement in Appeal No. 28 of 2010 in the matter of Tarini Infrastructure Limited vs. GUVNL and others.

5.59. APML submitted that the following points can be concluded from the arguments described above.

(a) One of the objectives of the National Electricity Policy and the National Tariff Policy is commercial viability of the electricity sector;

(b) Bidding guidelines under Section 63 of EA-2003 reflect and incorporate the principles envisaged under Section 61 of EA-2003, including the principle that the Tariff should reflective of the cost of generation;

(c) Power procurement as per the statutory framework constitutes a statutory contract in terms of the pre-approved and finalised PPA governed by provisions of the Act as well as the Competitive Bidding Guidelines; and

(d) The PPA envisages the adjustment of Tariff for unforeseen and uncontrollable events by the Commission so as to restore/restitute the party adversely affected, which is APML in the present case.

5.60. APML submitted that in the Tariff Policy and National Electricity Policy, it has also been emphasised that the private sector will have multiple options for investments and therefore, to attract the private capital in power sector, adequate returns on investment need to be provided. As per the above explained objective of the said policies, if the circumstances demand, necessary interventions can be made by the various authorities to achieve the object of the policies.

5.61. APML further submitted that Article 17.3.1 of the PPA provides rights to the Commission to adjudicate any matter related to revision in the Tariff in case of dispute between the parties.

5.62. APML submitted that under Article 18.1 of the PPA, the Commission has powers to approve an amendment or supplement the original agreement with a written agreement. Section 86 of the EA-2003 provides exhaustive powers to the Commission to regulate the electricity purchase by a distribution licensee and adjudicate upon the issues related to PPA between a generating company and a distribution licensee. The said Section also stipulates that while discharging its functions, the State Commission shall be guided by National Electricity Policy, National Electricity Plan and Tariff Policy.

5.63. APML submitted that as per the provisions of Article 17.3.1 of the PPA read with Article 18 thereof, the Commission has the power to determine the Tariff as per the provisions of the PPA and also as per the powers conferred by Section 86(1)(a) and

(b) of the Electricity Act, 2003, notwithstanding the fact that the PPA has been terminated by APML, as APML is willing to supply power at a revised Tariff.

5.64. APML submitted that in view of the above facts and also considering the power shortage in Maharashtra, it is not only important that the power plants should be facilitated to commission faster, but it is also important to ensure that no power project is lying idle. The objective of the GoM to make Maharashtra a zero load shedding state by 2012 will only be possible with the help of capacity addition of Tiroda TPS.

5.65. APML submitted that keeping above in perspective, it proposed the revision of Tariff to MSEDCL. No response had been received from MSEDCL for more than a year i.e., till the receipt of MSEDCL's letter dated 17 March, 2012. APML submitted that at the time of filing this Petition, Phase-I of Tiroda TPS was close to commissioning and it cannot afford to keep this generating capacity idle.

5.66. APML requested the Commission to issue an appropriate direction to MSEDCL to consider renegotiating the Tariff and to execute a new PPA based on the actual fuel cost likely to be incurred by APML as an alternative to returning the performance guarantee and without prejudice to the fact that the PPA stands terminated. APML submitted that the Scheduled Delivery Date under the terminated PPA was 14 August, 2012.

5.67. It added that as an interim measure and pending the hearing and final disposal of the present Petition, if it is not disposed of till September 2012, APML is ready to supply power on an adhoc basis on escalable Tariff or cost plus method or such other mechanism as the Commission may deem fit with a view to balance the equities and the interest of all parties involved, i.e., APML, GoM, MSEDCL and the consumers. Such offer to supply power is only to demonstrate the bonafide intent of APML's conduct and should not be construed as waiver of the rights that have arisen consequent to termination of the PPA.

6. The Commission held the first hearing in this matter on 22 August, 2012. Shri Sanjay Sen (Advocate) and Shri Kandarp Patel were present on the behalf of APML. Shri Kiran Gandhi (Advocate) and Shri A. S. Chavan, CE (PP), were present on

behalf of MSEDCL. Ms. Ashwini Chitnis, Prayas Energy Group (hereinafter referred to as "Prayas"), authorised Consumer Representative and Dr. Ashok Pendse, Thane Belapur Industries Association (hereinafter referred to as "TBIA"), authorised Consumer Representative were also present during the hearing.

7. The Commission directed both parties to submit all the details regarding allocation of coal blocks, coal linkages available and things under process and the information on issues of law and facts along with the chronology under affidavit.

8. Prayas made a submission on 9 October, 2012. The submissions made by Prayas are discussed in the following Paragraphs.

8.1. Prayas submitted that the Competitive Bidding Guidelines define Case 1 as a type of bidding where the location, technology, or fuel is not specified by the procurer. Prayas submitted that as recorded by APML in Paragraph 13 of the Petition on affidavit, information regarding fuel arrangements submitted by petitioner in the bid document was as follows:

> *"Fuel: Lohara (West) and Lohara (Extn.) coal blocks have been allocated to the Project, which will meet the **part of coal requirement** of the project. The **balance coal requirement** of the projects shall be met from **coal supply by CIL or its subsidiary and Imported Coal**." **(Emphasis added)***

8.2. Prayas submitted that as evident from the above, from the beginning of the bidding process, the bidder was fully aware that arranging the fuel is solely his responsibility and that the procurer is not obliged to assist in any manner in this regard. Further, in the qualifying process, the bidder made it clear that it had plans to source fuel from all possible sources i.e. captive block, linkage from CIL and imported coal, thereby not indicating absolute reliance on the blocks supposed to be allocated to it. More importantly, the bidding process gave the bidder complete flexibility to quote escalable charges for fuel cost, fuel handling and fuel transportation. However, in spite of this flexibility, the bidder choose to quote fixed fuel charge and managed to emerge as the lowest bidder (L1) in the process and thereby won the contract. Therefore, as far as the PPA is concerned, there is no connection between the source of the fuel and the Tariff agreed in the PPA, as the bidder is given the flexibility to

procure fuel at any cost and from any location at any point of time. Hence, cancellation or otherwise of the said coal blocks does not have any material impact on the PPA terms and conditions.

8.3. Prayas submitted that after winning the bid and signing the PPA, APML now claims to have terminated the contract by issuing a notice under section 3.3.3 of the PPA to MSEDCL on 16 February, 2011. Clause 3.3.3 of the PPA states as follows:

"In case of inability of the seller to fulfill the conditions specified in Article 3.1.2 ***due to any Force Majeure event****, the time period for fulfillment of the Condition Subsequent as mentioned in Article 3.1.2, shall be extended for the period of such Force Majeure event, subject to a maximum extension period of ten (10) Months, continuous or non-continuous in aggregate. Thereafter, this Agreement may be terminated by either the procurer or the Seller by giving a notice of at least seven (7) days in writing to the other Party." (****Emphasis added****)*

8.4. Prayas further submitted that the clause 12.3 of the PPA defines force majeure event as follows:

"A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that ***wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care*** *or complied with prudent practices:" (****Emphasis added****)*

8.5. Prayas further added that Article 12.4 of the PPA defines Force Majeure Exclusions. This clause states as follows:

*"****Force Majeure shall not include*** *(i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:*

a. ***Unavailability, late delivery, or changes in cost of*** *the plant, machinery, equipment, materials, spare parts,* ***Fuel or consumables for the Project;"*** *(****Emphasis added****)*

8.6. Prayas submitted that as can be referred from the above clauses of the PPA, a force majeure event implies inability of the affected party to perform its obligations as per the contract on account of events beyond its reasonable control. Prayas submitted that as evident from its above arguments, APML chose to quote fixed fuel cost in spite of having the flexibility to include escalable parameters while acknowledging the possibility of procurement from all possible sources such as captive block, linkage and imports. Further, APML is not claiming any inability to perform, as it is simultaneously seeking Tariff revision which clearly implies that sourcing fuel for generation of power is not the problem. Thus, the purported high cost of fuel is the only difficulty for petitioner in complying with the PPA terms, which has been explicitly excluded under the force majeure definition, as the bidder had the discretion to pass on such costs through escalable components in Tariff at the time of bidding. Because of the provision for such an option, there is no relief for variation in fuel cost under Article 12 of the PPA, which deals with relief measures in case of a force majeure event. This fact itself proves that there is no force majeure event as claimed by APML.

8.7. Prayas submitted that harmonious reading of the bidding guidelines (which give the bidder complete flexibility in choosing the fuel location and source and passing through such costs), along with clauses of Article 12 of the PPA, makes it clear that unavailability of captive coal block cannot be construed as a force majeure event. Prayas further added that the Commission has itself upheld this interpretation of the PPA in its Order dated November 16, 2011 in Case No. 9 of 2011 by ruling as follows:

"Thus, Article 12.4 Force Majeure Exclusions, ***specifically excludes the unavailability or changes in cost of Fuel from Force Majeure*** *unless the same are consequences of an event of Force majeure."*

8.8. Prayas submitted that in absence of force majeure event, the claimed termination notice issued under Section 3.3.3 of the PPA ceases to have any legal validity and hence the same should be declared as ab-initio null and void.

8.9. Prayas submitted that the present Petition highlights serious lacunae in MSEDCL's communication with the Commission and hence with the consumers, which needs

careful scrutiny. As claimed by APML, the termination notice under Clause 3.3.3 of the PPA was issued to MSEDCL in February 2011. It is indeed a serious concern that a hearing in this matter should come up before the Commission after more than 18 months since this crucial development took place. Prayas highlighted that in the intervening period nothing was communicated to the Commission regarding such termination notice and subsequent steps taken by MSEDCL, if any, in this regard.

8.10. Prayas submitted that merely a few weeks before the present Petition was filed, questions regarding status of this project and capacity addition therein were posed before MSEDCL during the Tariff revision process. In the Commission's Order dated 16 August, 2012 in Case No. 19 of 2012, MSEDCL in its reply to such questions has stated it had considered the power availability from Tiroda TPS contracted through Case-1 Stage-I process from August-September 2012 based on the information provided by the generator, i.e., APML, as it is more realistic.

8.11. Prayas pointed out that during the proceedings related to medium and long-term power procurement by MSEDCL, questions were repeatedly raised regarding status of the various projects from which power has already been contracted, including the units of Tiroda TPS, which are the subject matter of the present Petition. Prayas submitted that the Commission has directed MSEDCL to submit such details on more than one occasion.

8.12. Prayas submitted that the present case highlights the cost of regulatory failure in crucial matters such as power purchase planning and procurement. Despite such clear directions on several occasions, MSEDCL did not submit the crucial information regarding the said termination notice to the Commission. Also, in spite of repeated submissions from Consumer Representatives in this regard (Case No. 104 of 2009, Case No. 14 of 2010, Case No. 56 of 2010, Case No. 22 of 2010, etc.), the Commission neither insisted on compliance with its directives, nor has it taken the necessary steps to suo-motu assess the progress and status of the projects from which capacity has been contracted on long-term basis. Prayas further added that the above issues have occurred in spite of the fact that power purchase cost accounts for more than 70% of the distribution company's revenue requirement and failure in

power purchase planning has both cost and service quality implications for consumers.

8.13. Based on the above arguments, Prayas prayed to the Commission that:

"a. Declare the said termination notice as ab-initio null and void, as there is no force majeure event as per Article 12 of the PPA.

b. Direct the petitioner to ensure performance of its contract as per the agreed terms and conditions under the PPA dated 8th Sept 2008.

c. Undertake a detail scrutiny and assessment of MSEDCL's response to the said notice and steps taken by it in this regard. Direct MSEDCL to undertake necessary corrective actions to prevent such lapses in communication in future.

d. In light of such developments, undertake suo-motu public process to asses power purchase planning of MSEDCL with emphasis on following aspects:

i. Project wise data such as quantum of power contracted with private generators through competitive bidding process and capacity contracted through MoU processes with IPPs, centre and state generating stations.

ii. Plant-wise and unit-wise actual status of this contracted capacity

iii. Comparative analysis of the commissioning timeframe of this capacity; such as when the capacity is/was expected to be commissioned as per the respective contract and what is the actual present status of the plant/unit."

9. Second hearing was held in this matter on 11 October, 2012. Shri Sanjay Sen and Shri Kandarp Patel were present on the behalf of APML. Shri Kiran Gandhi and Shri A. S. Chavan were present on behalf of MSEDCL. Ms. Ashwini Chitnis was also present during the hearing.

10. The Commission noted that neither party had made any submissions in spite of the fact that both the parties were directed to make submissions during the previous hearing and directed both the parties to comply with the said directions. The Commission further directed MSEDCL to submit the first set of affidavits in reply to the queries raised by Consumer Representative during the hearing latest by 25 October, 2012. The Commission directed that respective rejoinders, if any, should

be submitted latest by 2 November, 2012. The Commission directed both the parties to submit the copy of affidavits to each other, Consumer Representatives and the advocates of both the parties.

11. As per the directive of the Commission, vide daily Order dated 11 October, 2012, MSEDCL submitted its response on 29 October, 2012. MSEDCL submitted that the three broad fundamental propositions on which APML has built its entire case are completely flawed and fallacious. MSEDCL provided following reasons in support of its argument.

11.1. Lohara coal blocks were allocated to APML by the Ministry of Coal for meeting its coal requirement for the Tiroda TPS. However, such allotment was subject to obtaining necessary permissions and clearances from Government authorities. APML was supposed to obtain clearance from MoEF before mining activities could be commenced and accordingly it had made an application on 20 January, 2008, i.e., before the submission of its bid on 16 February, 2008. The said ToR was therefore conditional and subject to an environmental clearance being granted to APML. However, the environmental clearance was denied by the MoEF based on the recommendation of the Expert Appraisal Committee in view of the fact that the proposed coal mine is within the proposed buffer zone of the Tadoba-Andhari Tiger Zone. The fact that the mine was within an ecologically sensitive zone was spelt out in the ToR itself. Hence, under the circumstances, it was certain that APML was always aware of the fact that there is a possibility of not obtaining the necessary clearances and permissions to commence mining operation in Lohara coal blocks prior to entering into the PPA on September 2008. Thus, failure to obtain necessary clearances cannot be considered as a force majeure event as defined in the PPA.

11.2. As regards the allegation of revision of Bid Documents from Case 1 type to Case 2 type in paragraph 42 of the Petition, MSEDCL submitted that APML has not provided any particulars and/or made any reference to any of the Orders of the Commission on the basis of which it contended that the bid document was changed from Case 1 type to Case 2 type. The Commission had issued two different Orders while approving the RfQ and RfP respectively. MSEDCL submitted that none of the

Orders suggested, in any manner, the approval of the Commission to change the bid documents from Case 1 type to Case 2 type.

11.3. As regards the lack of commercial viability cited by APML, MSEDCL submitted that in view of the fact that the bids were invited on a Case 1 type basis, the entire obligation and responsibility for supply of fuel was that of APML. APML had a choice to quote its rates on an escalable basis and on a non escalable basis. Again, APML has not produced any material, whatsoever, before the Commission to substantiate its contention that the contract has become commercially unviable. Hence, MSEDCL submitted that the question of contract becoming commercially unviable is baseless.

11.4. MSEDCL, in its response, also briefly detailed out the sequence of events leading to the current Petition and the correspondence after the Petition. MSEDCL also provided paragraph wise responses to the issues in the Petition. As regards the quantum of investments made by APML for the Tiroda TPS, MSEDCL cited lack of awareness regarding the quantum of investment or the amounts sourced from the consortium of lenders, and denied to admit the correctness of anything in this regard.

11.5. MSEDCL submitted that when APML responded to RfQ i.e., on 3rd February 2007, it had not obtained the allotment of Lohara coal blocks. The Lohara coal blocks were conditionally allocated to APML by the Ministry of Coal by a letter dated 20 November, 2007. APML was cognizant of the fact that it required prior permission of MoEF to operate the coal block. Thus, MSEDCL surmised that the arguments made by APML are ex-facie incorrect and false. MSEDCL also submitted that the basis on which APML decided to participate in the RfP and RfQ is wholly irrelevant because of the fact that the RfP and RfQ were issued on a Case 1 type basis.

11.6. MSEDCL also denied that APML was compelled to declare force majeure as a result of "unforeseen contingencies" beyond its control. MSEDCL submitted that it is incorrect and unreasonable for APML to contend that it was an unforeseen contingency that it would not receive environmental clearance from the MoEF to operationalise Lohara coal blocks. MSEDCL also denied the alleged event of force majeure or that the alleged termination was not challenged by it. MSEDCL cited that it had immediately responded to the letter dated 16 February, 2011, by its letter

dated 5 March, 2011 where it had denied that any force majeure event had occurred or that APML was entitled to terminate the PPA. MSEDCL also stated that APML had accepted this position and therefore did not seek cancellation and/or return of its performance guarantee till 11 April, 2012. MSEDCL also expressed that APML's offer to revise Tariff belied its contention that a force majeure has occurred preventing it from fulfilling its obligation under PPA. MSEDCL denied that the performance guarantee had been illegally withheld by it.

11.7. In the Petition, APML cited that specifying the fuel source was a prerequisite under the RfQ and RfP stage and hence, the bid was made taking Lohara coal blocks into consideration. MSEDCL, in its response, has denied the interpretation made by APML regarding specifying the fuel source in the RfQ and RfP. MSEDCL submitted that the PPA does not in any manner prevent APML from obtaining fuel from any source other than what is stated by it in its bid. A bidder is required to identify its fuel source while making its bid only in order to satisfy MSEDCL that it has an available arrangement for supply of fuel for generation of the contracted capacity. MSEDCL expressed that as per the current facts, the alternate fuel is available with APML. MSEDCL also denied admitting that 60% of the cost of generation is related to fuel. MSEDCL refused to accept that there is no case for executing a long-term PPA through Tariff based bidding process if fuel availability is linked to the market. Thus, MSEDCL submitted that the reference in the bid document to the source of fuel is only for the purpose of establishing the bidders' capacity to fulfill the contractual obligations.

11.8. MSEDCL denied admitting that APML was left with no fuel supply arrangement after a period of 18 months from the effective date and/or that Article 3.3.3 of the PPA has any relevance in the facts and circumstances of the present case. MSEDCL reasoned that even by assuming any changes in the circumstances post execution of the PPA, the same holds no relevance in view of the fact that the present PPA is on a Case 1 basis.

11.9. As regards the validity of PPA due to termination, MSEDCL submitted that in the view of the fact that no force majeure event had occurred, there can be no question of the PPA having been validly terminated. MSEDCL submitted that APML having

replied to the its letter dated 5 March 2011 and having supplied the information sought by the said letter, has lost its relevance in contending that the agreement between the parties had come to an end on 23 February, 2011. MSEDCL also refused to admit that APML would suffer huge financial losses if it is not relieved from the PPA because APML has not produced any evidence of its contention in this regard.

11.10. MSEDCL denied the argument that the Order dated 20 July, 2011, passed by the Commission in Petition No.88 of 2010, is an identical case. MSEDCL also denied that any force majeure event has occurred and/or that usage of imported or any other coal will impact the cost of generation to such an extent that APML's entire equity will be eroded or that it will result in default of debt service obligations. MSEDCL submitted that APML has produced no material to substantiate its contentions in this regard.

11.11. MSEDCL also submitted that in view of the power shortage in Maharashtra, it is important that the Commission does not permit parties such as APML to get away by participating in tenders on a particular basis, and then citing inability to fulfill obligations under untenable grounds. MSEDCL expressed that APML is not entitled to pressurize MSEDCL to revise the agreed upon Tariff by taking advantage of the power shortage in the State of Maharashtra.

11.12. Thus, MSEDCL concluded its response by submitting that that there is no occurrence of force majeure and therefore, in the interest of justice and public at large, requested the Commission to dismiss the Petition and direct APML to perform its obligations and to supply power to the MSEDCL at the contracted rate.

12. On 31 October, 2012 MSEDCL submitted the opinion of the Advocate General, Maharashtra in the present case. The summary of the opinion of Advocate General, Maharashtra on the queries raised by MSEDCL is as follows:

12.1. The RfQ dated 17 November, 2006 made it clear that the contract would be based on Case 1 process, where location and fuel are not specified by MSEDCL. APML submitted its bid only after an understanding of the basic terms. The essential term with respect to fuel arrangement in the RfQ was:

"Fuel: The choice of fuel and the transportation would be left to the discretion of the Bidder. The Bidder will assume complete responsibility to tie up the fuel linkage and infrastructural requirements for fuel transportation and storage."

12.2. Also, under clause 2.1.5 of the RfQ, the bidder was required to provide a comfort letter from the fuel supplier(s) for fuel linkage at the time of bid submission. Therefore, it can be inferred that the responsibility of fuel is with the bidder.

12.3. The RfP was issued to all the bidders, including APML, and it was on the basis of the terms and conditions and information in the RfP that the Bidders submitted their bids. APML was fully informed of these terms of RfP and their bids in pursuance of the terms shows that APML consented to the RfP terms.

12.4. The definition of RfP indicates that the PPA and other agreements are a part of the RfP project documents and they constitute an integral part of the RfP. Thus, the ultimate contract entered into between APML and MSEDCL has to be discerned primarily from RfP.

12.5. Further, APML submitted an undertaking which stated that it gave their unconditional acceptance to the RfP documents. APML in the undertaking also stated that it has submitted the Bid on the terms and conditions contained in the RfP and confirms its acceptance of all the terms and conditions of RfP. This clearly demonstrates that the basis of the contract and its fundamental and essential feature was the RfP. The covenants and the conditions contained therein are binding on APML. Further, clause 2.1.1 of the RfP states as follows:

"2.1.1 The size and location of the Power Station/s and the source of fuel and technology shall be decided by the Bidder. The Bidder would assume complete responsibility to tie up the fuel linkage and to set up the infrastructural requirements for the fuel transportation and its storage"

12.6. Therefore, the position that emerges is that the entire responsibility with respect to fuel required for power supply was with APML. This condition with regard to fuel is a fundamental aspect of the Case 1 type of transactions.

12.7. Though the present case relates to power purchase under a Case 1 process, the PPA of Case 2, modified suitably, was used due to the unavailability of SBD for Case 1 type at that point of time. The RfP, which is the fundamental and primary document, was of Case 1 type. The parties therefore intended to enter into a Case 1 transaction. Thus, the PPA executed between the parties must be read subject to the RfP and the undertakings given by APML in pursuance of the RfP. The RfP, PPA and other deeds and documents together constitute the contractual transaction between the parties and they have to be read in a harmonious and consistent manner, keeping in mind that it is not the PPA but the RfP which reflects the real transaction between the parties. Also, the PPA cannot lessen any of the responsibilities undertaken by APML. As the risk of fuel availability and arrangement is the responsibility of the Bidder, APML can be presumed to have factored in the risk element while arriving at its bid.

12.8. Moreover, Clause 12.4 of the PPA lists the exclusions from 'force majeure' and covers within its ambit unavailability, change in cost, etc. of fuel for the project as one of the force majeure events. Therefore, the question of APML being entitled to invoke the force majeure clause on account of any increase in the cost of fuel for the project does not arise. Moreover, the terms of RfQ and RfP cannot be negated by reference to a clause in the PPA prepared for a Case 2 situation.

12.9. The sole and limited issue is whether APML can rely on the force majeure clause in the PPA to invoke the dispute resolution clause, i.e. clause 17.3.1. On considering all the documents that constitute the contract between the parties, such an option does not appear to be available.

13. Pursuant to the directives of the Commission vide daily Order dated 11 October, 2012, APML submitted its response. The details of the submission are explained in the paragraphs below.

13.1. As regards the details regarding allocation of Lohara coal blocks, APML provided the chronology of events. APML described the clearance from Ministry of Coal and the subsequent correspondence with MSEDCL relating to the bid submission. However, on 25 November. 2009, the EAC of MoEF, based on reports of the GoM and of the National Tiger Conservation Authority decided not to consider Lohara coal blocks for environmental clearance. The EAC also recommended allocation of new coal block in lieu of withdrawal of ToR. Consequently, on 2 January 2010, APML informed the Respondent that the ToR in respect of Lohara coal blocks had been withdrawn, which resulted in conditions akin to "Force Majeure'. Subsequently, on 7 January, 2010, MoEF informed APML about the said withdrawal and recommended to MoC for allocation of alternate coal block. APML submitted that even with several efforts for mitigating the Force Majeure event as detailed in the Petition, the alternate coal block in lieu of Lohara coal block had not been allocated by Ministry of Coal due to absence of any policy to allocate alternate coal block, where original coal block cannot be explored due to environmental reasons, which are beyond the control of the Coal block allottee. APML also stated that the GoM has also taken up the said issue with the Government of India vide its letter dated 11 March, 2010, to allocate alternate coal block in lieu of Lohara coal blocks under a "special dispensation" to APML. Consequently, APML submitted that it has been exposed to unforeseen circumstances of non-availability of adequate quantity of coal, its quality and prices/cost, and hence terminated the PPA with MSEDCL.

13.2. As regards the details of the available linkages and the status of applications for balance requirement of fuel, APML submitted that the quality of allocated Lohara Captive Coal Block coal is of "D" to "F" Grade as mentioned in allocation letter dated 6 November, 2007 and was earlier identified for generation of 1000 MW, which would have contributed to approximately 75% of the contracted capacity of the PPA. The remaining quantum of 320 MW of the contracted capacity was envisaged to be generated using coal supplies from CIL/its subsidiaries. For the aggregate capacity of 1980 MW comprising of units 1, 2 and 3 (i.e. 3X660 MW), APML had applied for coal linkage of 1200 MW to cover the balance coal requirement of the project vide letter dated 23 November, 2007. Based on the

application made by APML, the SLC (LT) in its meeting held on 12 November, 2008, noted that Lohara coal blocks allocated to APML can sustain a capacity of only 800 MW instead of the earlier identified 1000 MW. Consequently, the Committee authorised issuance of LoA by Coal India Limited ("CIL") for capacity of 1180 MW (1980 MW less 800 MW) as per the provision of NCDP based on the recommendation of CEA and Ministry of Power ("MoP"). Later, Western Coalfields Limited ("WCL") and South East Coalfields Ltd. ("SECL") issued two Letter of Assurances ("LOAs") dated 1 June,2009 and 6 June, 2009 for supply of 2.557 million TPA (of "F" Grade Coal) and 2.185 million TPA (of "E" Grade coal) respectively.

13.3. As regards the delay in grant of necessary forest clearance by the Government authorities for Lohara coal blocks, APML had requested SLC (LT), to grant tapering linkage for Lohara coal blocks on 27 October, 2009. Subsequently, SLC (LT) in its meeting held on 29 January, 2010 authorised issuance of LOA by CIL on tapering basis to APML for 660 MW. Based on the same, SECL on 18 November, 2010 issued LoA for 2.746 million TPA (of "F" Grade Coal) in favour of APML for its Unit 3. Further, APML also applied for an additional tapering linkage for remaining 140 MW (800MW-660MW) which resulted in issuance of LOA for additional tapering linkage (of "F" grade coal) from SECL on 26 November, 2010 and tapering linkage (of "E" grade coal) from WCL on 13 May, 2011 respectively for its Units 1 & 2. In this regard, CEA's letter clarified the quantum of Tapering Linkage and its allocation for Units 1, 2 & 3 of Tiroda TPP.

13.4. APML submitted that the LOAs issued by CIL on a tapering basis i.e. 140 MW and 660 MW totaling 800 MW in lieu of Lohara coal blocks allocated to APML, is only for three years from the normative date of commencement of production. Hence, the LOA issued by WCL and SECL to APML on tapering basis for Unit 2 and Unit 3 is only a short term arrangement and may be withdrawn by the aforesaid authorities after the completion of the three years from the normative date of commencement of production of the Tiroda TPS. Additionally, APML highlighted that the coal of tapering linkage is of inferior quality in comparison to that envisaged from Lohara coal blocks.

13.5. APML also submitted that it made all possible efforts to avail an alternate coal block or to reinstate Lohara coal block by requesting for redefining the boundary and also updated MSEDCL on the same from time to time. APML submitted that it has no other coal supply arrangements, bankable or otherwise, to meet the coal requirement for power generation at Tiroda Power Project. APML had, at the time of the bid, disclosed the source of coal supply for generation of power to be supplied under the bid which resulted in the issuance of the LoI. Thus, APML reasoned that the source of fuel became part of the contract, and thereby a means of the performance of the contract. When the ToR for Lohara coal block was withdrawn, APML was left with the linkages including tapering linkages sanctioned as aforesaid, which in turn do not meet the requirement for generation of contracted capacity of the PPA. APML expressed that unless allocation of linkages is converted into a FSA, and that too within the time limit available for fulfillment of conditions subsequent in article 3.1.2 of the PPA, such linkages are of no significance to the performance under PPA. Therefore, APML submitted that at present, there is no coal available from domestic sources for supply of power from the Tiroda TPS. APML submitted that mere sanction of linkages by the SLC has had no effect whatsoever, and the actual and physical supply of coal is far from reality.

13.6. APML also highlighted that the plant is ready for generation of power and Unit 1 has been commissioned. APML submitted that, additionally, Unit 2 and 3 are also ready for Commissioning. APML stressed that it has made substantial investment to the tune of Rs. 15,000 Crore and has no other option but to use imported coal so that the project does not remain idle. APML submitted that if it is able to supply power to MSEDCL, but for the termination of the PPA, out of Unit 2 and 3 by use of imported coal, the cost thereof would be about Rs. 4.10 per kWh, subject to the changes in the price of imported coal. APML submitted that it has no firm source of domestic fuel supply at present.

14. APML also submitted a rejoinder on 6 November, 2012 to MSEDCL's paragraph-wise reply submitted to the Commission on 29 October, 2012. The details of the submission made by APML are summarised below.

14.1. As regards the termination of PPA, APML submitted that it had issued a notice of termination to MSEDCL by a letter dated 16 February, 2011 in accordance with Article 3.3.3 of the PPA. The said Article provided that the PPA may be terminated either by the Procurer or by the Seller by giving a notice of at least seven (7) days in writing to the other party. Thus, APML submitted that in the present case, the seven (7) days notice period for termination provided in Article expired on 23 February, 2011. After the expiry of the notice period provided in Article 3.3.3, the termination of the PPA has come into effect and thus APML has been discharged of its obligations to perform in terms of the PPA. APML also submitted that by letter dated 5 March, 2011, MSEDCL only sought to ascertain the facts and wanted certain information in order to enable it to reply to the notice of termination. APML expressed that the letter dated 5 March, 2011 is not a reply to the termination. APML cited the relevant portion of the letter highlighting the above stated as,

"...You are requested to forward us the above information so as to enable us to reply your above referred letter. Till then the PPA cannot be said to be terminated as contemplated by you..."

14.2. APML also highlighted that the said letter of MSEDCL was written much later than the expiry of the 7 days notice period, when the termination had already come into effect. Further, APML in terms of the request made by MSEDCL vide letter dated 5 March, 2011 handed over all the information that was sought by MSEDCL and also made a proposal to revise the Tariff. However, MSEDCL failed to revert to APML on the issue of either re-instatement of the PPA by revising the Tariff or termination of PPA even after receiving information as sought by them in terms of letter dated 5 March, 2011. Thus, APML expressed, that in effect, MSEDCL has accepted the termination of PPA by not replying to the notice of termination. APML substantiated its claims by highlighting the series of communication exchanged with MSEDCL prior to notice of termination of PPA.

14.3. APML submitted that it had also offered to give power from Units 4 and 5 in replacement of Units 2 and 3 on the same Tariff subject to change of the scheduled COD. APML highlighted, by quoting relevant excerpts from Order of Case No. 23 of 2011 that MSEDCL as well as the GoM had agreed to the existence of Force

Majeure and approved to accept the supply of power from Unit 2 & 3 prior to Scheduled Commercial Operation Date outside PPA, under a medium-term contract. Therefore, APML reasoned that the Commission may not go behind the reasons for termination as the PPA stands terminated from 23 February, 2011. APML also submitted that after termination has taken place, MSEDCL cannot widen the scope of the present petition by questioning the existence of force majeure event or termination of PPA. Thus, APML submitted that the Commission has no jurisdiction to go into the above issue, which is outside the frame of the Petition.

14.4. Further, in relation to the alternate prayers for revision of Tariff, APML submitted that MSEDCL has totally misunderstood the scope of the Petition and the pleadings in support thereto. APML submitted that the alternate prayer was made in line with discussions that have taken place with MSEDCL and was made to secure the long-term interests of MSEDCL. Therefore, APML submitted that after accepting the termination of PPA, MSEDCL cannot claim any rights there under and/ or insist that power supply to be as per terms of a non-existent PPA.

14.5. APML, by referring to various terms, definitions and excerpts of PPA, substantiated that the source of fuel had been specifically incorporated as a term of the PPA. APML highlighted that under Article 3.1.2, execution of fuel supply agreement by the seller and providing a copy of the same to the procurer was specifically made a condition of the PPA. Article 3.3.3 recognised that in case of failure to fulfill the said condition due to force majeure event, within a maximum period provided therein, either party can issue a notice of termination and exit from the PPA. Therefore, APML submitted that the source of coal becomes an intrinsic part of the PPA.

14.6. As regards the contention for considering lack of availability of Lohara coal blocks as a force majeure event, APML resubmitted its arguments stating that Article 12.3 of the PPA is inclusive in nature.

14.7. In relation to the regulatory aspect of coal block allocations and exploitation, APML submitted that the coal block allottee had adhered to the terms specified in the ToR and any violation could have resulted in revocation of grant. If the terms of the ToR are complied with, the allottee becomes eligible for a final approval from MoEF. In

the present facts, APML was issued the ToR and was in the process of complying with the fulfill conditions specified therein, when the ToR itself was revoked. Therefore, APML objected to the allegations of MSEDCL that APML was all along aware that the coal block region was enormously sensitive. APML contended that had it been so, there was no question of the ToR being issued by MoEF. Further, APML submitted that the cancellation of the ToR itself was followed by recommendation for grant of alternate coal block by MoEF (EAC), GoM and MoC clearly showing that the act of cancellation of the Lohara coal blocks was unusual and surely could not have been reasonably foreseen by the parties at the time of bid and / or execution of PPA.

14.8. Further, in relation to the regulatory aspect of coal block allocations and exploitation, APML also expressed that it is necessary to appreciate that domestic coal production and distribution is nationalized under the Coal Mines (Nationalisation) Act, 1973. Therefore, when the very source of coal in India is under the sole ownership and control of the State, there is no question of allocating risks of coal procurement which solely depends on the statute and policy regulating coal. Therefore, APML submitted that it is necessary to appreciate that irrespective of whether it is a Case 1 or Case 2 bid processes, the fact that ultimate ownership of coal vests with the Central Government cannot be ignored.

14.9. Substantiating its stance on acceptance of MSEDCL of considering non availability of coal as a force majeure situation, APML submitted that MSEDCL, in Case No. 88 of 2010 had recognised that non-availability of coal is a Force Majeure event and therefore sought revision of Case 1 RfP documents before the Commission. APML, by highlighting the relevant portions of the said Order, cited that the Commission had also confirmed such revision in RfP documents. Thus, APML submitted that there cannot be two separate and conflicting standards of performance in relation to procurement of coal. APML submitted that despite the settled position on this matter as stated above, MSEDCL is contradicting its own stand in the present case. APML further clarified that allocation of risk in a contract is possible when the commodity in question can be procured from the market. In the present case, by virtue of the nationalisation of coal, the commodity is not available in the market and its supply is

entirely dependent on polices of the Central Government. Hence, APML expressed that in India, it is not possible to allocate risk in relation to procurement of coal through contract as it inherently carries a sovereign risk.

14.10. By citing clauses from Article 12 of PPA related to force majeure, APML submitted that force majeure event or circumstance can be stated to have occurred when an event takes place which are of the following nature:

a) The event or circumstances wholly or partly prevents or unavoidably delays an affected party in the performance of its obligations under the PPA;

b) Such event or circumstances is not within the reasonable control, directly or indirectly of the affected party; and

c) Such event or circumstances could not have been avoided if the affected party had taken reasonable care or complied with prudent utility practices.

Thus, APML submitted that in order to render any finding in relation to existence of force majeure, the Commission has to first appreciate whether the nature of event falls within the aforesaid three categories. For each of the above stated events, APML provided the following explanation,

14.11. APML submitted that it does not have coal to meet generation of the contracted capacity. At present, it only has Letters of Assurance for tapering linkage, which has not been converted into a binding FSA. Further, the tapering linkage is only for a short term supply of three years. Quantity of such linkage is only 75%, 50% & 25% of linkage quantity in 1st, 2nd and 3rd year respectively. Additionally, out of three years, one year has already passed. Even in this one year, APML did not get any coal.

14.12. APML clarified that for Unit 2, it has a long-term linkage for 520 MW. However, CIL and/ or its subsidiaries has not executed any FSAs to convert the linkage into a contractually binding and assured supply of coal. Therefore, presently, there is no FSA for Unit 2. For Unit 3, APML does not have any long-term linkage. Hence, apart from Lohara coal blocks, even for the balance capacity of 520 MW, no FSA has been executed in the stipulated period. APML submitted that the execution of FSA is not within its control. Therefore, APML concluded that it does not have

assured supply of coal to meet its generation obligations under the PPA and thus is prevented from meeting its obligations under the PPA.

14.13. By citing Section 3 of the Coal Mine (Nationalisation) Act, 1973 and New Coal Distribution Policy, 2007, APML submitted that coal as a commodity is entirely controlled by the Central Government. Therefore, APML reasoned that it would not be justified to blame it for the events or circumstances that led to the cancellation of the ToR of the coal block and its inability to get an alternate coal block rendering the total restriction on the use of the coal block. By citing reference to the minutes of MoEF (EAC), dated 24 & 25 November, 2009, APML submitted that it is evident that the decision of cancellation of allocation was taken by the State.

14.14. APML denied the allegations that it has not taken reasonable care or complied with prudent utility practices which could have led to the cancellation of the Lohara coal blocks. APML substantiated its stance by submitting that as per the EAC minutes referred to above, the EAC has stated that the MoEF and MoC must work in tandem in identifying Go and No-Go Areas while considering allotment of coal blocks in the country so that such problems are not encountered in the future. Further, while recognizing the difficulty faced by project proponent, the EAC has advised that other coal blocks could be allotted in their name or through coal linkage by the MoC.

14.15. Thus, APML concluded that there is no case of any negligence and/ or failure to take reasonable care on its part which led to the cancellation of coal block i.e. occurrence of force majeure event. Therefore, the case of APML is fully covered by the force majeure event defined in clause 12.3 of the PPA.

14.16. APML submitted that the MoP issued the SBDs for Case 1 type bidding process in March 2009 while the bidding process in the present case was initiated by the MSEDCL in 2006. In the absence of SBDs for Case 1, MSEDCL adopted the PPA from SBDs of Case 2 and released revised bid documents under Case 1 with approved changes in the same.

14.17. As regards the lack of performance by APML as per the terms of PPA, APML submitted that withdrawal of ToR for Lohara coal block has prevented it from

performance of its obligations under the PPA. APML submitted that the quoted bid was on the basis of coal from Lohara which covered almost 75% of the coal needed for supply of power under the PPA. APML further added that the withdrawal of ToR post the submission of its bid and execution of PPA has prevented it from discharging its obligations under the PPA.

14.18. With regards to the availability of coal from domestic linkage of CIL, APML submitted that even after directions the issued by the PMO on 15 February, 2012 to sign FSAs with power companies, whose power projects have commissioned / would get commissioned on or before 31 March, 2015, there has been no progress towards execution of the FSA. APML submitted that looking at past track record of CIL (including non-delivery of contracted supply coupled with tapering linkages), it is evident that the CIL would not be able to meet the requirements of 520MW out of contracted capacity under PPA. APML further highlighted, that till date, neither CIL nor its subsidiary have executed any FSA in relation to the said PPA. Moreover, the current model FSA has significant changes from the previous model of FSA.APML submitted that the provisions of the new model FSA are contrary to the provisions in NCDP. APML added that as per the provisions of the model FSA, the take/supply or pay commitment is pegged at 80% of Annual Contracted Quantity, thereby, even if CIL supplied entire take or pay quantity, there will be shortfall in required coal to meet Normative Availability obligation under PPAs. APML submitted that the FSA has been reduced to a mere "best effort" contract, which cannot be the basis of any long-term supply of power at fixed levellised price. APML submitted that while the Central Government wants all power to be sourced by distribution companies through long-term bids, it has failed to rationalize the coal distribution policy which is essential for power generation and supply. As a result, long-term power sale contracts at fixed bid prices are impossible to perform. APML submitted that, therefore, it would have to arrange imported coal not only for 800 MW in lieu of Lohara coal blocks but also effectively for 40% of linkage capacity of about 200 MW resulting in procurement of imported coal for 1000 MW of contracted capacity. Thus, APML expressed apprehension that such adverse financial implications would erode the net worth of the Petitioner within a period of 2-6 years from the

commissioning of project and consequently lead to APML's default on its debt obligations to its lenders.

14.19. As regards the acute power deficit scenario in the State of Maharashtra, APML submitted that it was in this context that it was considering option of providing power from a ready power plant subject to an agreement and approval of Tariff.

14.20. As regards the contention of MSEDCL that APML was aware of the risks of cancellation of ToR for Lohara coal blocks, APML submitted that part of the core zone of Lohara coal blocks consisted of forest land and number of Reserve Forests (RE) within 10 km buffer zone. APML stated the fact that resources like coal are mainly found in the state of Maharashtra, Orissa, Jharkhand, Madhya Pradesh and Chhattisgarh. In all the said states the mines are located either in eco-sensitive zones or are covered under the forest zone. There are number of cases wherein the coal mines have been allotted in such eco-sensitive areas. APML highlighted its case is not unique and Environment Clearance (EC) is normally granted with certain conditions. Further, the grant of EC is a Part of Initial Consents under Schedule 2 of PPA. As per Article 3.12 (i), the Condition Subsequent related to approval of initial consents is required to be fulfilled within 18 months of from effective date unless affected by any Force Majeure event. Further, non fulfillment of such condition subsequent due to Force Majeure event would lead to non fulfillment of Article 3.1.2 (ii) and in both the cases, provisions of Article 3.3.3 would apply which leads to termination as an ultimate eventuality. At the time of submission of bid, APML was well aware of this fact and accordingly participated in the bidding process. Additionally, APML highlighted that MSEDCL had also recognized the fact as stated above. APML clarified that if the intention was to cast absolute responsibility on Seller, MSEDCL should have inserted specific provision to that effect stating that bidder should know Acts/ Rules/ Regulations related to Environment/ Forest clearance in Clause 2.82 of the RfP.

14.21. As regards the proposal for the reinstatement of the PPA, APML submitted that it was subject to the sole condition of mutually revising the Tariff. APML denied the alleged exclusion under Article 12.4 of the PPA and its interpretation by MSEDCL.

14.22. MSEDCL, in its response, had submitted that the reference in the bid document to the source of fuel is only for the purpose of establishing the bidder's capacity to fulfill the contractual obligations. APML submitted that Lohara coal blocks is the very basis of the financial bid; hence it has prudently considered business risk and quoted non-escalable rates. The reason behind quoting the non-escalable rates was that fuel source and cost allied thereto was known. APML expressed that in the present case the issue is not pertaining to increase in fuel price of coal from Lohara coal blocks which can be squared off by quoting the escalable rates. The present case involves the change of entire source of fuel and consequent fuel price increase. APML submitted that the said risk of price increase was taken with reference to coal supply from Lohara coal blocks. However, APML stated that there is a well recognised distinction between prudent business risk and impossibility in performance of the contract. When the basis of bid is frustrated, force majeure and the consequences thereof cannot be denied.

14.23. APML also denied that it has ever mentioned adequate fuel for supply of contracted capacity from Units 2 & 3. APML submitted that the allegation in this context is wrong and misleading. APML highlighted again that the financials of the bid was worked out with availability of quality of coal from Lohara Coal block, which was to provide 75% of the coal requirement for servicing the contract / PPA. At the time of grant of linkage the estimation of coal from Lohara Coal block was reduced further by 200 MW. APML submitted that it accepted this risk and did not seek revision of Tariff although the financial parameters were severely affected. But when the ToR for the entire coal block was withdrawn, it became impossible to proceed with supply of contracted capacity. APML highlighted that this position was well accepted by both MSEDCL and GoM.

14.24. APML also denied the allegations that it had not taken necessary effort to mitigate the cancellation of Lohara coal blocks. Further, APML submitted that it has conveyed all the efforts to MSEDCL from time to time and also vide its letter dated 20 June, 2011.

14.25. APML also submitted that the bid resulting in execution of its 1320 MW PPA is not based on the price of coal availed from linkages as alleged. The linkages were

secured after execution of PPA. Hence, APML expressed that it is wrong to allege that it has alternate fuel supply arrangements in place for use in supply of 1320 MW power from Unit 2 and 3. Further, APML highlighted that CIL has not executed an FSA even for the linkage coal, which itself frustrated the PPA.

14.26. As regards the allegations by MSEDCL that APML quoted Tariff on non-escalable basis despite having option of quoting on escalable basis, APML submitted that it had quoted non-escalable bid because the source of fuel was pre-determined (i.e. Lohara coal blocks) wherein quality and quantity was known. Had it been the case that APML was going to procure the coal from any other source, APML would have submitted the escalable bid considering the aspects of coal quality and grade and transportation from where the source would have been envisaged. APML highlighted the fact that the submission of non-escalable bid in itself indicates that the bid was on the basis pre- defined source i.e. Lohara coal blocks and none other.

15. A third hearing was held in this matter on 9 November, 2012. Shri Aspi Chenoy (Advocate), Shri Sanjay Sen and Shri Kandarp Patel were present on the behalf of APML. Shri Kiran Gandhi, Shri Chirag Balsara (Advocate) and Shri A. S. Chavan were present on behalf of MSEDCL. Ms. Ashwini Chitnis and Dr. Ashok Pendse were also present during the hearing.

16. The Commission directed both the parties to submit the brief chronology of events. The Commission also directed APML to compare PPA (SBD) of Case 1 and Case 2.

17. APML made a submission on 20 December, 2012, in which it submitted the information sought by the Commission.

17.1. APML submitted a revised list of dates and events and a comparison between Case 1 and Case 2 bid process and documents in line with the directions given by the Commission through daily Order. APML also submitted a detailed activity chart covering various events related to the cancellation of ToR for Lohara coal block by MoEF. MSEDCL made a submission on 21 December, 2012, in which it submitted the brief list of dates and events related to the present Case as directed by the Commission.

18. A fourth hearing was held in this matter on 21 December, 2012. Shri Sanjay Sen, Shri Vikram Nanwani (Advocate) and Shri Kandarp Patel were present on the behalf of APML. Shri Kiran Gandhi, Shri Chirag Balsara and Shri A. S. Chavan were present on behalf of MSEDCL. Ms. Ashwini Chitnis and Shri Srihari Dukkipati from Prayas were also present during the hearing.

18.1. In the hearing, Member of the Commission, Shri Vijay L. Sonavane recused himself from the proceeding of the Case, as he was witness to the execution of the PPA dated 8 September, 2008 signed between APML and MSEDCL. Further, since Member Shri Vijay L. Sonavane recused himself from the matter, the Commission authorised the Chairman for hearing and deciding the matter in accordance with Clause 29 of Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004.

18.2. The Commission further directed the Advocates of the parties to consult their respective parties, inquiring whether they had any objection to the Case now being heard by/presented to the Commission with a single member, i.e., the Chairman. The Commission adjourned the hearing till 12:00 noon for compliance of the above directive.

18.3. The hearing resumed at 12:00 noon. Representatives of APML clarified that APML did not have any objection to the matter in this case being heard by a single member Commission. Representatives of MSEDCL clarified that MSEDCL would like to leave the decision regarding the appropriateness of this case being heard by a single member of the Commission to the discretion of the Commission. Ms. Ashwini Chitnis submitted that she needed to evaluate the appropriateness of this case being heard by a single member Commission and reserved her comments on the same till the next hearing. On consultation with both the parties, it was decided that it would be appropriate to hold de-novo hearing in this matter, as the constitution of the Commission had changed.

19. In the de-novo hearing, the Commission heard advocates of both the parties. The Commission directed APML to submit the information pertaining to the following issues:

a) Dates when Case 1 and Case 2 Bidding Guidelines were promulgated;

b) Whether CIL and their subsidiaries are signing Fuel Supply Agreements now, and if so, since when?

c) Whether APML was aware that Lohara coal block was in Tiger Reserve Forest and appropriate diligence was carried out by APML?

d) Whether any judicial remedy was sought by APML on cancellation of coal block?

20. The Commission further directed both the parties to submit their arguments in writing and serve the copies of the same upon each other and the Consumer Representatives.

21. During the hearing on 21 December, 2012, APML had submitted a compilation of Orders issued by the Hon'ble Supreme Court which relate to the power to regulate. A list of the Cases referred is mentioned below.

a) V.S. Rice & Oil Mill & Others V. State of Andhra Pradesh;

b) K. Ramanathan V. State of Tamil Nadu and Anr.;

c) D.K. Trivedi & Sons and Ors. V. State of Gujarat and Ors.;

d) Jayajeerao Cotton Mills Limited & Anr. V Madhya Pradesh Electricity Board & Anr.; and

e) Central Power Distribution Co. & Ors. V. Central Electricity Regulatory Commission & Anr.

22. APML made a submission dated 29 December, 2012 in the present matter. In the said submission, APML submitted the information sought by the Commission through daily Order dated 21 December, 2012.

22.1. APML submitted the dates when Case 1 and Case 2 bidding documents were issued, which are as given in the following table:

Table 3: Dates of publication of SBD

Date	Particulars
19 January, 2005	Competitive Bidding Guidelines were published
31 March, 2006	Case 2 SBD were published

Date	Particulars
17 November, 2006/24 November, 2006	MSEDCL issued RfQ with the draft PPA under Case 1 by modifying Case 2 SBD
3 April, 2007	MSEDCL issued first RfP under Case 1
8 September, 2008	PPA between APML and MSEDCL was executed
2 April, 2009	Case 1 SBD were published

22.2. Regarding the query whether CIL is signing FSAs currently, APML submitted that it had signed an FSA for 2.283 MTPA with South Eastern Coal Fields Limited (SECL) just after the hearing in the present Case held on 21 December, 2012. APML further submitted that the FSA was executed only for 2.283 MTPA instead of 2.557 MTPA for which the LoA was issued initially. APML highlighted that the above mentioned FSA was for Unit 1 and 2, whereas the present Case relates to power supply from Unit 2 and 3. APML stressed on the argument that the FSA provides for firm commitments of only 65% of the annual contracted capacity from domestic coal and the shortfall up to 80% will be required to be met through expensive imported coal. APML highlighted that under the FSA, in case of failure to supply coal up to 80% of the contracted capacity, the revised penalty rate is only 0-1.5% of the shortfall.

22.3. APML added that even if the coal equivalent to 100% of Annual Contracted Capacity is made available under the FSA, the cost of generation using CIL linkage coal will be much more compared to Lohara coal due to the following reasons:

a) Cost of coal is much more than the estimated cost of production from Lohara coal blocks;

b) Transportation distance from CIL coal companies to Tiroda project is more than the distance from Lohara coal blocks;

c) Quality of CIL coal is much inferior compared to the coal from Lohara coal blocks; and

d) Unlike coal production cost from Lohara coal blocks, prices of coal from CIL are subject to future price escalation.

22.4. APML submitted that its request for converting tapering linkage for 800 MW to long-term linkage has not been approved by SLC (LT) till date. APML clarified again that Unit 3 of Tiroda TPS does not have any long-term linkage.

22.5. Regarding the query of the Commission on whether APML was aware of Lohara coal reserve being in the Tiger Reserve Forest, APML submitted that the coal blocks are identified by MoC for allocation. It added that once the coal block was allocated, APML applied for the same assuming that subject to usual Environment Impact Assessment (EIA), the clearances would be granted. APML submitted that it was not aware that the location of Lohara coal blocks could be a cause for cancellation of the coal block.

22.6. APML submitted that for the grant of ToR, the "scoping" provision of notification issued by MoEF dated 14 September, 2006 is as follows:

"The Expert Appraisal Committee or State level Expert Appraisal Committee concerned shall determine the Terms of Reference on the basis of the information furnished in the prescribed application Form 1/Form 1A including Terms of Reference proposed by the applicant, a site visit by a sub-group of Expert Appraisal Committee or State Level Expert Appraisal Committee concerned, Terms of Reference suggested by the applicant if furnished and other information that may be available with the Expert Appraisal Committee or State Level Expert Appraisal Committee."

22.7. APML submitted that the above provision mentions that due care should be taken by EAC while granting ToR. APML highlighted that while presenting the case for ToR, APML had mentioned about the actual risk associated with the coal block which can be inferred from the minutes of 21st EAC meeting dated 28 April, 2008-30 April, 2008 prescribing the ToR. APML submitted that even after considering the same, EAC prescribed the ToR for Lohara coal block. APML also submitted a list of projects which were granted environmental clearance in similar situations.

22.8. Regarding the query of the Commission regarding judicial remedy sought by APML after withdrawal of ToR of Lohara coal block, if any, APML submitted that a Public Interest Litigation (PIL) had been filed by a Non Government Organisation called Eco Pro Organisation in Nagpur Bench of Bombay High Court through letter dated 20 December, 2008. APML submitted that the said PIL was against the Union of India, MoEF, GoM and others, wherein the Hon'ble High Court has impleaded

APML. APML submitted that the matter is pending adjudication till the date of the present submission.

22.9. APML submitted that though it has not sought any judicial remedy due to the above mentioned facts, it has sought an alternate coal block or redefining the boundaries of Lohara coal block from the MoC and has also approached various authorities to resolve the issue of coal supply for Tiroda TPS.

23. The Commission held another hearing in this matter on 31 December, 2012. Shri Sanjay Sen, Shri Vikram Nanwani and Shri Kandarp Patel were present on the behalf of APML. Shri Kiran Gandhi, Shri Chirag Balsara and Shri A. S. Chavan, were present on behalf of MSEDCL. Ms. Ashwini Chitnis was also present during the hearing.

23.1. The Commission heard advocates of both the parties during the hearing. The Commission directed APML to submit the following information:

a) How has the capacity charge been calculated for the PPA under consideration? APML was required to confirm whether it has included mining related fixed cost in the capacity charge of the quoted Tariff;

b) CMPDI report on Lohara coal block;

c) Information on lending arrangements made for the project under consideration;

d) Copy of the Red Herring Prospectus, other relevant documents provided to SEBI in the matter related to project under consideration and minutes of the Annual General Meeting; and

e) CAG reports on coal block allocation and UMPP.

23.2. The Commission directed MSEDCL to submit the following information:

a) Exact details of the bidders and the quoted levellised Tariff as per the financial bids; and

b) Comparison of the four PPAs signed between APML and MSEDCL.

23.3. Further the Commission directed both APML and MSEDCL to provide their input on the following options along with pros and cons of each of the options:

a) Occurrence of force majeure condition is rejected and as a consequence, AMPL has to supply power as per the PPA. What is the sustainability of the project and short-term & long-term impact on consumers?

b) Occurrence of force majeure is accepted and accordingly, the termination of the PPA is accepted;

c) Changing the Tariff stream from non-escalable to escalable maintaining the same levellised Tariff;

d) Tenure of the PPA is increased from 25 years to 30 years so as to mitigate the impact of increase in energy charges;

e) Considering change in policy as change in law, introduce an add-on charge so as to make the bidder commercially neutral; and

f) Tariff is determined under Section 62 of EA-2003.

23.4. Commission further directed that in all the above options, wherever possible, the parties should quantify the impact of selecting the option in terms of Rupees/kWh. The Commission also clarified that apart from the above six options, APML and MSEDCL may suggest any other options, if they deem appropriate for consideration.

23.5. The Commission reiterated its earlier direction to both the parties that all submissions and arguments by APML and MSEDCL should be submitted in writing by serving copies upon each other and the Consumer Representatives.

24. APML made a submission under affidavit in accordance with the directions of the Commission on 15 January, 2013. The summary of submissions made by APML is described in the following paragraphs.

24.1. APML had submitted its bid in Case 1 Stage-I bid process for supplying 1320 MW considering coal availability for capacity of 1000 MW from Lohara coal block as per ecological reserves estimated in the allocation letter and the CMPDIL report. APML submitted that for the balance capacity, it had relied upon the provisions of

NCDP notified on 18 October, 2007, which mandates CIL and its subsidiaries to provide 100% coal under FSA.

24.2. APML submitted that subsequent to the submission of its bid in the Case 1 Stage-I bid process, the following modifications have led to force majeure and/or change in law under the PPA:

a) Withdrawal of ToR for Lohara coal block; and

b) Provisions of latest Standard FSA being contrary to the provisions of NCDP

24.3. APML submitted that the above events apart from being force majeure events, also qualify under the provisions of “Change in Law” as per Article 13.1.1 of the PPA, as they have occurred after the submission of the bid on account of actions on part of the Indian Government Instrumentality.

24.4. APML submitted that these events have made APML more dependent on imported coal for supplying the power committed under the PPA. APML requested the Commission to consider such deviations from extant policy as an unforeseeable risk which is beyond the APML’s control. APML submitted that it has analysed the impact of such change in law on all the affected parties in the presentation submitted by it as an annexure.

24.5. In reply to the Commission’s query on how APML has calculated the capacity charge for the PPA under consideration and whether it had included mining related fixed cost in the capacity charges quoted by it, APML replied that it has calculated the capacity charges based on competitive capital cost and efficient operational parameters as compared with CERC norms. APML added that the above facts along with the information regarding debt: equity ratio of 80:20 is also reflected in the Red Herring Prospectus (RHP) of Adani Power Limited. APML averred that the capacity charges quoted by it do not include the cost of mining & transmission assets.

24.6. APML submitted that considering the benefits of 'Mega Power' status in the capital cost and reduced O&M expenses to the tune of 50% as compared to prevailing CERC norms, it was able to quote the levellised capacity charge of Rs. 1.05 per kWh as against Rs. 1.31 per kWh as per CERC norms. It submitted that as against the above, the capital cost has increased to such an extent that it will erode the return

on equity for the promoters significantly. APML added that the main reasons for increase of capital cost are (a) delay in commissioning of project owing to non availability of Indian work permits to Chinese workers/engineers (b) increase in interest cost expenditure; and (c) variation in foreign exchange rate.

24.7. In reply to the Commission's query on the lending arrangement for the power project, APML submitted that to finance the first two phases of Tiroda TPS, it has tied up Rs. 4,920 Crore for Phase-I and Rs. 2,017 Crore for Phase-II from various banks. It submitted the sanction letters from the lead bank, State Bank of India.

24.8. APML also submitted following in compliance to the daily Order of the Commission:

a) Copy of CMPDI report on Lohara Coal block;

b) Copy of Comptroller and Auditor General of India (hereinafter referred to as "CAG") report on "Allocation of Coal Blocks and augmentation of coal production" dated 11 May, 2012;

c) Copy of CAG report titled "Report of the Comptroller and Auditor General of India on Ultra Mega Power Projects under Special Purpose Vehicles for the year ended March 2012" dated 11 May, 2012;

d) Details of bidders and quoted Levellised Tariffs as per financial bids of Case 1 Stage-I bid process; and

e) Comparison of PPAs executed with MSEDCL.

24.9. APML also submitted a presentation prepared by its consultants, i.e., KPMG, on evaluation of options in accordance with Commission's directions through daily Order dated 31 December, 2012. It sought the opportunity to present its opinion on the six possible options for disposal of this case in the next hearing.

24.9.1. APML submitted that if it has to supply as per the quoted levellised Tariff of Rs. 2.64 per kWh, its networth would get eroded. The following table summarises the evaluation of options as submitted by APML in the presentation:

Table 4: Evaluation of options by APML

Sr. No.	Options	APML	MSEDCL	Consumers	Lenders	State Government
1	Supply as per PPA dated 8 September, 2008	Plant unsustainable; Likely to be BIFR Case	Power deficit to widen by 1400 MW	Tariff impact of alternate procurement will be ~ Rs. 0.15 – 0.20 per kWh considering short term purchase at Rs. 4.50 per kWh	APML will be unable to service debt	Negative impact on investment climate
2	Acceptance of occurrence of Force Majeure event	Agreement gets terminated; APML may supply to other entities	Power Deficit to widen by 1400 MW	Tariff impact of alternate procurement will be ~ Rs. 0.15 – 0.20 per kWh considering short term purchase at Rs. 4.50 per kWh	APML likely to meet repayment schedule	State likely to lose power supply from Tiroda TPS to other States
3	Conversion of Non-escalable to Escalable Tariff	Impact as per Option 1				
4	Increasing Energy charges to reflect actual fuel cost and increasing PPA tenure to 30 years with Capacity charges for last five years equal to capacity charge for 25th year	May improve financials in near term but the overall returns may suffer; may be unable to recover R&M costs	Will get the benefit of reduced capacity charge from the 26th year i.e., Rs. 2.2 per kWh	Tariff will be significantly lower by Rs. 0.07-0.13 per kWh compared to procurement from alternate sources	DSCR: 1st year: 63% 10th year: 96%	State will be enabled to meet increasing industrial demand
5	Imposition of Add-on charge considering the situation as change in law	Plant enabled due to cost recovery	Issue of power deficit will be addressed	Tariff will be significantly lower by Rs. 0.07-0.13 per kWh compared to procurement	Debt serviceability of APML will be significantly improved	Improved investment climate; Assistance in meeting the objective of power for

Sr. No.	Options	APML	MSEDCL	Consumers	Lenders	State Government
				from alternate sources		all; Assets of IPTC would be utilized
6	Converting the Tariff to Cost-plus	Plant enabled	Issue of power deficit will be addressed	Tariff will be significantly lower by Rs. 0.02-0.08 per kWh compared to procurement from alternate sources	Debt service coverage comfortable	Improved investment climate; Assistance in meeting the objective of power for all; Assets of IPTC would be utilized

24.9.2. It was further highlighted in the presentation that the allocation of captive block allowed APML to have predictability of coal mining costs. However, the CIL's linkage prices and imported coal prices are beyond APML's control.

24.9.3. However, it was further highlighted that the coal supply situation for the project may improve in a period of 3-5 years as CIL's coal supply may improve and surplus sales from upcoming coal blocks may be a source of cheaper coal supply. Also the possibility of being allocated an alternative coal mine or the ability to use coal from Lohara coal blocks through underground coal mining.

24.9.4. It was further mentioned that if the problem is unaddressed, loans to the extent of Rs. 7,400 Crore may face the possibility of becoming non-performing assets and future bid prices will increase substantially to account for uncontrollable risks.

24.10. APML averred that enabling Tiroda TPS by allowing a pass through of the cost of fuel is in the best interest of all stakeholders and highlighted that if the issue is not addressed, it will result into the following: (a) Loans to the extent of Rs. 7400 Crore will become NPAs; (b) Future bid prices will be significantly higher as the bidders will also account for uncontrollable risks; and (c) about 1000 employees will lose jobs. APML submitted that even if the incremental charges to recover fuel costs are allowed, power from Tiroda TPS will still remain competitive as compared to Tariffs discovered in recent Case 1 bids. APML submitted that it will be able to address the issue of fuel uncertainty through linkage and captive coal mechanism in

the long term and thus a pass through of fuel costs is required to sustain in a period of fuel uncertainty over the next five years.

25. MSEDCL made a submission on 11 January, 2013 in reply to the queries raised by the Commission in its daily Order dated 31 December, 2012. MSEDCL submitted its views on implication of each of the six possible options for disposal of this case as directed by the Commission in the said daily Order. Along with the above, MSEDCL also submitted a brief comparison of the four long-term PPAs that it had signed with APML (including the one under dispute) and the list of bidders in Case 1 Stage-I bid process carried out by MSEDCL as directed by the Commission.

26. The Commission held another hearing in this matter on 18 January, 2013 in the office of the Commission. Shri Aspi Chenoy, Shri Sanjay Sen, Shri Santosh Kamat and Shri Kandarp Patel were present in the hearing on behalf of APML. Shri Chirag Balsara and Shri Ashok Chavan were present in the hearing on behalf of MSEDCL. Ms. Ashwini Chitnis and Dr. Ashok Pendse were also present during the hearing.

26.1. During the hearing, the representatives of APML made a presentation on the pros and cons of options identified by the Commission in the daily Order dated 31 December, 2012. The advocates of both the parties further argued on this matter and the Consumer Representatives also gave their opinion on the issues.

26.2. In the daily Order dated 18 January, 2012, the Commission opined that as presented by the Petitioner during the hearing, the levellised Tariff of Rs.2.64 per kWh appeared to be financially unviable. The Commission further noted that in case the termination of PPA is accepted, APML will be free from contractual obligations, whereas, MSEDCL will have to procure power from alternative sources. Fresh procurement from alternative sources of power is likely to result in considerably higher Tariffs and will impact the consumers of MSEDCL. Based on the above observations, the Commission directed APML and MSEDCL to make efforts to work out options for feasible Tariffs amicably in line with the enabling provisions of Article 17.2 of the PPA. The Commission directed both the parties to keep the following aspects in perspective in their efforts to reach an amicable solution:

a) Legal and contractual provisions including sanctity of the contract;

b) Protection of investment made in generating asset in rural part of Maharashtra;

c) Interest of other stakeholders, i.e., consumers, lenders, etc., is protected;

d) Non availability of generation capacity (1320 MW) to MSEDCL; and

e) Tariff is reasonable and competitive considering the other supply options.

26.3. The Commission also directed MSEDCL to submit the copy of Minutes of the pre-bid meetings for Case 1 Stage-I bid process.

26.4. Further, the Commission appointed Shri Harinder Toor (Advocate) as Amicus Curiae in line with the provisions of Regulation 21(d) of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004.

27. The Commission held another hearing in this matter on 23 January, 2013 in the office of the Commission. Shri Harindar Toor, who was appointed by the Commission as Amicus Curiae was present during the hearing. Shri Sanjay Sen and Shri Kandarp Patel were present in the hearing on behalf of APML. Shri Chirag Balsara, Shri Kiran Gandhi and Shri Ashok Chavan were present in the hearing on behalf of MSEDCL. Ms. Ashwini Chitnis and Dr. Ashok Pendse were also present during the hearing.

28. In this hearing, Shri Harindar Toor, the Amicus Curiae appointed by the Commission, presented his arguments on the various issues of law. The summary of arguments put forth by Shri Toor is described in the following paragraphs.

On validity of PPA

28.1. Shri Toor pointed out that the Recital A of the PPA states that the procurer, i.e., MSEDCL has obtained the Order of the Commission adopting the Tariff defined in the PPA under Section 63 of the Electricity Act, 2003. The recital further states that the copy of the Order has been made available to the Seller i.e., APML and the MSEDCL acknowledge receipt of the said Order through the PPA on the date of execution of the PPA.

28.2. Shri Toor pointed out that the PPA had been executed on 8 September, 2008. However, the effective date defined in the PPA is 14 August, 2008 or the date of signing the PPA, whichever is earlier. However, there was no Order on adoption of

Tariff for the said PPA on either of the above dates, and accordingly, both the parties to the PPA were not in compliance of Section 63 of EA-2003. Alternatively, the parties were under mistake about a very material fact i.e., the adoption of Tariff for the PPA.

28.3. Shri Toor pointed out that there is also no reference to any Order on adoption of Tariff in any of the pleadings of APML, including the factual matrix of dates and events submitted by APML in its Petition and further submissions.

28.4. He submitted that the absence of Order adopting the Tariff has drastic consequences on the present matter, as the Tariff is required to be adopted by the Commission as per Section 63 of the Electricity Act, 2003.

28.5. He submitted that as per Section 2(g) of the Indian Contract Act, 1872, (hereinafter referred to as "Contract Act") an agreement not enforceable by law is said to be void; whereas, as per Section 2(h), an agreement enforceable by law is a contract.

28.6. He further pointed out that Section 10 of the Contract Act reads as follows:

"10. What agreements are contracts: All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

28.7. Shri Toor pointed out that based on the above provision, an agreement can be declared as void under the Contract Act. He further pointed out that Section 20 of the Contract Act deals with the situation where both parties were in mistake with regards to a material fact, and the same reads as follows:

"20. Agreement void where both parties was under mistake as to matter of fact. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void."

28.8. Shri Toor submitted that in the present Case, the parties were in mistake with regards to a material fact that the Tariff had been adopted by the Commission. Accordingly, the PPA would be void as per the above Clause.

28.9. Shri Toor submitted that in his opinion, the PPA is void since inception, since no Order for adoption of Tariff has been issued by the Commission as per the

provisions of Section 63 of the Electricity Act, 2003. He further submitted that Section 65 of the Contract Act deals with the obligations of parties entered into an agreement based on mistake of material facts, which is reproduced below:

"65. Obligation of person who has received advantage under void agreement or contract that becomes void.-When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

28.10. He further pointed out that the Order for adoptions of Tariff under Section 63 of the Electricity, Act 2003 needs to be an elaborate Judicial Order after considering whether the due process has been followed and cannot be a ministerial Order.

On Jurisdiction of the Commission assuming that PPA is valid based on valid approval under Section 63 of the Electricity Act, 2003

28.11. Shri Toor submitted that the jurisdiction of the Commission in matters of dispute is set out in the Competitive Bidding Guidelines. The relevant provisions are reproduced below.

"5.17. Where any dispute arises claiming any change in or regarding determination of tariff or any tariff related matters, or which partly or wholly could result in change in tariff, such dispute shall be adjudicated by the Appropriate Commission.

All other disputes shall be resolved by the arbitration under the Indian Arbitration and Conciliation Act, 1996."

28.12. Shri Toor submitted that the jurisdiction of the Commission in matters of dispute is limited to the disputes related to determination of Tariff. For all other matters of dispute, the Commission is not vested with the jurisdiction to go into such disputes. The Commission, while considering matters related to determination of Tariff, may take a prima facie view when other matters are related or interlinked. He added that the Commission cannot bind the parties so far as issues like termination of PPA or return of performance guarantee or any other ancillary issues relating to damages are concerned by giving a definite finding on the matter. All other matters necessarily have to be decided by arbitration. Shri Toor submitted that when the Commission is

exercising such limited jurisdiction for determination of Tariff, it should adhere to the provisions of Section 61 and Section 86 (4) of the Electricity Act, 2003.

28.13. Shri Toor submitted that the Commission can refer the issue for arbitration where the dispute is not related to Tariff as per Section 86(1) (f) of the Electricity Act, 2003. Shri Toor further quoted Section 158 of the Electricity Act, 2003, which reads as follows:

"Section 158. (Arbitration):

Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the license of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996."

28.14. Shri Toor submitted that the Arbitration and Conciliation Act, 1996 is applicable in matters of disputes other than determination of Tariff. But as to the fitness, expertise and the appropriateness of the arbitrator, it is for the Commission to decide the appropriate person under Section 158 of the Electricity Act, 2003. He further added that appointment of the arbitrator can be done when the parties make an application under Section 158 of Electricity Act, 2003.

28.15. Referring to the case law that had been cited and the reference made to Section 56 of Indian Contract Act, 1872 by the parties in the earlier hearings, he submitted that the Commission is not a Civil Court, but is an expert body which discharges regulatory functions. Accordingly, reference to the Judgments under Section 56 of the Indian Contract Act may not be relevant.

28.16. He further opined that a Civil Court cannot rewrite a contract, whereas the Commission has the jurisdiction to rewrite the contract and change the Tariff of an executed contract under the provisions of the Electricity Act, 2003.

28.17. He further pointed out that Clause 17.3.2, where the provisions for arbitration have been described is ultravires, as the parties do not have the authority to change the

jurisdiction of the Commission for appointment of an arbitrator as per Section 158 of the Electricity Act, 2003.

Arguments related to the present matter considering that the Commission has the jurisdiction to resolve disputes related to matters other than Tariff

28.18. Shri Toor submitted that the Commission has to keep in mind that the definition of force majeure as per Clause 12.3 of the PPA is an inclusive definition, i.e., it can mean that some event is a force majeure over and above and beyond the instances which are set out in Clause 12.3 under Sub-clauses (i) and (ii). He submitted that the Commission has to first examine whether the refusal by MoEF to grant environmental clearance is within the reasonable control, directly or indirectly, of the affected party or if the affected party had taken reasonable care or complied with prudent utility practices. He submitted that force majeure clause will be applicable in case only when the said refusal by MoEF is not within the reasonable control of APML and it could not have been avoided even if the APML has taken reasonable care.

28.19. He submitted that the relevant clause in the present Case in the definition of non-natural force majeure event as per the PPA is as follows:

"The unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consent required by the Seller or any of the Seller's contractors to perform their obligations under the Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development/operation of the Project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down."

28.20. He submitted that if APML is evoking force majeure under the above Clause, MSEDCL can respond that it would first be necessary to obtain an Order by an appropriate Court for APML to invoke force majeure citing the above Clause.

28.21. However, APML can also invoke force majeure under the inclusive definition of force majeure under the provisions of Clause 12.4 of the PPA, which is reproduced below:

"12.4 Force Majeure Exclusions

Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Project

....

e. Insufficiency of finances or funds or the agreement becomes onerous to perform; and....."

28.22. Shri Toor submitted that APML can invoke force majeure citing either Sub-clause (a) or (e) under Clause 12.4 if he is able to prove that (i) unavailability or change in cost of fuel (as per (a)) has been triggered by an event of force majeure or (ii) the agreement has become onerous to perform because of an event of force majeure. If APML claims the occurrence of force majeure based on the above clauses, it will have to prove that withdrawal of ToR by MoEF was an event of force majeure and the prevention of the same was beyond its reasonable control.

28.23. Further Shri Toor pointed out that Clause 18.4 of the PPA results in a conclusion that everything has been concluded in the PPA and the PPA is complete by itself. As per the said Clause, the parties have agreed that the PPA is the final expression of their intendment they had agreed and understood and whatever they have agreed has fructified and has been finalised in the PPA.

29. Further, during the hearing, advocates of APML and the Consumer Representatives also put forth their arguments.

30. The Commission directed APML to submit the following information:

a) Financial model (Excel Sheet) used for the presentation made during the hearing held on 18 January, 2013;

b) Present status of commissioning of its Unit 2 and 3;

c) The status of its application for allotment of alternate coal block and clarification on its stand in the event of the allocation of an alternate block to APML in future;

d) The economic and financial viability of the project considering all 5 units in existing circumstances;

e) The technical parameters of the boiler including station heat rate, turbine efficiency, auxiliary consumption and maximum percentage of imported coal that can be used; and

f) Clarification on whether the other stakeholders, primarily lenders, were aware of the termination process? If so what was their view on the same? Provide correspondences and documents regarding the same to be submitted.

30.1. The Commission also directed that APML may submit the financial model showing how APML have arrived at the stream of energy charge quoted in PPA on its discretion if it deems appropriate. The Commission further directed APML to substantiate the fact that on 2 January, 2010, when it had offered MSEDCL to supply the power from Unit-4 and 5 of Tiroda TPS at the levellised Tariff of Rs. 2.64, it was feasible to supply power at levellised Tariff of Rs. 2.64 per kWh with linkage coal and currently, it is not feasible for APML to supply power based on linkage coal at levellised tariff of Rs. 2.64 per kWh.

30.2. The Commission also directed MSEDCL to submit the following information:

a) Present status of commencement of supply from the project being developed by Lanco, which was selected along with APML under the Case 1 Stage-I bid process and the documents submitted by it under provisions of the conditions subsequent of PPA, and

b) The action taken by it on the letter dated 2 January, 2010, wherein, APML had offered to supply power at the same rate as agreed in the PPA under Case 1 Stage-I from Unit 4 and 5.

30.3. The Commission also directed Amicus Curiae to clarify the following:

a) Whether the Tariff discovered through Section 63 of Electricity Act, 2003 can be altered by the Commission?

b) Whether acceptance of occurrence of force majeure event will only lead to termination of PPA or the Commission can re-determine the Tariff to save the PPA. If so, under what rules and regulations can the Commission do so?

c) If the event of the force majeure affecting fuel occurred in construction phase of the project, will it lead to termination of the PPA?

30.4. The Commission also directed the parties to comply with the directions of the Commission given in its earlier daily Orders.

31. Prayas made a submission on 23 January, 2013 on the arguments made by Ms. Ashwini Chitnis during the hearing. The submissions of Prayas are discussed in the following paragraphs.

31.1. Prayas submitted that the implication of APML's claim in the present case will be as follows:

"

- ***For governance and competition in the sector:*** *The petitioner after willingly taking fuel related risks, opted to quote a fixed tariff even though the bidding framework provided the option of quoting escalable components to pass through fuel costs at the time of bidding. After eliminating competitors, the bidder is on one hand claiming unilateral termination of the PPA and on the other demanding increase in tariff and signing of a new PPA without giving other competitors any opportunity to compete on the same terms and conditions.*

- ***For consumers:*** *As per the PPA, this generation of 1320 MW (which would translate into 9829 MU / yr.) should have become available to MSEDCL from August 2012. Not getting this power (and also power from Lanco) as per agreed rate and at decided schedule has lead to shortage and high cost short/medium term power purchase. In fact, MSEDCL is buying medium term power @ Rs. 4 per unit from the same Tiroda project of Adani to meet the present supply shortfall. The petitioner is seeking increase in tariff as against the PPA rate to about a range Rs. 3.11 to 3.63 per unit. Increase of first year tariff to say Rs.*

3.11 per unit will imply an additional tariff burden of Rs. 423 Cr / yr. for the consumers whereas raising it to say Rs. 3.63 per unit will impose a burden of almost Rs. 934 Cr. / yr. If the tariff is revised by say Rs. 0.50 per unit more than the PPA agreed rate, then for next 25 years such increase will impose an additional burden of Rs. 4,539 Cr (based on NPV of this amount calculated at a discount rate of 10%)."

31.2. Prayas further submitted that during the course of hearings being undertaken in this matter, on 21 December, 2012, Member Shri Vijay L. Sonavane recused himself from this case as he was a witness to the execution of the PPA dated 8 September, 2008 signed between the parties to this Case and which is being relied upon by the parties in this case. The post of member finance or the third member at the Commission has been vacant since September 2010 as the Government of Maharashtra has failed to make any appointment in the last two years. Based on a PIL filed against the State Government, the High Court has directed the Government to fill this vacancy within a period of six months.

31.3. Prayas further submitted that Clause 29 of Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 empowers the Commission to direct that any specific matters or issues be heard and decided by a bench constituted by less than the full strength of the Commission. Prayas submitted that under the provisions of this Clause, the Commission decided that this case shall be heard de novo by the Chairman as a single member Commission. Prayas submitted that it had raised concerns regarding this decision in its earlier submissions, as the present matter highlights major lacunae in regulatory processes and raises serious governance issues and hence suggested that it will be desirable to wait for the Government to appoint the third member and then initiate proceedings in this matter. However, the Commission decided to proceed with matter as a de novo case with a single member Commission till the third member joins the Commission.

31.4. Prayas further added that in the subsequent hearings, APML has contended that withdrawal of Lohara coal blocks, for which ToR was granted to APML, effectively translated into a force majeure event. Therefore, using the provisions related to force majeure under Clause 3.3.3 of the PPA, APML decided to unilaterally terminate the

contract in February 2011. While claiming to have terminated the contract, APML has simultaneously made a prayer in the present Petition for revising the discovered Tariff and has informed willingness to supply at such increased rates.

31.5. Prayas added that in the intervening period, i.e., from February 2011 till this present Petition was filed, no information was provided to the Commission regarding the said termination by either MSEDCL or APML. On numerous occasions during this intervening period, Prayas had requested the Commission to inform the public regarding the actual status of projects contracted under long-term PPAs and based on these submissions, the Commission had directed MSEDCL on several occasions to provide such information (Case No. 104 of 2009, Case No. 14 of 2010, Case No 56 of 2010, Case No. 22 of 2010, etc.). However, no information regarding the said termination was provided by MSEDCL while replying to such queries. Also, the Commission never undertook any independent status review of capacity addition even when such review was categorically demanded and when the Commission was dealing with multiple cases related to long-term and medium-term power procurement, where such information can have significant financial impact on the final decisions.

31.6. Prayas further submitted that failure to frame issues while seeking more and more submissions and information regarding project viability is a serious lacuna in a matter of such significance and involving such high level of legal complexity and in fact can be considered tantamount to attempt at vitiating due process of law, as it denies opportunity to all the parties to make specific submissions on the real governance related and legal issues, if they were appropriately framed.

31.7. Based on Commission's demand to present options to make the project viable (without establishing the unviability of the discovered Tariff), APML made a presentation during the hearing held on 18 January, 2013, laying out various scenarios considered by them based on Commission's suggestions. The presentation put forth various options which indicate additional financial impact on the consumers. In spite of such huge Tariff implications for the consumers, the Commission has not shared any independent scrutiny or analysis regarding the

APML's claims concerning unviability of the Tariff agreed as per PPA till the time of the current submission of Prayas.

31.8. Prayas submitted that it is also essential to note that on several instances, APML would have claimed existence of a legally binding PPA and on that basis may have sought various State resources as well as concessions and approvals from various State and Central agencies. More importantly, request and allocation of coal linkages and alternate captive coal block would have been made based on existence of a valid PPA. Therefore, if the PPA is not legally valid ab-initio or has been terminated in February 2011 as claimed by APML, all these clearances, concessions and fuel resources would also become infructuous and legally invalid and the same will have to be obtained de-novo. Prayas submitted that given these circumstances, it becomes pertinent for the Commission to seek specific information on affidavit from APML regarding whether it has informed about the said termination of the PPA to agencies such as Central Electricity Authority, Ministry of Power, Ministry of Coal, Coal India Limited and its relevant subsidiaries.

32. Prayas requested the Commission to direct all the parties to respond to its arguments raised in the above submission. APML made a submission on 28 January, 2013 requesting the Commission to allow it to amend the Petition by including additional arguments under Paragraph 58 of the Petition. It submitted that APML was not aware that the Tariff offered by it under the competitive bidding process had not been approved by the Commission and came to know about this fact during the hearing in this matter on 18 January, 2013. It submitted that MSEDCL has a legal and statutory obligation to ensure adoption of Tariff by the Commission and it has not brought on record the fact that the Tariff was not adopted by the Commission during the proceedings of this Case. APML submitted that due to the above facts, it has not raised the issues related to adoption of Tariff in its Petition and subsequent submissions and is compelled to seek leave of the Commission to amend the Petition. A summary of the additional arguments made in the amended Petition is described below.

32.1. APML submitted that the failure to get the Tariff adopted as per the provisions of Section 63 of the Electricity Act, 2003 goes to the very root of the matter under

present Petition. It submitted that unless the Tariff is formally adopted, it is not binding on the parties and does not have any legal sanctity. It submitted that the Electricity Act, 2003 mandatorily requires the Tariff to be adopted, so that the PPA can be executed based on such adopted Tariff. APML added that since the Tariff was not adopted in compliance with the provisions of law, the incorporation of the same in the Power Purchase Agreement dated 8 September, 2008 violates the law.

32.2. APML submitted that due to the failure of MSEDCL to ensure adoption of Tariff as per the provisions of Section 63 of EA-2003, read with the Competitive Bidding Guidelines, the PPA signed on 8 September, 2008 is not binding and cannot be legally enforced or implemented. It submitted that APML was under the mistaken belief that the Tariff has been adopted and the incorporation of the same in the PPA is valid and binding. Having discovered that the Tariff has not been adopted, the PPA which was executed on the basis of a mistaken belief is void and has no legal consequences.

32.3. It submitted that acceptance of the offered Tariff and the filing of a defective Petition for adoption of Tariff by MSEDCL, does not make the Tariff legal or binding. It submitted that the Commission cannot adopt the Tariff at this stage, when the PPA has been terminated on account force majeure events.

32.4. APML submitted that the delay of four years in seeking adoption of Tariff is a default on the part of MSEDCL. It added that adoption of Tariff is required to be done within a reasonable time as per the Section 63 of EA-2003 and the Competitive Bidding Guidelines. APML added that the delay of over four years offends the provisions of the statute and the Commission cannot act on the Petition for adoption of Tariff after four years without giving effect to subsequent events which have occurred in the intervening period. APML further submitted that the delay on the part of MSEDCL in seeking adoption of Tariff is a ground for rejection under Section 63 of the Electricity Act, 2003.

32.5. APML added that the timeline for completion of the entire Case 1 bid process as per the Competitive Bidding Guidelines is 270 days and any extension of time beyond 730 days requires approval of the Commission in accordance with Paragraph 5.16 of the Competitive Bidding Guidelines. It added that the aforesaid timelines are

indicative of the fact that the four years delay in adoption of Tariff is not an acceptable position and violates the principles of Section 63 of Electricity Act, 2003. APML submitted that no Order for adopting the Tariff can be passed at this stage after a delay of four years.

32.6. APML further submitted that MSEDCL does not have any vested right under the PPA until the Tariff has been adopted by the Commission. MSEDCL's acceptance of offer made by APML in the bid process is only a provisional acceptance and cannot be given effect to as binding till the consent is obtained from the State Commission. APML submitted that its obligations under the PPA stand discharged due to the fact that the Tariff has not been adopted even after a lapse of over four years. Based on the above facts, APML submitted that it has a right to terminate the PPA in a case where its obligations stand discharged.

32.7. APML further added that the Recital A of the PPA which provides that the Procurer has obtained Order of the Commission on adoption of Tariff under Section 63 of Electricity Act, 2003 and a copy of the same has been received by the Seller is incorrect. APML submitted that it has acted on a bona fide mistake of fact. It submitted that its obligations stand discharged on account of such bona fide mistake of fact and the PPA stands terminated on this ground also.

33. Dr. Ashok Pendse (TBIA) submitted his written arguments on 6 February, 2013. The major arguments put forth by Dr. Ashok Pendse as discussed in the following paragraphs:

33.1. Regarding the question whether the present Case should be resolved through arbitration, Dr. Pendse submitted that as per Paragraph 5.17 of the Competitive Bidding Guidelines, Amicable Dispute Resolution based on provisions of Indian Arbitration and Conciliation Act, 1996 will only be applicable in case of disputes related to the bid process. He submitted that considering the above, the present case should not be referred for arbitration, as it involves dispute on issues like force majeure and Tariff.

33.2. Dr. Pendse submitted that the Commission has the jurisdiction to decide the present Petition and quoted Judgments of the Hon'ble Supreme Court in the Case of BSES

Limited Vs. M/s Tata Power Co. Ltd. and Others (Civil Appeal 8262-8263 of 2003) and in the Case of Tata Power Company Limited Vs. Reliance Energy Limited and Others (Civil Appeal 4269 of 2008) to support his argument.

33.3. Dr. Pendse submitted that Lohara coal block was allocated to APML after it had bid in the RfQ Stage of Case 1 Stage-I bid process. Hence it cannot be argued that APML had been selected based on the coal block allocated to it and the PPA is co-terminus along with the cancellation of coal block. Dr. Pendse quoted the Judgment of Hon'ble ATE in Order in Appeal No. 184 of 2010 in the Case of Adani Power Limited Vs. Gujarat Electricity Regulatory Commission and Others.

33.4. Quoting the above Judgment, Dr. Pendse submitted that withdrawal of ToR for Lohara coal blocks and unavailability of fuel due to the same does not constitute a force majeure event as per the PPA. He added that APL, at the time of qualifying in the RfQ, could not have known that it would get Lohara coal blocks one year later. Therefore, cancellation of ToR for Lohara coal blocks cannot form a force majeure event. He submitted that based on the above, the termination of the PPA is void.

33.5. Dr. Pendse highlighted that withdrawal of ToR for Lohara coal blocks only affects 800 MW out of contracted 1320 MW and there are no adverse cost implications on the remaining 520 MW. Dr. Pendse argued that APML have already applied for alternate coal block in lieu of Lohara coal blocks.

33.6. Dr. Pendse highlighted that although initially APML was ready to offer power from Unit 4 and 5 at the same Tariff as that quoted in PPA dated 8 September, 2008; subsequently it has invoked force majeure clause and stated that it cannot supply power at the quoted Tariff.

33.7. Dr. Pendse submitted that according the presentation made by APML's consultants during the hearing held on 18 January, 2013, APML expects the coal supply situation to improve in the next few years. However, the PPA is for 25 years. He submitted that based on the above, the claim for increase in Tariff or invocation for force majeure must not be allowed.

33.8. Dr. Pendse submitted that the Commission and the Consumers only came to know about the problems regarding the power supply from Tiroda TPS when the present

Petition was filed, i.e., after a period of 2 years from the day when APML had initially cited occurrence of force majeure event. Dr. Pendse submitted that this is a serious lapse on the part of the Utility and appropriate action must be taken against the utility under Section 142 and 146 of the EA-2003.

34. MSEDCL made a submission on 11 February, 2013 in response to the directions given by the Commission in daily Order dated 23 January, 2013.

34.1. MSEDCL submitted the status of the project of Lanco from which power had been contracted through Case 1 Stage-I bid process. MSEDCL submitted that the project identified in the bid documents was in Raipur District of Chhattisgarh. However, vide letter dated 3 March, 2009, LMPPL had sought approval of MSEDCL to supply power from their project in Maharashtra, as it was compelled to shift the project from Chhattisgarh to Maharashtra considering certain constraints arising out of power policy of the Government of Chhattisgarh. MSEDCL gave its consent for change of project site vide letter dated 26 November, 2009.

34.2. MSEDCL submitted that LVTPL vide letter dated 10 December, 2010 claimed that they have practically completed /achieved all milestones as per the PPA except for certain administrative procedural aspects and sought MSEDCL's cooperation in considering the conditions subsequent as deemed to be completed. However, MSEDCL requested LVTPL for submission of additional performance guarantee on account of non-fulfillment of conditions subsequent, which was a sum of Rs. 15.30 Crore calculated for the time period till 2nd week of January, 2011. MSEDCL submitted that LVTPL had not submitted the performance guarantee till date.

34.3. MSEDCL submitted that vide letter 5 June, 2011, LVTPL informed it that in response to PIL against Environmental Clearance granted for its project, Hon'ble Nagpur High Court has issued Order directing MPCB to conduct fresh public hearing. LVTPL further informed that it has approached Hon'ble Supreme Court against the said Order. LVTPL further informed that the same will lead to additional delays in achieving commercial operation.

34.4. MSEDCL submitted that it has issued a preliminary default notice to LVTPL vide letter dated 11 October, 2012. MSEDCL submitted that vide letter dated 11 January,

2013, it has also sought penalty for delay in achieving commercial operation on the scheduled delivery date as per PPA.

34.5. As regards the query of the Commission regarding MSEDCL's response to the offer of APML to supply power from Unit 4 and Unit 5 in lieu of Unit 2 and Unit 3 of Tiroda TPS, MSEDCL stated that it had submitted the said proposal to the Government of Maharashtra vide letter dated 21 July, 2010, based on its board resolution in this matter. MSEDCL informed that it has not received a decision from Government of Maharashtra on this issue till the date of this submission.

34.6. MSEDCL also submitted the reply to the queries raised by various bidders during Case 1 Stage-I bid process as directed by the Commission.

35. APML made a submission on 11 February, 2013 to reply to the queries raised by the Commission vide daily Order dated 18 January, 2013 and 23 January, 2013. The replies of APML to the queries of the Commission are summarised in the following paragraphs.

35.1. With regard to submission of a certificate authenticating the computations presented by APML's consultants (i.e., KPMG) in the hearing dated 18 January, 2013, APML submitted that the figures stated in the presentation are true and correct and have been derived based on various assumptions/scenarios considering the prevailing market conditions.

35.2. Regarding the efforts made to explore the option of underground mining at Lohara coal blocks, APML submitted that it is exploring the feasibility of underground mining and is in consultation with various experts in underground mining in Wardha coal fields. APML submitted that it has also sought permission of MoEF and GoI for underground mining considering reduced percentage recovery of coal reserve. APML submitted that it has also requested the PCCF, GoM to give its recommendation to MoEF for granting permission to carry out underground mining from Lohara coal blocks.

35.3. Regarding the boiler configuration of Tiroda TPS, APML submitted that the Units are designed for Indian origin coal considering availability of coal from Lohara coal

block and long-term linkages. APML submitted the design parameters for Tiroda TPS, which are as follows:

Table 5: Design parameters for Tiroda TPS

Parameter	Design Value	Range
Design GCV (kcal/kg)	3927	3331-4527
Ash (%)	37	25.45-41.5
Total Moisture (%)	10	9-12

35.4. APML clarified that it is possible to operate the Units entirely on imported coal. However, imported coal having specifications (i.e., GCV, % Total Moisture, % Ash Content, etc.) as close to that of the coal for which the Units have been designed needs be procured. APML further submitted that the efficiency parameters of the power plant and coal handling plant will be affected due to the specification of imported coal used. APML stated that considering the above, although it is possible to operate the power plant entirely on imported coal, operational and efficiency parameters will be compromised if the same is done.

35.5. Regarding the status of commissioning of Unit 2 and 3 of Tiroda power plant, APML submitted that Unit 2 was synchronised on 31 January, 2013 and Unit 3 was ready for synchronisation. APML submitted the letter sent to CEA intimating the commissioning of Unit 2 and the letter sent to State Load Despatch Centre (SLDC), Maharashtra requesting for synchronisation of Unit 3.

35.6. Regarding the status of its application for an alternate coal block, APML submitted that while withdrawing the ToR for Lohara coal block on 7 January, 2010, MoEF recommended MoC for allocation of alternate coal block or reinstating ToR with redefined boundary of Lohara coal block. APML stated that it has already submitted the details of communications with various agencies like GoM, GoI, MoEF, etc. in this regard in its earlier submissions. APML clarified that no progress has been made due to absence of policy for allocation of alternate coal block. APML further submitted that in case an alternate coal block is allocated, it will pass on the benefits of coal supplies from captive coal block on cost-plus basis.

35.7. The submissions of APML regarding the economic and financial viability of the project are summarised in following paragraphs.

35.7.1. The following table summarises the levellised Tariffs from all the PPAs signed from Tiroda TPS.

Table 6: Levellised Tariff from all Tiroda TPS units

Sr. No.	Unit No.	Capacity under PPA (MW)	Levellised Capacity Charge (Rs/kWh)	Levellised Energy Charges (Rs/kWh)	Total Levellised Tariff (Rs/kWh)
1	2 and 3	1320	1.05	1.59	2.64
2	1,4 and 5	1200	1.26	2.02	3.28
3		125	1.26	2.02	3.28
4		440	1.26	2.02	3.28
Total/Weighted Average		3085	1.17		

35.7.2. APML submitted that the capital cost of the project has increased substantially on account of devaluation of rupee, restriction on Chinese visas and due to delays in land allocation, forest clearance and water allocation. Further, the interest rates have also increased significantly compared to the time when the project was conceptualised. APML submitted that the above reasons have led to higher fixed cost. APML submitted that the revised capital cost and the fixed charges for the project are expected to be as under.

Table 7: Actual fixed cost per unit of Tiroda TPS

Parameter	Unit 1-3	Unit 4-5	Total
Expected Project cost (Rs. Crore)	10,500	7,040	17,540
Net Generation at Normative Availability (MUs)	13,244	9,190	22,434
Total Levellised capacity charges (Rs. Crore)	1,723	1,293	3,016
Per unit capacity charges (Rs per kWh)	1.30	1.41	1.34

35.7.3. APML submitted that on an aggregate basis considering all five units of Tiroda TPS, it would recover Rs. 2,626 Crore towards capacity charges/fixed charges. APML submitted that compared to the same, Rs. 3,106 Crore is the projected fixed cost for Tiroda TPS, which would result in an under-recovery of Rs. 390 Crore on account of fixed costs.

35.7.4. APML further submitted that if power is supplied under PPA dated 8 September, 2008 as per the quoted energy charges, there will be a substantial under-recovery of fuel cost. APML submitted that as shown in the presentation made by its consultants on 18 January, 2013, the details of projected energy changes assuming a different mix of domestic and imported coal are as given in Table 8. APML submitted that

due to the under-recovery of fuel cost, it would incur a loss in the range of Rs. 515 Crore to Rs. 1,579 Crore per annum depending on use of imported coal and prices of imported coal and CIL coal.

Table 8: Recovery of energy charges

Tariff Component (Rs per kWh)	Fuel Mix : 70% CIL:30% Imported	Fuel Mix : 30% CIL:70% Imported	Fuel Mix : 0% CIL:100% Imported
Estimated Energy Charges	2.00	2.65	3.15
Quoted Energy Tariff	1.44	1.44	1.44
Additional Fuel Cost per unit	0.56	1.21	1.71

35.8. With regard to the awareness of the other stakeholders regarding the termination of PPA, APML submitted that it had intimated its lenders regarding its measure to approach the Commission to seek relief under force majeure clause under the PPA dated 8 September, 2008 during its consortium meeting in accordance with terms and conditions of the Common Loan Agreement executed with SBI and other lenders. APML submitted that the lenders viewed this measure as a positive step considering the circumstances and the fact that Tariff revision would be an appropriate step in the interest of all stakeholders of the Project. APML further submitted that as and when this Petition is disposed, it shall also inform the outcome to its lenders.

35.9. Regarding the query of the Commission on the methodology of arriving at the quoted Tariff stream of energy charge, APML submitted that it had projected the energy charges on a cost plus basis, considering the coal supplies equivalent to 1000 MW from Lohara coal blocks and 320 MW based on coal linkages from SECL coal fields. APML submitted that the Tariff stream so arrived was further rationalised to ensure that the ratio of minimum and maximum energy charges is less than 0.5, which was one of the requirements of the bid.

35.10. With regard to how it was workable for APML to supply from Unit 4 and 5 prior to scheduled COD at a levellised Tariff of Rs. 2.64 per kWh in January 2010 and not presently, APML submitted that while offering supply of power at PPA rate subject

to consideration of change of unit from Unit 2 and 3 to Unit 4 and 5, the following assumptions and/or conditions were prevailing:

a) As per the PPA for 1320 MW from Unit 2 and 3, APML has no right to supply power outside the PPA prior to SCoD, whereas in the PPA for Unit 4 and 5, APML has right to supply prior to SCoD outside the PPA;

b) Unit 2 & 3 was expected to be complete by December, 2011 and Units 4 and 5 were expected to be complete around August 2012;

c) The scheduled supply date as per the PPA for 1320 MW from Unit 2 and 3 was August 2012; whereas, Scheduled Supply Date for PPA for 1200 MW from Unit 4 and 5 was April 2014;

d) As Lohara coal blocks was cancelled and the alternate coal block would have taken about 2 years time to commence production, Unit 2 and 3 would have been required to operate on costlier imported coal or CIL coal. Therefore, if units for supply under PPA dated 8 September, 2008 were not changed from Unit 2 and 3 to Unit 4 and 5, APML would have to supply power to MSEDCL at quoted Tariff of Rs. 2.64/ kWh, which would have resulted in significant financial losses;

e) Unit 4 and 5 were expected to be commissioned after time lag of about 6 months as compared to Unit 2 and 3.Therefore, it would have got extra time of about 6 months if the Units for supply under PPA dated 8 September, 2008 were replaced with Unit 4 and 5;

f) The basis of the offer was that alternate coal block would be allocated, which would take 2 to 3 years for development. By that time, the Scheduled COD for supply of power under PPA for 1200 MW would have arrived and the alternate coal block would have been developed or would have been in an advance stage of development; and

g) Policy for auction of coal block did not exist at time when the said offer was made; and hence, APML expected that it would get an alternate coal block comparable to Lohara Coal block without any incremental cost.

35.11. APML submitted that as explained in the above paragraph, APML offered to supply power under PPA dated 8 September, 2008 from Unit 4 and 5 in good faith with an objective to mitigate force majeure event and continue obligation under PPA and assuming that it would get an alternate coal block. However, MSEDCL did not accept the said offer of APML. APML further submitted that the alternate coal block has also not been allocated so far and even if a new coal block is to be secured at this stage, it can only be through auction considering the prevailing policy of GoI. APML submitted that under such circumstances, the cost of coal from an alternate coal block would be much higher compared to that of Lohara coal block. APML submitted that therefore, the said offer cannot be honored today due to changed circumstances.

36. MSEDCL made a submission in this Case on 13 February, 2013 in response to the application of amendment of Petition filed by APML. The major arguments put forth by MSEDCL are as given in the following paragraphs.

36.1. MSEDCL submitted that APML's application for amendment of Petition is malafide, untenable and the same requires to be dismissed with costs, inter-alia on the following grounds:

a) The hearings for Case No. 68 of 2012 commenced on 22 August, 2012 and all the pleadings in the matter had been completed and the stage of final arguments was also coming to an end. MSEDCL submitted that APML had concluded their arguments on 31 December, 2012. MSEDCL submitted that in view of the fact that hearings of the present Petition have reached such an advanced stage, the application for amendment cannot be allowed.

b) Since the main Petition in the present Case is not maintainable, the same cannot be cured or rectified by an amendment application.

c) Through the amendment application, APML is seeking to introduce a totally new and inconsistent case than which has been pleaded in the main Petition. MSEDCL submitted that if the amendment application is allowed, not only will a new inconsistent case other that what has been pleaded in the main

Petition be introduced, but the same will also lead to an expansion of the scope of the present Petition after the conclusion of the entire hearing.

36.2. With regard to paragraph 2 of the amendment application, MSEDCL submitted that the said application for amendment of Petition in the present Case is not necessary for the determination of the issues raised in the main Petition.

37. The Commission held another hearing on this matter on 13 February, 2013. Shri Harindar Toor, Amicus Curiae was present during the hearing. Shri Sanjay Sen and Shri Kandarp Patel were present on behalf of APML. Shri Chirag Balsara and Shri Kiran Gandhi were present on behalf of MSEDCL. Authorised Consumer Representatives, Dr. Ashok Pendse and Ms. Ashwini Chitnis were also present during the hearing.

37.1. During the hearing, the Amicus Curiae responded to the queries raised by the Commission during the hearing held on 23 January, 2013. The Commission heard the advocates of APML and MSEDCL and Consumer Representatives.

37.2. APML was directed to reply to the queries raised by the Consumer Representatives. The Commission also directed MSEDCL and APML to comply with all the past daily Orders issued in Case No. 68 of 2012.

37.3. The Commission allowed APML to file a rejoinder on the reply of MSEDCL regarding the application of APML for amendment of Petition and directed all parties to make their submissions on the application for amendment of Petition by APML.

38. APML made a submission under affidavit on 12 February, 2013 seeking interim relief in the present Case. APML submitted that it is seeking interim relief from the Commission, since its power plant is ready for generation of power and the Petition for adjudication of dispute in the present Case is pending for disposal before the Commission. APML submitted that it is seeking relief to avoid undue hardship to the generating company as well as the consumers and without prejudice to the rights of both the parties.

38.1. Informing the status of the units from which power has been tied up under PPA dated 8 September, 2008, APML submitted that Unit 2 of the Tiroda TPS has been

synchronized on 31 January, 2013 and Unit 3 was expected to be commissioned soon. APML submitted that if the above mentioned units are not operated in spite of being ready to generate power, the same would neither be in the interest of APML nor the consumers of Maharashtra.

38.2. APML argued that no prejudice will be caused to MSEDCL if the interim relief is allowed. APML submitted that on the contrary, if the interim relief is not allowed, there is a serious risk of the Tiroda power project becoming a Non Performing Asset (NPA) and an investment of Rs. 15,000 Crore getting stranded. APML thereby prayed the following to the Commission:

"i) to direct the Respondent to procure the power at the mutually agreed tariff or such other tariff as this Hon'ble Commission may deem fit in the facts and circumstances of the present case till the time and subject to final disposal of the main petition;

ii) Any other or further relief(s) which the Hon'ble Commission may deem fit may be passed."

39. Subsequent to the hearing held in the matter on 13 February, 2013, APML requested the Commission vide letter dated 19 February, 2013 to allow APML to present its arguments on the Interim Application filed by it on 12 February, 2013.

39.1. The matter was taken up on an urgent basis for In-Chamber hearing on 20 February, 2013, as Unit 2 of Tiroda TPS was already synchronised and Unit-3 of Tiroda TPS was expected to be synchronised soon thereafter. Pending the disposal of matter in Case No. 68 of 2012, an interim arrangement was required as the power plant was ready for supplying power.

39.2. Shri Sanjay Sen, Shri Jatin Jalundhwala, Shri Jigesh Langalia and Ms. Rhia Marshall were present in the hearing on behalf of APML. Shri Chirag Balsara, Shri Kiran Gandhi and Shri A.S. Chavan were present in the hearing on behalf of MSEDCL.

39.3. During the hearing, APML informed that Unit 2 of Tiroda TPS had been synchronised to the grid in January 2013 and Unit 3 was expected to be synchronised soon. Therefore, APML submitted that it was willing to supply power

to MSEDCL at levellised Tariff of Rs. 2.64 per kWh based on the terms and conditions provided in the PPA, as an interim arrangement and without prejudice to its rights in Case No. 68 of 2012.

39.4. The Commission noted in the daily Order that MSEDCL was facing shortage of power from approved sources, i.e., Parli power plant, which had been shut down due to shortage of water supply and RGGPL and Uran power plant, which were running at a lower PLF due to shortage of gas. The Commission further ruled that considering the above factors, the interim arrangement as proposed by APML was justified and would benefit of consumers. The Commission further noted that APML was offering to supply power at the levellised Tariff of Rs. 2.64 per kWh, which was the Tariff discovered in a transparent bid process and agreed rate under the PPA.

39.5. Considering the above factors, the Commission approved the supply of power at levellised Tariff of Rs. 2.64/kWh based on the terms and conditions provided in the PPA as an ad- interim measure till the Interim Application dated 12 February, 2013 is heard by the Commission.

40. Prayas made a submission on 26 February, 2013, in which it submitted its observations on daily Order dated 20 February, 2012 in the present Case.

40.1. Prayas highlighted that as per the daily Order, APML will have to supply power to MSEDCL as per the terms and conditions of the PPA dated 8 September, 2008, without prejudice to the rights of any parties in Case No. 68 of 2012. Prayas submitted that as per Article 11.1 of the PPA, if MSEDCL procures any power from APML prior to commercial operation date, the same needs to be supplied at the rate of energy charges. Only after the units, from which power has been tied up under the said PPA achieve commercial operation, the Tariff as per the PPA is chargeable.

40.2. Prayas submitted that there was no communication from the Commission regarding the possibility of conducting any hearing on 20 February, 2013 based on the interim Petition. Prayas further submitted that by conducting an ‘In-Chamber’ hearing, the Commission has denied the opportunity for other parties to put forth their arguments in this crucial matter and urged the Commission to avoid such practices in the future.

41. In its submission dated 22 March, 2013, APML replied to the arguments raised by TBIA in its submission dated 6 February, 2013. The issue-wise reply is as given the following Paragraphs.

41.1. Regarding the arbitration proceedings between APML and MSEDCL in Case No. 68 of 2012, APML submitted that the case filed under Case No. 68 of 2012 is not related to the bid process and documentation thereof. As regards the jurisdiction of Commission, APML submitted that in the present Case, the Commission can only adopt the Tariff after considering the present facts and circumstances.

41.2. Regarding whether the PPA is co-terminus with the cancellation of ToR for Lohara coal blocks, APML submitted that as per the RfQ, bidders were required to submit the details of the source of coal at the time of submission of bid. Referring to the arguments of Dr. Pendse which are based on the Judgment of Hon'ble ATE in Appeal No. 184 of 2010, APML submitted that the present Case is entirely different from the Case matter of the cited Judgment. APML submitted that the cited Judgment dealt with a Case which related to the rights and obligations of the parties under the PPA and the matter is pending before the Hon'ble Supreme Court of India for adjudication. APML submitted that the issue involved in the cited Judgment is pertaining to termination of PPA under a separate Article of the PPA. APML submitted that in the present matter, the case relates to occurrence of Force Majeure event and subsequent Change in Law under the PPA due to subsequent events.

41.3. APML submitted that Article 3.3.3 of the PPA clearly gives APML a right to terminate the contract on the occurrence of a Force Majeure event. APML added that even the GoM has acknowledged the occurrence of the said event vide its letter dated 11 March, 2010. APML submitted that the major difference between both cases is that in the present case entire coal block has been cancelled; hence, the major source of coal based on which the bid was submitted is no longer available.

41.4. As regards the contention of withdrawal of ToR affecting only 800 MW out of the contracted capacity of 1320 MW, APML submitted that it has committed to supply power in the PPA dated 8 September, 2008 from Unit 2 and 3 of the Tiroda plant. APML submitted that it has long-term linkage for only 520 MW. APML submitted that it has tapering linkage for 800 MW, which may be withdrawn at any time.

APML further submitted that the quality of coal available through linkage is of inferior quality than that which would have been available from Lohara coal blocks. APML further submitted that it had already demonstrated during the hearings in this matter that a blending of 30% imported coal will result in a Tariff of Rs. 3.11 per kWh.

41.5. APML submitted that in light of the above arguments, all objections and contentions filed by TBIA should be rejected.

42. MSEDCL made a submission on 1 April, 2013 in reply to the affidavit of APML dated 12 February, 2013 seeking interim relief. The major arguments raised in the submission are as summarised in the following paragraphs.

42.1. MSEDCL submitted that the PPA dated 8 September, 2008 is valid, subsisting and binding on the parties. MSEDCL submitted that APML is required to supply power and MSEDCL is willing to purchase the power from APML as per the said PPA. MSEDCL submitted that having executed the PPA at quoted Tariff, APML is not entitled to seek revision of Tariff, by contending that if power is supplied at the agreed Tariff, it would incur significant financial loss. MSEDCL averred that the said PPA was executed and Tariff was agreed by the parties through transparent process of bidding in accordance with the Competitive Bidding Guidelines.

42.2. MSEDCL submitted that a formal Order on adoption of Tariff should be issued at the earliest as per the requirements under Section 63 of EA-2003. MSEDCL further submitted that if the process for issuance of the said Order is likely to take some time, it is necessary in the interest of the Consumers of MSEDCL to direct APML by an interim Order to forthwith commence supply of power in accordance with the PPA in view of the various issues raised by APML in its submission dated 12 February, 2013.

43. APML filed a rejoinder on 1 April, 2013 in reply to the objections raised by Prayas regarding the daily Order dated 20 February, 2013. APML submitted that the submission is without prejudice to its objection that Prayas has no locus standi in the matter of the present Petition, which has been filed under section 86(1)(f) of EA-2003 for adjudication of a dispute between two contracting parties.

43.1. APML submitted that the Commission has accepted the proposal to supply at the provisional levellised Tariff rate of Rs. 2.64 per kWh as an ad-interim measure in view of a non-existent commercial arrangement to sell the power from Unit 2 and 3 of Tiroda TPS, till the Interim Application is heard on 3 April, 2013. APML submitted that the condition of supply as *"based on the terms and conditions provided in the PPA*" in daily Order dated 20 February, 2013 is merely an adoption of the procedure contained in the PPA, which is incidental to the supply at provisional levellised tariff rate of Rs 2.64 per kWh. APML submitted that the said condition has been kept to ensure that the parties would have the mechanism to effectuate the payment for such supply and has nothing to do with supply under PPA, since PPA is already terminated. APML submitted that the contentions raised by Prayas that APML is obligated to supply power as per terms and conditions of the PPA dated 8 September, 2008 is without proper understanding of the spirit behind inclusion of the said condition for supply and APML denies the same.

43.2. Regarding the In-Chamber hearing conducted on 20 February, 2013, APML submitted that the Commission had accepted its request for an urgent hearing recognising the difficulties being faced by APML. APML submitted that the Commission had conducted the In-Chamber hearing due to the lack of time considering APML's request for an urgent hearing. APML submitted that the Commission had also ensured the issuance of the daily Order of the hearing on the same day. APML submitted that it believes the action of the Commission in this regard was fair and transparent. APML submitted that the Consumer Representatives will get an opportunity to represent their views on the matter during the next hearing on 3 April, 2013, since the approval granted by the Commission vide daily Order dated 20 February, 2013 was an ad-interim decision and was in effect only till the next hearing.

44. The Commission held another hearing in this matter on 3 April, 2013. Shri Sanjay Sen and Shri Jatin Jullundhwala were present on behalf of APML. Shri Chirag Balsara, Shri Kiran Gandhi and Shri. A.S. Chavan were present on behalf of MSEDCL. Dr. Ashok Pendse and Ms. Ashwini Chitnis were also present during the

hearing. The Commission heard the advocates of APML and MSEDCL and the Consumer Representatives.

44.1. During the hearing, the Commission informed that the Secretary of the Commission had raised certain objections with respect to decisions taken during the "In-Chamber" hearing held on 20 February, 2013. The Commission distributed the documents carrying internal notes by the Secretary and the Chairman on the draft daily Order dated 20 February, 2013 which was put up for approval of the Commission.

44.2. The Commission directed all the parties including the Consumer Representatives present during the hearing to submit their comments on submission made by Prayas on 26 February, 2013. The Commission also directed the parties and the Consumer Representatives to make submissions on the internal notes pertaining to daily Order dated 20 February, 2013 as discussed above.

44.3. The Commission further ruled that daily Order dated 20 February, 2013 will continue to remain in force till further Orders.

45. Prayas made a submission on 22 April, 2013 in this matter. The major arguments put forth by Prayas in the said submission are as discussed in the following paragraphs.

45.1. Prayas submitted that APML is claiming to have terminated the contract and is simultaneously making a prayer for revising the discovered Tariff and has shown willingness to supply at such higher Tariffs. Prayas submitted that it has already made its arguments in its previous submissions regarding untenability of the force majeure claim under the PPA dated 8 September, 2008 and bidding framework.

45.2. Prayas reiterated its arguments with respect to the fact that APML only replied on Lohara coal blocks for a part of its contracted capacity and it had chosen to quote non-escalable Tariff in spite of relying on imported coal/linkage coal for a part of its requirement.

45.3. Prayas highlighted that the Letter of allocation for Lohara coal blocks dated 6 November, 2007 was not a final approval and was subject to certain conditions. Prayas highlighted the relevant Paragraph in which the MoC makes it categorically

clear that the allocation of mining lease of the coal block may be cancelled on certain grounds. The said Paragraph is reproduced below.

"2. Allocation / mining lease of the coal block may be cancelled, inter-alia on the following grounds:

a. Unsatisfactory progress of implementation of their end use sponge iron plan/power plant/cement plant.

b. Unsatisfactory progress in the development of coal mining project.

c. For breach of any of the conditions of allocations mentioned above."

45.4. Quoting the extracts of the ToR for Lohara coal blocks, Prayas pointed out that the ToR categorically notes that the coal blocks will only meet a part of the coal requirement and the balance coal requirement would have to be met though open purchase from CIL.

45.5. Prayas further added that the last section of the ToR requires APML to conduct a public process as per the EIA Notification, 2006. Prayas quoted the relevant extract of the EIA Notification, 2006, which specify that the Appraisal Stage of the project will involve detailed scrutiny by the EAC or State Level Expert Appraisal Committee (SEAC) involved in the application including, inter-alia, the outcome of the public consultations including public hearing proceedings. Prayas further highlighted that as per the notification, the EAC or SEAC concerned shall make categorical recommendations to the concerned regulatory authority (responsible for granting environmental clearance) either for grant of prior environmental clearance on stipulated terms and conditions or rejection of the application for environmental clearance along with reasons.

45.6. Prayas, quoting the minutes of the EAC meeting, highlighted that a mining plan was rejected earlier at the same proposed location. Prayas further noted that in the minutes of the EAC meeting, it had been mentioned that PCCF had informed during the meeting that the methodology followed in the conservation plan submitted by APML was flawed as it did not address the movement of tigers and their seasonality had not been adequately addressed in the plan.

45.7. Prayas submitted that following things can be inferred from the above arguments:

a) Even if the coal block would have been allocated, it would have met only a part of the coal requirement of the Tiroda TPS and APML will have to rely on purchase from CIL or imports to meet the remaining requirement of coal; and

b) There was always a possibility that subject to various conditions being satisfied, the said blocks may or may not be allocated to APML.

45.8. Prayas submitted that APML was aware of the above mentioned risks and had the option of passing the risk to consumers at the time of bidding. Prayas submitted that in spite of the above, APML opted to quote a fixed trajectory for 25 years for the fuel charge in its bid and also succeeded in winning the contract. Prayas argued that now that these potential risks have become a reality, APML is terming the same as a force majeure event.

45.9. Quoting Article 12.3 of the PPA, Prayas submitted that the following conditions must be met for an event to qualify as a force majeure event.

a) Such an event would wholly or partly prevent or unavoidably delay performance other affected party; and

b) It should be of such nature that the affected party could not have foreseen it or could not have mitigated it in any way even after complying with most prudent utility practices.

45.10. Prayas pointed out that it is critical to note that APML was not only fully aware of the risk involved in assuming that the blocks conditionally allocated may not be ultimately granted to it, but had also warned its investors against the possibility of this risk materializing into a reality. Prayas quoted the excerpts of the Draft Red Herring Prospectus (DRHP) of Adani Power Limited (APML's holding company) dated 14 July, 2009, in which the risks related to coal from Lohara coal blocks was specifically identified.

45.11. Prayas submitted that the risk declaration made by APL in the DRHP highlights the following aspects:

a) APML fully understood the conditional nature of the coal block allocation and also envisaged significant opposition to both its power project as well as

mining operations from not just local population but from the forest authorities as well as other concerned authorities;

b) Even if the coal blocks were allocated, it is clear from the DRHP that APML/APL fully understood that there is no assurance that coal from them will be sufficient for generation over the term of the PPA;

c) APML was also fully aware that coal supply tied up by them (either linkage or the coal block) may not be sufficient and they may need to rely on imported coal and or open purchase from CIL to meet the balance requirement of coal; and

d) APML had also informed its potential investors about these risks and advised them to invest in its public offer after accounting for the same.

45.12. Prayas submitted that considering the above arguments, it will be incorrect to term the cancellation of conditionally allocated coal blocks as a force majeure event under the PPA for the following reasons:

a) Force majeure clause specifically excludes issues related to unavailability or change in price from force majeure considerations, as bidding framework gives the bidders complete flexibility in terms of choosing the fuel source and allowing them an option to partially or completely pass through the fuel cost;

b) APML submitted a bid for the Case 1 bid process with a categorical admission that the conditionally allocated captive coal blocks will only meet its coal requirement partially and the balance requirement will be met through linkage coal and/or imported coal;

c) In spite of this dependence on coal to be procured at market rates, APML chose to quote non-escalable energy charges for the entire term of the PPA and emerged as the lowest bidder;

d) The allocation of coal blocks was conditional and there was precedent of an earlier instance whereby a mining project had been rejected at the same proposed location; and

e) The decision of the concerned Ministry to cancel the ToR for the said coal blocks is legally valid and entirely within its jurisdiction and the same has not been challenged or questioned by APML before any forum.

45.13. Prayas submitted the following prayers based on its arguments raised in all of its submissions:

"a. Declare the said termination notice as ab-initio null and void, as there is no force majeure event as per Article 12 of the PPA

b. Direct the Petitioner to ensure performance of its contract as per the agreed terms and conditions under the PPA dated 8th Sept 2008.

c. Undertake a detail scrutiny and assessment of MSEDCL's response to the said notice and steps taken by it in this regard. Direct MSEDCL to undertake necessary corrective actions to prevent such lapses in communication in future.

d. In light of such developments, undertake suo-motu public process to asses power purchase planning of MSEDCL with emphasis on the following aspects:

i. Project wise data such as quantum of power contracted (both long term and medium term) with private generators through competitive bidding process and generating stations.

ii. Comparative analysis of the commissioning timeframe of this capacity; such as when the capacity is/was expected to be commissioned as per the respective contract and what is the actual present status of the plant/unit.

iii. Plant-wise and unit-wise, scheduled delivery date as per PPA, scheduled/actual date of commercial operation as per SLDC records, PPA agreed tariff and actual tariff and actual tariff at which power is being currently purchased, if at all."

45.14. Prayas requested the Commission to direct all parties to submit para-wise replies to its submissions and to include all its submissions in the final Order in this matter.

46. Through its submission dated 30 April, 2013, APML replied to the arguments raised by Prayas on 22 April, 2013.

46.1. APML submitted that the role of Consumer Representatives needs to be revisited. APML submitted that the Consumer Representatives can only be permitted to urge the larger consumer issues and cannot be permitted to take any active role in matters concerning contractual disputes. APML submitted that the Consumer Representatives are not parties to the Case and therefore, have a limited role in the present dispute.

46.2. APML submitted that it is necessary to appreciate that the EA-2003 provides the jurisdiction to the Commission to determine the Tariff and to adjudicate disputes between the Generating Companies and Licensees. APML submitted that as per EA-2003, Consumer Representatives have no role in Commission's adjudicatory jurisdiction under Section 86 (1) (f).

46.3. APML submitted that submissions made by Prayas cannot be considered pleadings which require responses from the parties to the dispute. APML submitted that in view of the above, the proceedings in the present adjudication of dispute cannot be driven on the basis of any submissions made by the Consumer Representatives. APML added that such submissions have only a limited scope and cannot finally determine the rights and obligations of parties to the dispute, which arises from the terms of the PPA (which has since been terminated) and the provisions of the statute. APML submitted that consumer participation in the present matter is not required and such participation offends the sanctity of the adjudicatory process envisaged in EA-2003. APML further submitted that the role of Consumer Representative is envisaged by the Commission to take care of interest of Consumers at large and not to cause delays in the proceedings by making unreasonable demands.

46.4. APML submitted that it is not duty bound to reply to each contention of the Consumer Representatives individually when the same has been covered in the rest of its Affidavits, unless such action is required as per the directions of the Commission.

46.5. APML submitted that it denies the contentions made by Prayas in its letter in entirety. APML submitted that the major issue raised through the letter pertains to an accepted position of Force Majeure and termination of PPA. APML submitted that

the main Prayers in APML's Petition are based on the occurrence of a Force Majeure event and subsequent termination of PPA.

46.6. APML submitted that it has already replied to majority of the contentions raised in the submission of Prayas through its arguments in the main Petition as well as in subsequent submissions. APML submitted that in accordance with the same, the reply to queries raised by Prayas have been answered only briefly in its present submission.

46.7. As regards the contention raised on unilateral termination of the PPA, APML denied that the PPA has been unilaterally terminated. APML submitted that the present Petition has been filed for return of performance guarantee pursuant to the APML's termination letter dated 16 February, 2011. APML submitted that in alternative to the above, it has sought reinstatement of PPA only after considering appropriate revision in Tariff. APML submitted that the above becomes more pertinent in view of the facts that Tariff discovered under the PPA is admittedly unviable, does not reflect the cost of generation. APML submitted that the prayers made in this regard are very clear and unambiguous and Prayas has clearly misconstrued and misinterpreted the scope of the present Petition.

46.8. APML further submitted that post the submission of its bid in Case 1 Stage-I bid process, MoEF has revoked the ToR granted for Lohara coal blocks. APML submitted that the above event was not envisaged by APML and has resulted into a force majeure situation under the PPA. APML submitted that this fact has been accepted both by MSEDCL and the GoM. APML reiterated that it has put in its best efforts to mitigate the impact of changed circumstance by requesting for an alternate coal block or redefining the boundaries of Lohara coal blocks.

46.9. APML submitted that these events have resulted in increasing dependence on costlier imported coal making the PPA unviable for APML at the quoted Tariff. APML submitted that on the basis of the aforesaid circumstances, it proceeded to terminate the PPA by issuing seven days termination notice. APML submitted that after the expiry of the notice period provided in Article 3.3.3, the termination of the PPA has come into effect. APML submitted that by not replying to the notice of termination, MSEDCL has accepted the termination. APML reiterated that

MSEDCL itself acknowledged the merits or the basis on which termination was effected. APML submitted that after receiving all relevant information, MSEDCL chose not to contest termination of PPA and accepted the same, and therefore, the termination of PPA is not unilateral as alleged by Prayas. APML submitted that since the PPA is terminated under Article 3.3.3, MSEDCL is contractually obliged to return the performance guarantee submitted by APML at the time of bid submission.

46.10. As regards the claim of force majeure and termination of PPA, APML submitted that the occurrence of force majeure and subsequent termination is an accepted position and has not been challenged. APML submitted that since Lohara coal blocks were the major source of coal for meeting the coal requirement of the contracted capacity, the withdrawal of ToR for Lohara coal blocks unquestionably constitutes a force majeure event.

46.11. As regards the source of coal as Lohara coal blocks, APML submitted that it has never claimed Lohara coal blocks to be the only source of coal. APML submitted that is has always maintained the stand that the balance coal requirement shall be met from other sources which had a meager impact on the financial bid at the time of bid submission. APML submitted that at the time of bid submission, it had already achieved a substantial milestone with respect to coal arrangement i.e. allocation of Lohara coal block. APML submitted that for the balance requirement of coal also, it had already made an application on 23 November, 2007.

46.12. As regards assuming the risk of increase in prices of coal to be procured from CIL, APML submitted that the fuel arrangement for the balance requirement of coal apart from Lohara coal blocks was always an insignificant quantum as far as financials of the bid are concerned. APML submitted that in view of the quantity and quality of coal available to it, APML had quoted Tariff entirely in non-escalable components. APML submitted that on the contrary, quoting escalable Tariff without any basis would have resulted in passing unnecessary risk to consumers, since the cost of mining coal from allocated coal blocks was certain and fixed in nature. APML submitted that by quoting a non-escalable Tariff, it actually attempted to pass on the benefit of control over fuel cost to the Consumers of MSEDCL.

46.13. As regards the argument that the allocation letter for coal block was not a final approval and the same could have got cancelled on various ground after allocation, APML submitted that the issuance of allocation letter is a significant milestone during the process of coal block allocation. APML submitted that the cancellation of the coal block was not on account of reasons cited by Prayas. APML added that while withdrawing the ToR for Lohara coal blocks, the EAC noted that MoC could allot an alternative coal block or provide linkage. APML submitted that even the MoEF had conveyed a similar request for allotment of other coal block, which sufficiently justifies that the cancellation of Lohara coal blocks was never because of default on part of APML.

46.14. APML denied the argument that the coal block may or may not materialise based on whether various conditions have been satisfied or not. APML submitted that denial of environmental clearance for the coal block owing to reasons not attributable and controllable by APML and the inability to resolve the issue even after sufficient efforts on its part to prevent such event clearly falls within the ambit of definition of Force Majeure under Article 12.3 read with Article 12.4 of the PPA.

46.15. With respect to the argument that the risk of coal not materializing from Lohara coal blocks was not unforeseen, APML submitted that Prayas cannot participate in any discussion/argument on the question of interpretation of the terms of the contract and/or EA-2003, to the extent it involves the dispute between the parties. APML reiterated that the role of the Consumer Representatives is limited and cannot be extended to make submission on the merits of the dispute between the parties. APML submitted that without prejudice to the above, Prayas has clearly misunderstood the whole gamut of force majeure. APML submitted that the basic intention of force majeure is to capture those incidents and occurrences affecting the contract, which are not under control of the parties even if they acted prudently. APML submitted that based on the above, the argument that risk of occurrence of an event was known to a party and hence the same cannot be considered as force majeure is incorrect. APML submitted that a number of clauses of the PPA would have become redundant if the criteria cited by Prayas were correct. APML submitted that having knowledge of any risk cannot automatically disqualify it from becoming

a force majeure event, as both of these are two independent aspects. APML therefore submitted that the said argument by Prayas is futile and deserves to be set aside.

46.16. APML added that knowing a risk does not mean that a party has to bear the consequences of that risk. APML submitted that as a prudent utility practice and matter of transparency and corporate governance, it had disclosed all the relevant risks associated with the business in the DRHP. APML submitted that appraising the investors completely regarding the risks associated with the business and enabling them to make decisions based on such risk knowledge is a normal practice and adopted by all companies. APML submitted that such a disclosure is mandated in order to make aware the investors about risk associated with the business be it Force Majeure or not. APML submitted that there may be companies that might be subjected to such risk and still got allocation of coal block/approvals for power projects. APML added that the above clearly indicates that the risks described in the DRHP were only perceived risks.

47. APML made a submission on 2 May, 2013 in response to the directions of the Commission through daily Order dated 3 April, 2013 for submission of comments on internal notes pertaining to daily Order dated 20 February, 2013.

47.1. APML submitted that the Secretary had raised the following issues:

a) Manner in which the hearing was conducted;

b) Infirmity and errors in the draft Daily Order not being in the interest of Consumers of Maharashtra;

c) Transparency was not maintained and there where administrative lapses shown by officers/consultants of the Commission;

d) APML tried to take advantage by getting approval of ad interim Tariff; and

e) Say of MSEDCL was not recorded.

47.2. APML submitted that the hearing conducted on 20 February, 2013 was transparent and fair. APML added that as per Regulation 65 of Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004, the Commission

has power to decide the manner, date, place and time of the hearing, according to the necessity for the purpose of expeditious disposal of a matter. It further quoted Regulation 65 of MERC (Conduct of Business) Regulations, 2004, which is reproduced below:

"The Commission may determine the stages, manner, place, dated and time of the hearing of the matter, as considered appropriate for expeditious disposal"

47.3. APML submitted that considering the shortage of power in Maharashtra and the benefit of Consumers of MSEDCL, the Commission accepted the proposal of APML to supply power at levellised Tariff of Rs. 2.64 per kWh as an interim measure till the Interim Application dated 12 February, 2013 is heard and subject to further Orders. APML said that the above Order was without prejudice to the rights of both the parties of this Case. APML further added that MSEDCL has accepted the above Order of the Commission.

47.4. APML submitted that it had proposed to supply power at the provisional Tariff in view of the fact that the units of Tiroda TPS were ready for generation and it was in neither in the interest of MSEDCL or APML to keep the units idle.

47.5. APML submitted that there is no basis in the argument that APML tried to take advantage by getting approval of an ad-interim Tariff. APML averred that supplying power at such an unsustainable rate is detrimental since the same will severely impact cash flows. APML submitted that the power supply has been approved without prejudice to the rights and contentions of the parties and is subject to final outcome of the Interim Application.

47.6. APML further denied that the submission of MSEDCL was not recorded in the matter. APML submitted that during the hearing, legal counsels of MSEDCL were also present and their submissions have also been considered by the Commission. APML added that if MSEDCL had any grievance, it would have filed an application for review of the said daily Order. APML added that after MSEDCL has already accepted the Order, it cannot be argued that MSEDCL's say was not recorded.

47.7. APML submitted that in view of the above arguments, the reply of the Commission to the allegations made represents a correct picture of circumstances under which the hearing was conducted and approval for supply at interim Tariff was granted.

48. The Commission held another hearing in this matter on 9 May, 2013. Shri Sanjay Sen and Shri Jatin Jullundhwala were present on behalf of APML. Shri Chirag Balsara, Shri Kiran Gandhi and Shri A.S. Chavan were present on behalf of MSEDCL. Authorised Consumer Representative, Ms. Ashwini Chitnis was also present during the hearing.

48.1. The Commission directed all the parties to the Case to submit their consolidated final written arguments.

48.2. The Commission reiterated in the daily Order that the decision taken as per daily Order dated 20 February, 2013 for the interim arrangement for power purchase at a levellised Tariff of Rs. 2.64 per kWh will continue to remain in force till further Orders.

49. On 30 May, 2013, APML submitted its consolidated arguments in line with the directions of the Commission. The additional arguments put forth APML in addition to the arguments already submitted in its prior submissions are described in the following paragraphs.

Regarding risk allocation for fuel

49.1. APML submitted that in order to analyse the issue of force majeure and the ability of APML to terminate the PPA under Article 3.3.3, a close review of the relevant terms of the PPA is required. APML added that the PPA, being a contract, needs to be interpreted in light of the intention of parties that existed on the date of execution of the PPA. APML submitted that for evaluating the same, the circumstances under which the Case 1 Stage-I bid process was conducted also need to be evaluated. The reason of evaluation of the circumstances is to appreciate the ability of parties to allocate risks relating to availability of coal and the intention of the parties for such risk allocation.

49.2. APML submitted that before analysing the issue as to whether there is any clear indication in relation to allocation of risk of procurement and supply of domestic

coal in the RfQ, RfP, APML’s offer and the PPA, it will be useful to first review the provisions in the Competitive Bidding Guidelines.

49.3. APML submitted that paragraph 2.2 of the Competitive Bidding Guidelines outlines the two routes for power procurement, i.e., Case 1 and Case 2. As per the said paragraph, a process of procurement shall be classified as Case 1 where the location, technology, or fuel is not specified by the procurer. However, for hydro projects, load centre projects, other location specific projects with specific fuel allocation such as captive mines available, which the procurer intends to set up are classified as Case 2. APML added that as per paragraph 3.2(iv), if fuel linkage or captive coal mines are provided, the same should be available before publication of RfP. In case, bidders are required to arrange fuel, the same should be specified in the RfQ.

49.4. APML highlighted that the specific guidelines in relation to fuel arrangement for Case 1 procurement was introduced by the Central Government by an amendment in the Competitive Bidding Guidelines dated 27 March, 2009. The Central Government introduced paragraphs (II) (i) to (v) in clause 3.2, which relate to Case 1 procurement. In clause 3.2(II)(iv), as amended on 27 March, 2009, the bidding guidelines makes a distinction qua fuel arrangement for generation of power based on domestic fuel and imported coal. It is provided that in relation to Case 2 bidding, in case of domestic fuel the bidder shall have made "firm arrangement for fuel tie up" either by coal block allocation or coal linkage. While the said amendment recognises that its only an "arrangement" for fuel "tie up" at the bidding stage (and not allocation of risk of fuel supply during the PPA period), the said amendment cannot be considered for the present purposes. MSEDCL issued the final RfP in the present case on 16 February, 2008. It is submitted that based on the said RfP, APML placed its bid on 20 February, 2008.

49.5. In this context, it is also relevant that since there was no specific guidelines relating to Case 1 procurement in the original Competitive Bidding Guidelines, the Central Government had not provided any draft Standard Bidding Documents (SBDs) for the same. Therefore, MSEDCL modified the Standard PPA for a Case 2 process. Therefore, any reliance on the Case 1 guidelines, which are available today in the present facts have to be made considering the above facts in perspective.

49.6. APML submitted that the above fact has been entirely overlooked by the Advocate General, Maharashtra in his opinion dated 30 December, 2011, based on which MSEDCL has denied the acceptance of a force majeure event. APML submitted that the very fact that the Case 1 protocol (including the SBD) did not exist on the date on which bids were invited, goes to the very root of the said opinion. Further, the bidding protocol cannot be the only basis on which decision of whether the coal supply risk is entirely assumed by the bidder can be taken. To establish the same, the terms of the PPA need to be examined, which has not been done in the case of the said opinion.

49.7. APML submitted that it is relevant to evaluate as to why the Case 1 protocol (guidelines and SBD) was not issued by the Central Government simultaneously with the Case 2 protocol. Coal, being a State subject, could not be allocated under the prevailing policy regime at that time. While the Competitive Bidding Guidelines were issued in 2005, the New Coal Distribution Policy came into existence only in October 2007. The policy was capable of being immediately operationalised.

49.8. APML added that in spite of the above, execution of FSA and ensuring supply of coal in terms of the FSA, which is indispensable for any long-term power supply commitment, is not possible even till date. APML submitted that as can be observed from Case No. 88 of 2010, if MSEDCL is not in a position to assume the risk of fuel in a Case 2 process, a private party cannot assume the entire fuel risk under Case 1 process.

49.9. APML submitted that since coal has been nationalised under the Coal Mines (Nationalisation) Act, 1973 and is entirely within the domain and control of Central Government, there cannot be any allocation of risk related to supply or procurement of coal. APML added that to allocate risks that are not within the control of parties would be entirely speculative and result in a contract which is not enforceable.

49.10. APML submitted that the fact that coal is not a commonly available commodity and is entirely under the control of the Central Government has been recognised in several Judgments of Hon'ble Supreme Court of India. APML quoted the excerpts from the Judgment of the Hon'ble Supreme Court of India in the Case of Ashoka Smokeless (reported in (2007) 2 SCC 640).

49.11. APML submitted that its arguments in the Petition and the hearings held in this matter need to be evaluated considering the above facts.

49.12. APML referred to various sections of the bidding documents to establish that the parties recognise the risk relating to the availability coal and as such, did not allocate such risk to either of the two parties. The arguments related to the same are as follows:

49.12.1. APML submitted that Paragraph 2.1.5 of the RfQ expressly required the bidder to submit a comfort letter from the fuel supplier for fuel linkage at the time of the bid submission in response to the RfP. APML submitted that in case of captive coal mine, while no express document was sought, the letter of allocation of coal block was considered adequate. There was no requirement that the coal block should be operating or otherwise.

49.12.2. APML submitted that as per the bidding documents, there was no requirement of comfort letter when the fuel is not from a linkage route. Therefore, the parties recognised that when fuel is from a linkage route, it is not possible to have any binding contract with the fuel supplier, and that a 'comfort letter' will suffice for purposes of qualifying to make a bid. This clearly shows that the parties were aware that fuel through linkage cannot be assured through any binding contract executed between the bidder and the fuel supplier. This is clearly indicative of the background facts that exist in relation to domestic coal, which was fully in the knowledge and consideration of the parties at the time of participation in the bid, selection of the bidder and execution of PPA. APML averred that there is no specific risk allocation in case of coal procurement/supply.

49.12.3. Referring to Paragraph 2.8.1.4 of the RfP, APML added that bidder was supposed to quote the Tariff considering three scenarios depending on the source of coal in escalable and/or non-escalable components. Depending upon the source of coal, the bidders had an option to quote the Tariff in the escalable component, which was linked to specific escalation rates issued by Hon’ble CERC and there was a separate rate of escalation for each scenario. APML highlighted that the important aspect here is to examine whether or not the bid documents envisage the consequences of an event in which the scenario considered by the bidder ceased to exist.

49.13. APML submitted that in the present case, it proceeded on the basis of scenario 1, which is the scenario where the bid is based on a captive coal block. However, subsequently the ToR for captive coal block was withdrawn in view of certain actions taken by the Central Government (MoEF), over which APML has no control. APML submitted that such a situation was not envisaged in the bid. The allocation of risks that was envisaged under the bid parameters was only to the extent within a particular scenario. The risk that was assumed by the bidder was a risk that existed within a particular scenario and not outside such scenario. The risks allocated to the bidder include risks relating to the fact that no adjustment will be allowed for heat rate degradation. APML submitted that based on the above, it is clear what risk was assumed by the bidders and what was not assumed by the bidders. This is a case of change of scenario, which goes to the very root of the offer and the resultant contract.

49.14. APML added that MSEDCL has relied on Clause 2.1.1 of the RfP, which provides that the bidder shall assume "full responsibility to tie up the fuel linkage and to set up the infrastructure requirement for the fuel transportation and its storage". From a reading of the said Clause, it is quite clear that the obligation is to ensure "tie up" of linkage. Execution of FSA is a condition subsequent. Once it is accepted that execution of FSA is a condition subsequent, it is clear that the same is not a risk that was assumed at the time of bid and execution of PPA. The consequence of non-fulfillment of conditions subsequent is the termination of PPA.

49.15. APML added that the said Clause applies for fuel linkage and not in relation to allocation of captive coal block. The risk attached to allocation of coal block and operation of the same is wholly different from the risks attached with supply of coal through a linkage. In case of a coal block allocation; there are other attended risks apart from the sovereign risks which relate to operating a coal block. There is no express provision of the RfP under which the bidder has assumed those risks.

49.16. Also, it is necessary to appreciate that even for fuel linkage the risk of the bidder is limited to his responsibility to tie up fuel linkage. If there is an issue in relation to getting coal supply post tie-up of fuel linkage, the risk is not with the bidder. The reason for this is that the bidder has no say in relation to the terms of the fuel supply

agreement under which the fuel linkage is made operational. This is a matter within the domain of the Central Government and the Central Government-owned coal companies.

49.17. APML submitted that considering the above facts, it is clear that the bid document recognises that the bidder is only capable of securing a tie up for fuel linkage but has no control over implementation of the linkage. This fact needs to be recognised in order to appreciate the intention of the parties at the time of the bid. There is no assumption of risk with regard to any of the follows:

a) Allocation of captive coal block;

b) Operation of captive coal block; and

c) Implementation of fuel linkage post tie-up of the same.

49.18. APML averred that the fact that fuel is an important part of the contract is evident from the details regarding the fuel sought at the RfP stage. The details of fuel sought in the RfP stage indicate that the source of coal, which is fundamental to generation and pricing of power, was well within the realms of consideration of the parties and taken serious note of at the time of bidding. APML submitted that considering the above, MSEDCL's submission that they are not concerned with the source of coal and that the matter is only within the domain of the bidder is incorrect.

Regarding force majeure

49.19. APML submitted that the event of signing of an FSA is one of the conditions subsequent as per Article 3.1 of the PPA and the PPA can be terminated as per Article 3.3 of the PPA if this condition subsequent has not been met due to a force majeure event. APML averred that the above fact indicates that in case an FSA is not executed in a definite timeframe due a force majeure event, the PPA can be terminated by the parties. APML submitted that the PPA does not envisage a situation which requires the bidder to procure coal from any other source apart from that indicated in the bid, which is clear from the fact that if that was the intent, Article 3.3.3 would have been meaningless. APML averred that the clause has to be given interpretation which is reasonable and acceptable in the commercial world.

49.20. APML reiterated its arguments that it has terminated the PPA within the inclusive definition of force majeure. APML submitted that in the present case, withdrawal of ToR by MoEF is an event which prevented APML from the performance of its obligations. APML averred that the event was not within the responsible control of APML could not have been avoided by APML by taking reasonable care or following prudent utility practices.

49.21. APML re-emphasised the arguments that MSEDCL did not dispute or question the existence of a force majeure event and even the GoM in its letter dated 11 March, 2010 has acknowledged that the withdrawal of ToR for Lohara coal blocks has made the project techno-commercially unviable.

49.22. APML submitted that MSEDCL cannot rely on Article 19 of the PPA, which relates to the option of supplying power from an alternate source. APML submitted that it had offered to supply power to MSEDCL from Unit 4 and 5 of Tiroda TPS as an intermediate measure, but MSEDCL did not respond to the said offer of APML. APML submitted that having rejected the proposal for supply from alternate units, it is not open for MSEDCL at this stage to rely on Article 19 for supply from an alternate source after the PPA has been terminated.

49.23. APML submitted that the provisions in Schedule VI of the PPA indicate that the source of coal has to be identified as the part of the Tariff schedule. Further, the clause for computation of penalty in case of inability of the procurer to fulfill minimum off-take guarantee also takes into account the cost of penalty to off-take coal up to the minimum guaranteed quantity. APML submitted that considering the above clauses, it is clear that the claim that the procurer has nothing to do with fuel is incorrect.

Relief under frustration

49.24. Quoting Section 56 of the Contract Act, APML submitted that the PPA dated 8 Septembers, 2008 stands dissolved and the obligations of the APML stand discharged. APML submitted that since the unviability of Tariff for supply of power due to non-availability of coal from Lohara coal blocks has been established, the positive law enumerated in Section 56 of the Contract Act can be invoked. APML

quoted the following Judgments to support its arguments related to frustration on account of commercial impossibility of performance of contract:

a) Satyabrata Ghosh Vs Mugneeram Bangur & Co. and Anr. AIR 1954 SC 44;

b) Naihati Jute Mills Ltd Vs Khyaliram Jagannath, 1968 (1) SCR 821;

c) Smt. Sushila Devi and Anr. Hari Singh and Ors., (1971) 2 SCC 288;

d) Har Prashad Chaubey Vs. Union of India and other, 1973 2 SCC;

e) Tarapore and Company Vs Cochin Shipyard Ltd., Cochin and Anr., (1984) 2 SCC 680;

f) Central Bank of India Staff Co-operative Building Society Limited Vs. Daulipalia Ramchandra Koteswara Rao, AIR 2004 AP 18;

g) Anglo-Russian Merchant Traders Limited [1917] 2 K.B. 679;

h) Staffordshire Area Health Authority Vs. South Staffordshire Waterworks Co. [1978] 1 W.L.R. 1387; and

i) Holcim Singapore Pte Ltd Vs. Precise Development Pte Ltd. and Another application, reported in [2011] SGCA 1.

Regarding Jurisdiction of the Commission to modify Tariff

49.25. APML quoted the following Judgments to highlight the special jurisdiction/powers of the Commission vested in Tribunals, which are generally not available to civil courts:

a) Coop. Central Bank Vs. Additional Industrial Tribunal, (1969) 2 SCC 43;

b) Rohtas Industries Ltd. Vs. Brijnandan Pandey, 1956 SCR 800;

c) New Manek Chowk Spg. and Wvg. Co. Ltd. Vs. Textile Labour Association, (1961) 3 SCR 1;

d) Cellular Operators Association of India and Ors. Vs. Union of India (UoI) and Ors; (2003) SCC 186;

e) Transmission Corporation of Andhra Pradesh Ltd. and Anr. etc. etc. Vs. Sai Renewable Power Pvt. Ltd. and Ors, etc. (2011) 11 SCC 34;

Regarding provisions related to Tariff in EA-2003

49.26. Quoting Section 61 of EA-2003, APML emphasised that the Appropriate Commission needs to be guided, inter alia, by the following principles outlined in the said Section while exercising jurisdiction under Section 63 of the EA-2003 also.

a) Generation of electricity is conducted at commercial principles;

b) Factors which would encourage competition efficiency, economical use of the resources, good performance and optimum investments;

c) Recovery of cost of electricity in a reasonable manner; and

d) Tariff progressively reflects the cost of supply of electricity.

49.27. APML further submitted that Section 63 of EA-2003 starts with a non-obstante clause to the effect that notwithstanding anything contained in Section 62, if Tariff is determined through a competitive bidding process in accordance with the guidelines framed by the Central Government, the Commission shall adopt such Tariff. APML submitted that it is clear that the non-obstante clause in Section 63 does not extend to either Section 61 or Section 86 of EA-2003. APML averred that from the scheme of EA-2003, it is quite clear that even if Tariff has been determined through the Section 63 route, the Commission continues to have the power to "regulate" such tariff keeping in view the principles of Section 61 and its jurisdiction under Section 86 (1) (b).APML added that a close review of Section 86 (1) (b) read with the overall scheme of the Act confirms the following:

a) Section 86 (1) (b) is an independent and distinct source of power / jurisdiction and not an extension of powers for initial Tariff determination under Section 62, 63 and 86 (1) (a) of the Act;

b) The power to "regulate" under Section 86 (1) (b) is distinguished from the power of "determination" of Tariff;

c) Regulation of Tariff can happen only after Tariff has been determined and there is an agreement in place;

d) The section expressly clarifies that the power to regulate includes the price at which electricity shall be procured from the generating companies through

agreements for purchase of power for distribution and supply within the State of procurement of power;

e) Existence of PPA does not (and cannot) affect jurisdiction vested under the statute;

f) For exercise of jurisdiction under section 86 (1) (b) it is immaterial whether the Tariff has been determined through section 62 or section 63 route;

g) The scheme of the Act, including the powers / jurisdiction vested in Section 86 (1) (a) and (b) confirm that Tariff is not a pure contractual matter, based on principles of mutuality;

h) The fact that even in a bidding route, the Commission has to mandatorily adopt Tariff based on certain regulatory principles, takes away the initial contractual characters that existed at the time of bid; and

i) The fact that Tariff does have any contractual characteristics is reinforced by the provisions of section 86.

49.28. APML quoted the following Judgments to establish the wider definition of the term "regulate" and the powers to change the Tariff of an existing contract:

a) Sri Ventaka Seetaramanjaneya Rice and Oil Mills and Ors. Vs. State of Andhra Pradesh etc., AIR 1964 SC 1781;

b) K Ramanathan Vs. State of Tamil Nadu and Anr., (1985) 2 SCC 116;

c) D.K. Trivedi & sons and Ors. Vs. State of Gujarat and Ors., AIR 1986 SC 1323;

d) Jiyajirao Cotton Mills Ltd. and Anr. Vs. Madhya Pradesh Electricity Board and Anr., reopened in AIR 1989 SC 788;

49.29. APML further quoted the following Judgments which specifically deal with powers to change the Tariff of an executed PPA:

a) Rithwik Energy Systems Limited represented by its Director Vs. Transmission Corporation of Andhra Pradesh Limited and others, 2008 ELR (APTEL) 237;

b) Patikari Power Ltd. Vs. Himachal Pradesh Electricity Regulatory Commission, Appeal No. 179 of 2010;

c) Konark Power Project Ltd. Vs. Bangalore Electricity Supply Company Ltd. and another, Appeal No. 35 of 2011; and

d) Tarini Infrastructure Limited Vs. Gujarat Urja Vikas Nigam Ltd and others, Appeal No. 29 of 2011.

49.30. APML further quoted the Judgment in the Case of Aluminum Company of America Vs. Essex Group Inc (reported in 499 F. Supp. 53) to highlight the ability of courts to give close attention to the legitimate business aims of the parties, to their purpose of avoiding risks of great losses and to the need to frame a remedy to preserve the essence of the agreement.

50. The Commission held another hearing on this matter on 31 May, 2013. Since the new member of the Commission, Smt. Chandra Iyengar had joined the Commission, the Case was heard by the bench comprising of the Chairman and the Member for all the further hearings.

50.1. Shri Sanjay Sen was present on behalf of APML. Shri Chirag Balsara and Shri Kiran Gandhi were present on behalf of MSEDCL. Dr. Ashok Pendse (TBIA) and Shri Srihari Dukkipati, Prayas were also present during the hearing.

50.2. The Commission heard the advocates of APML and MSEDCL and the Consumer Representatives during the hearing.

50.3. The Commission reiterated that the decision taken as per daily Order dated 20 February, 2013 for the interim arrangement for power purchase at a levellised Tariff of Rs. 2.64 per kWh will continue to remain in force till final disposal of the present Case.

50.4. APML was directed to submit the following information/clarifications before the next hearing in this matter:

a) Note on the phasing and fuel planning of Tiroda Thermal power plant at the conceptualization stage and whether coal block was initially allotted for 1000

MW Capacity. What was the unit configuration proposed at the conceptualisation stage?

b) The chart indicating unit-wise coal allocation and off-take for all the five units and their supporting documents;

c) Whether the Petitioner has followed all the procedures specified in the relevant Clauses of PPA regarding termination of PPA as claimed by the Petitioner?

d) Whether additional Performance Bank Guarantee is provided for meeting condition subsequent in the PPA?

e) Documents establishing that the procedures under Article 12.5 of PPA have been complied with;

f) Whether Ministry of Environment & Forest put any conditions while recommending to MoC regarding the allocation of alternate coal block; and

g) Any response from MoC not accepting the request for allocation of alternate coal block.

50.5. MSEDCL was directed to submit whether all procedures specified in the PPA were followed by APML and MSEDCL with regards to termination of the PPA. The Commission also directed MSEDCL to submit its written arguments in this Case in a week from the date of daily Order.

51. The Commission held the next hearings in this matter on 10 June, 2013 and 11 June, 2013. Shri Sanjay Sen, Advocate and Shri Kandarp Patel were present on behalf of APML. Shri Rahul Chitnis, Shri Chirag Balsara, Shri Kiran Gandhi, Advocates and Shri A.S. Chavan CE(PP) were present on behalf of MSEDCL. Authorised Consumer Representatives, Dr. Ashok Pendse, Ms. Ashwini Chitnis and Shri Srihari Dukkipati were also present during the hearing.

51.1. The Commission heard the Petitioner, Respondents and the Consumer Representatives.

51.2. The Commission reiterated its earlier direction given in daily Order dated 18 January, 2013 and directed APML and MSEDCL to make efforts to work out

options for feasible Tariffs amicably in line with the enabling provisions of Article 17.2 of the PPA. The parties were directed to keep the aspects highlighted in daily Order dated 18 January, 2013 in perspective, in their efforts to reach an amicable solution. The parties were directed to evaluate the feasibility of the options after considering different scenarios, including a) feasibility considering only Unit 2 and 3 of Tiroda TPS and b) feasibility considering all five units of Tiroda TPS. The Commission directed the parties to conduct the above mentioned meeting(s) before the next hearing and submit the minutes of the said meeting(s) to the Commission.

51.3. The Commission directed APML to provide the following information/clarifications:

a) Whether APML was aware at the time of submission of RfP in Case 1 Stage-I bid process that a proposal for mining project in same proposed location (Lohara) was rejected earlier in 1999? When did APML come to know about this fact?

b) Whether APML submitted a revised conservation plan, once the original conservation plan was rejected by Principal Chief Conservator of Forests, Maharashtra?

c) Whether the offer for supply from alternate units, i.e., Unit 4 and 5 was for a specific period or entire tenure of PPA;

d) Detail of unit-wise coal supply, which shall include a) details of project capacity for which coal allocation was requested at various point of time along with the projected break-up of coal source i.e., Captive Mines, Linkage Coal, Imported coal and any other source, if any; (b) allotment of coal for all the five unit against the request made; and (c) Current status of coal supply for all Units (1 to 5) with source, cost and quantum;

e) Lohara coal block was allocated to Adani Power for 1000 MW power plant at Tiroda. By natural principle, supply of coal from Lohara coal block should be provided to first unit of power plant which is coming at the Tiroda. However, at the time of bidding APML had excluded Unit 1 in Case 1 Stage-I bidding process. What were the reasons behind such planning? and;

f) The benefits availed by APML under the policy dated 28 March, 2005 of Government of Maharashtra i.e., "*Maharashtra State Policy for investment in power generation sector for capacity addition of 500 MW and above*". APML to further clarify the impact of the provisions relating to a certain percentage of power to Maharashtra as per the policy on validity of termination of PPA.

51.4. MSEDCL was directed to submit the following information/clarifications before the next hearing:

a) The specific queries raised to the Advocate General, Maharashtra and query-wise reply thereof;

b) Chronology of action taken by MSEDCL/GoM on receipt of termination notice from APML;

c) Clarify the reasons for not considering the offer of APML to supply power from alternate units, i.e., Unit 4 and Unit 5 of Tiroda TPS and whether it has formally replied to the said offer of APML;

d) Some of the documents suggested that responsibility of approval of plan for mining is with State Government. MSEDCL to find out whether it should be done by parent Department or any other Department. If the latter, what were the steps taken by parent Department to approach any other Department. Whether any steps taken within the Government if there was any conflict of interest between the Departments; and

e) Reasons for accepting higher Tariff bid for Unit 1 when contract has been signed at comparatively lower Tariff from Unit 2 and 3 of the same power plant.

51.5. APML and MSEDCL were also directed to provide all required information to the Authorised Consumer Representatives and conduct meetings with them if required before the next hearing.

52. APML, on 13 June, 2013, submitted its response to the queries raised by the Commission vide daily Order dated 31 May, 2013. APML's replies are summarised in the following paragraphs.

52.1. With regard to the unit configuration proposed at conceptualisation stage, APML informed that it submitted application for allocation of Lohara West and Lohara Extension (E) coal blocks on 10 January, 2007 for catering to the coal requirement of 1200 MW generation capacity. APML submitted that MoC had allocated Lohara coal blocks on 6 November, 2007 for catering to the coal requirement of 1000 MW generation capacity. APML submitted that during this time, NCDP was notified on 18 October, 2007, as per which, CIL would provide supply of 100% of normative coal requirement to consumers of coal at notified prices. APML submitted that in order to derive the environmental benefits of supercritical technology and in view of NCDP; it had envisaged Tiroda TPS with a configuration of 660 MW x 3 units.

52.2. Regarding the query on Unit-wise allocation, APML submitted the following information:

Table 9: Status of coal arrangement for all units of Tiroda TPS

<table>
<tr><th>Unit</th><th>Installed Capacity (MW)</th><th>Capacity with coal linkage (MW)</th><th>Linkage Coal quantity (MTPA)</th><th>Type of Linkage</th><th>Status</th></tr>
<tr><td>1</td><td>660</td><td>660</td><td rowspan="2">4.233</td><td rowspan="2">Long term</td><td rowspan="2">FSA signed*</td></tr>
<tr><td rowspan="2">2</td><td rowspan="2">660</td><td>520</td></tr>
<tr><td>140</td><td>0.540</td><td rowspan="2">Tapering</td><td rowspan="2">LoA in place FSA not yet signed</td></tr>
<tr><td>3</td><td>660</td><td>660</td><td>2.750</td></tr>
<tr><td>4 and 5</td><td>1320</td><td>1320</td><td>-</td><td>Long term linkage applied for on 30 May, 2009</td><td>Not yet granted</td></tr>
</table>

**As per FSA signed with SECL, the Petitioner will get coal for 25%, 22%, 25% and 28% of Annual Contracted Quantity in Q1, Q2, Q3 and Q4 respectively.*

52.3. Regarding the query whether APML has followed the procedure specified in the relevant Clauses of PPA related to termination of PPA, APML submitted it had followed the procedure as per the terms and conditions of the terminated PPA starting from notification of force majeure situation till termination of the PPA and subsequent steps thereon. APML added that the PPA was terminated as per the provisions of Article 3.3.3 of the PPA.

52.4. Regarding the additional performance guarantee, APML submitted that it had not provided any additional bank performance guarantee to MSEDCL. APML further submitted that it is not required to provide additional bank guarantee if fulfillment of

condition subsequent as provided in Article 3.1.2 is delayed due to occurrence of a force majeure event. APML submitted that even MSEDCL did not demand additional performance guarantee prior to termination of PPA in view of the above provisions. APML added that the fact that MSEDCL did not demand additional performance guarantee indicates that MSEDCL accepted the occurrence of force majeure event. APML further submitted that as per Article 14 of the PPA, failure to fulfil conditions subsequent as per Article 3.1.2 due to a force majeure event is not even an event of default as per the PPA.

52.5. Regarding the query whether MoEF put any conditions while recommending the allocation of alternate coal block for APML to MoC, APML submitted that no condition was imposed by MoEF. APML further submitted that it has not received any formal response from MoC regarding the allotment of an alternate coal block. However, AMPL submitted an extract of the SLC (LT) meeting held on 7 January, 2013, which is reproduced below:

"The Committee noted that there is no policy for allocation of alternate coal blocks in any contingency. It was also noted that the coal blocks allotted to APML have neither been de-allocated nor cancelled and they had again applied to the State Government concerned for clearance in April 2012. JS, MOP informed that APML has since got the cancellation letter in this regard from the State Government and observed that in such cases where coal blocks are not coming up for any reason whatsoever but their end use plants have either come up or are at an advanced stage, such cases should be considered favourably-particularly if the project developers have a long-term PPA with DISCOMs, which has been laid down as a pm-condition for coal supply to the power projects during the 12th Plan Period.

Recommendations:

It will not be possible to give any specific recommendation in the matter by the SLC (LT) at this point of time, as it will have implications for many other similarly situated power plants. A decision may be taken by MoC on such a category of the power plants after laying down general principles in this regard."

53. Prayas made a consolidated submission on 31 May, 2013 in accordance with the directions of the Commission. Prayas submitted that considering principles of natural justice, due process and regulatory governance, as well as provisions of Section 94 (3) and 174 of EA-2003, Sections 2(a)(ii), 2(a)(vii), 2 (a) (viii) and Section 18 of Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 and Section 9(1) of Maharashtra Electricity Regulatory Commission (Authorised Consumer Representatives) Regulations, 2012, and the Commission's inherent authority/jurisdiction over the regulatory process, Consumer Representatives directed by MERC have every right to participate in this matter and to make submissions and comments and to put the same before the Commission.

54. APML made a submission on 1 July, 2013 in response the queries raised by the Commission in its Daily Order for hearings held on 10 June, 2013 and 11 June, 2013. The responses of APML against the queries raised by the Commission are given in the following paragraphs.

54.1. APML informed that as directed by the Commission, a meeting was held between APML and MSEDCL on 26 June, 2013. APML submitted that the parties have not been able to arrive at an amicable solution as MSEDCL had decided to not to take any position on APML's claim of higher generation cost and financial losses, and conveyed that the matter may be decided by the Commission. APML also submitted the minutes of the said meeting.

54.2. In response to the Commission's query whether APML was aware at the time of submission of RfP that the proposal for coal mining at Lohara was rejected earlier in 1999, APML replied that it was not aware of the same and came to know about the same through the minutes of meeting of EAC dated 24-25 November, 2009.

54.3. Regarding the question whether APML has submitted a revised conservation plan after the original conservation plan was rejected by MoEF, APML replied that it had not submitted the same. However, APML clarified that it had requested to redefine the boundary of Lohara coal block to avoid infringement of the notified buffer zone of TATR, but the same had not received any favorable response till the date of this submission.

54.4. Regarding the query whether the offer for supply from alternate units, i.e., Unit 4 and 5 was for a specific period or entire tenure of the PPA, APML clarified that the said offer was based on the presumption that APML will be granted an alternate coal block based on the recommendation of EAC and MoEF. APML added that the offer was also time bound and was made considering the criteria to match the commissioning of units with the expected timeline of development of alternate coal block.

54.5. Regarding the query related to the coal arrangement at the planning stage, execution stage and as per the current status of coal availability in detail,APML provided following information:

54.5.1. APML applied for allocation of Lohara coal blocks on 10 January, 2007 for the generation capacity of 1200 MW at Tiroda. Ministry of Coal (MoC) had allocated Lohara coal blocks to APML on 6 November, 2007 for a generation capacity of 1000 MW. Meanwhile, NCDP was notified by Ministry of Coal, Government of India on 18 October, 2007, which assured coal supply up to 100% of normative requirement by CIL at notified prices. APML submitted that it conceptualised the Tiroda TPS with the configuration of 3 units of 660 MW each (total 1980 MW) in order to derive the environmental benefits of supercritical technology and considering the assurance of supply of coal based on NCDP.

54.5.2. SLC (LT) authorised the issuance of LoA for balance generation capacity of 1180 MW by CIL on 12 November, 2008 in accordance with the provisions of NCDP and considering the recommendations of CEA / MoP after evaluating the fact that Lohara coal blocks can sustain a generation capacity of only 800 MW. Based on the decision of SLC (LT), WCL and SECL issued LoA's dated 1 June, 2009 and 6 June, 2009, respectively.

54.5.3. In lieu of grant of clearance by MoEF for Lohara coal blocks, APML applied for grant of Tapering Linkage on 27 October 2009, SLC (LT) in its meeting held on 29 January, 2010, authorised issuance of LOA by CIL on tapering basis to the Petitioner for Unit 3 of 660 MW, consequent to which SECL issued LOA for 2.7467 MTPA. Further, the Petitioner was issued LOA for 0.2913 MTPA from SECL on 26

November, 2010 and for 0.2489 MTPA from WCL on 13 May, 2011 for 140 MW capacity of Unit 2.

54.5.4. APML added that the LOAs issued by CIL were on tapering basis for 800 MW and that the linkage was allocated was only for three years from the normative date of commencement of production as per following norms:

a) First Year- 75% of normative quantity as applicable in the 12 months immediately preceding the normative date of commencement of production,

b) Second Year- 50% of normative quantity as applicable in the 12 months immediately preceding the normative date of commencement of production,

c) Third Year- 25% of normative quantity as applicable in the 12 months immediately preceding the normative date of commencement of production,

54.5.5. As per the clarification sought by SECL for supply of carpeting and trial run coal, CEA being the designated authority, clarified that with reference to the minutes of meeting of SLC (LT) held on 8 April 2010 that 140 MW and 660 MW (totalling to 800 MW covered under Lohara coal block allocated to APML) the tapering linkage is against the 2nd and 3rd Units respectively.

54.5.6. Presently it is receiving coal under supply from FSA with SECL for 1180 MW signed on 28 December, 2012. Subsequently, on 19 March, 2013, an addendum to the FSA was signed transferring the obligation from WCL to SECL for complete capacity.

54.5.7. Considering the demand-supply situation in Maharashtra, APML planned further two additional units of 660 MW, enhancing the project capacity to 3300 MW with 5 supercritical units of 660 MW each. The application for Coal Linkage for Units 4 and 5 was made on 30 May, 2009 and is still under consideration of SLC (LT). The Coal linkage for Unit 4 and 5 have not yet been granted.

55. On 1 July, 2013, MSEDCL submitted its response to the queries raised by the Commission through daily Order dated 10 June, 2013 and 11 June, 2013 and stated the following:

55.1. With regard to making efforts to resolve the issue amicably in-line with the enabling provisions of Article 17.2 of the PPA, MSEDCL submitted that a meeting was held between APML and MSEDCL on 26 June, 2013 and provided a copy of the minutes of the meeting to the Commission.

55.2. As regards evaluating the feasibility of the project under different scenarios, MSEDCL submitted that it is yet to receive the information which it had requested from APML on 21 June, 2013 and may comment on the matter after it receives the said information.

55.3. With regard to the specific queries raised to the Advocate General, Maharashtra, MSEDCL submitted that it had written a letter to GoM seeking a copy of the specific queries raised to the Advocate General, Maharashtra and reply thereof.

55.4. MSEDCL submitted the following chronology of the action taken by MSEDCL/ GoM on receipt of the termination notice from APML.

Table 10: Chronology of Action taken by MSEDCL on termination notice sent by APML

Date	Event
16 February, 2011	APML sent a notice for termination of PPA
5 March, 2011	MSEDCL requested APML to submit some more information so as to enable MSEDCL to reply to the termination notice and also mentioned that till the above is done, the PPA cannot be said to be terminated
15 March, 2011	APML submitted the information sought by APML
13 May, 2011	MSEDCL submitted a proposal to GoM stating that, change in Tariff, if any due to alleged force Majeure of APML be decided by GoM and the Commission
18 June, 2011	MSEDCL wrote a letter to APML inquiring about efforts made by APML for allocation of coal
23 June, 2011	MSEDCL informed GoM about efforts made by APML for allocation of coal
6 August, 2011	GoM raised the following queries to MSEDCL: 1. Responsibilities of the procurer for availability of coal and alternate arrangement of coal for supply of power. 2. Whether any legal advice was taken regarding force majeure in the matter of cancellation of Lohara coal blocks and availability of coal due to cancellation? 3. If there is provision of increase in the cost of fuel and FOCA in the original PPA, then what are the problems faced by APML in supplying power as per original PPA? 4. What are the revised rates, if the proposal is sent to MERC for sanction?
12 August, 2011	MSEDCL replied to the queries raised by GoM
18 February, 2012	GoM conveyed the opinion of Advocate General, Maharashtra on this matter to MSEDCL, in which it was opined that force majeure clause cannot be invoked and hence APML's request for Tariff revision cannot be considered

Date	Event
17 March, 2012	MSEDCL informed APML that force majeure clause cannot be invoked in the present Case and revision in Tariff cannot be considered.
19 March, 2012	APML sought a copy of the Advocate General, Maharashtra's opinion from MSEDCL
11 April, 2012	APML forwarded the opinion of Shri. V.N. Variava, former Judge, Hon'ble Supreme Court stating that PPA has been terminated and sought the refund of bank guarantee submitted as per the PPA
7 May, 2012	MSEDCL's sent a letter to GoM seeking an order on further course of action on the contentions raised in APML's letter dated 11, April, 2012
3 August, 2012	MSEDCL informed APML that force majeure cannot be invoked and revision of Tariff cannot be considered citing GoM's letter dated 18 February, 2012

55.5. Regarding not considering the offer of APML to supply power from alternate Units, i.e., 4 and 5, MSEDCL submitted that APML's proposal was referred to the GoM vide letter dated 12 January, 2010 and the approval for the same has not been received till date. MSEDCL submitted that, subsequently, APML repeated its offer on 22 May, 2012, stating that, with a view to enable MSEDCL to mitigate power deficit, APML was willing to supply power from Unit 2 and 3 on short/ medium term, through competitive bidding process at reasonable rates. Further clarifying the reason for not accepting the offer, MSEDCL submitted that as per the PPA dated 8 September, 2008, the Scheduled Commercial Operation Date (SCOD) operation was 14 August, 2012. MSEDCL added that as per Clause 4.4.6 and Schedule 6 of the PPA, APML was required to supply power only to MSEDCL and at the quoted Tariff as per the PPA, in case Units 2 and 3 were commissioned earlier than the SCOD.

55.6. In reply to whether any steps were taken by the GoM, if there is conflict of interest between the departments, MSEDCL submitted that it had sought the reply to the above query from GoM vide letter dated 13 June, 2013. MSEDCL attached the reply received from the GoM dated 2 July, 2013, in which, it had stated that the responsibility of clearances to be given to the coal mines is with the central government and hence, the energy department or any of the other departments of the State does not have any role in this matter.

55.7. In response to the query as to why it had accepted the proposal for supply of power from other units of Tiroda TPS at a higher Tariff as compared to Unit 2 and 3,

MSEDCL replied that after the power from Unit 2 and 3 was tied up under the Case 1 Stage-1 bid process, the offer for the additional power could have been made from a combination of Units 1, 4 and 5. MSEDCL submitted that it could not have ascertained during evaluation of bids, whether APML has offered to supply from Unit 1 & 4 or Unit 1 & 5 or Unit 4 & 5.

55.8. With regard to the benefits received by APML under the GoM policy dated 28 March, 2005, MSEDCL submitted the response received from the GoM. The GoM had forwarded the query to APML, to which, APML had replied that the GoM has been providing all possible administrative support in respect to allocation of land, various state clearances, water, etc. for the project. APML had further clarified in the letter that there was no specific fiscal support or concession, which was extended to the project by the GoM under the said policy.

56. MSEDCL submitted a pointwise reply to Prayas on 3 July, 2013, as below:

56.1. It had provided the status of power projects,from which it has contracted power to the Commission, during the proceedings in Case No. 53 of 2012 and attached a copy of the presentation made providing the information on status of power projects

56.2. It had considered the commissioning of Tiroda TPS, for supply of 1320 MW from APML, as per the progress of power project provided by the generating company in Case No. 19 of 2012. MSEDCL submitted that the Commission in the above case had considered the CoD based on research carried out by its Market Monitoring Cell.

56.3. MSEDCL added that it has submitted the details of termination notice of the PPA to the GoM for its decision on this issue. The details of correspondence in this regard have been submitted as an annexure to MSEDCL's letter dated 1 July, 2013.

57. The Commission conducted the last hearing in this matter on 3 July, 2013. Shri Sanjay Sen and Shri Kandarp Patel were present on behalf of APML. Shri Rahul Chitnis, Shri Chirag Balsara, Shri Kiran Gandhi (Advocates for MSEDCL) and Shri A.S. Chavan C.E. (PP), MSEDCL were present on behalf of MSEDCL. Authorised Consumer Representatives, Dr. Ashok Pendse and Ms. Ashwini Chitnis, were also present during the hearing.

57.1. APML's consultants, Boston Consulting Group, made a presentation during the hearing on the financial impact of supplying power at the quoted Tariffs on APML after considering various scenarios. The salient features highlighted in the presentation are as follows:

57.1.1. As per the estimates, APML would incur an annual loss of Rs. 928 Crore only on account of under-recovery of capacity charges.

57.1.2. APML is expected to incur the financial losses on account of under-recovery of energy charges to the extent as shown in the following table:

Table 11: Projection of losses under various scenarios

Scenario of coal availability	Linkage materialisation – 65%	Linkage materialisation – 80%
Tapering Linkage-800 MW Long-term Linkage-1180 MW	Rs. 2345 Crore	Not analysed
Long-term linkage for 1980 MW by conversion of tapering linkage of 800 MW into long-term linkage	Rs. 2091 Crore	Not analysed
Long-term linkage for entire 3300 MW	Rs. 1254 Crore	Rs.771 Crore

57.1.3. APML faces the risk of erosion of entire net worth in the second year itself. Further, financial institutions have stopped lending to APML, which may affect the operations of the power plant.

57.1.4. There may be a positive impact of the decisions taken in the meeting of Cabinet Committee on Economic Affairs (CCEA) on 21 June, 2013 on the coal availability of Tiroda TPS.

57.2. Based on its submissions, APML requested the Commission as follows:

"-Grant an interim Tariff as immediate measure in line with principles of CERC order and CCEA directive w.e.f. SCoD, subject to adjustment on final decision; and

-Work out a sustainable long-term mechanism to adjust Tariff to mitigate increase in fuel cost."

57.3. MSEDCL concluded its arguments in the present Case during the hearing.

57.4. After, hearing the parties and the Consumer Representatives, the Commission reserved the matter for Order.

58. On 4 July, 2013, APML submitted the copy of the presentation made by its consultants during the hearing held on 3 July, 2013.

Commission's Analysis and Ruling

59. APML has terminated the PPA effective from 23 February, 2011 citing force majeure events and invoking the provisions under clause 3.3.3 and 12.3 of the PPA. MSEDCL has not accepted the event as force majeure and has refuted the termination claimed by APML. Under the present petition APML has approached the Commission for adjudication of dispute under Section 86 of the EA-2003 with respect to the PPA signed between APML and MSEDCL on 8 September, 2008. APML has requested the Commission to direct MSEDCL to return the performance guarantee submitted as per the terms of the PPA or to consider a revision in Tariff and sign a new PPA.

60. The Commission notes that the dispute relates to the occurrence of force majeure event, and hence the matter and circumstances leading to the event needs to be analysed in detail, to take a view on the matter. While arguing on force majeure, the parties have also debated issues on the jurisdiction of the Commission in the present case, the nature of bid process, the responsibility for tying up fuel, etc. for the procurement process under which the present PPA was signed.

61. The Commission, considering the prayers, the submissions and the deliberations during the hearings, has analysed the issues to answer the following queries:

    A. Whether the Commission has the jurisdiction to adjudicate upon a dispute related to the PPA signed between MSEDCL and APML?

    B. Whether withdrawal of ToR for Lohara coal blocks can be termed as an event of force majeure affecting APML under the PPA?

    C. Whether other grounds of termination cited by APML are tenable or not?

    D. Whether APML has made adequate efforts to reinstate the ToR or for allocation of alternative coal block in lieu of Lohara coal blocks?

E. Whether the withdrawal of ToR for Lohara coal blocks has affected the viability of the Unit 2 and 3 of Tiroda TPS? How will it impact the stakeholders?

F. What is the role of the Commission if an operating project faces the risk of becoming a stranded asset due to special circumstances? and

G. What are the issues to be considered while providing relief?

A. Whether the Commission has the jurisdiction to adjudicate upon a dispute related to the PPA signed between MSEDCL and APML?

62. Before dealing with the issues in the present matter, the Commission has analysed whether it can adjudicate the dispute regarding termination of PPA signed between MSEDCL and APML.

63. The relevant extract of Article 17 of the PPA between APML and MSEDCL is quoted below:

"17.3 Dispute Resolution

17.3.1 Where any dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff or (ii) relates to any matter agreed to be referred to the MERC under Article 4.7.1, 13.2, 18.1 hereof, such dispute shall be submitted to adjudication by the MERC. Appeal against the decisions of the MERC shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.

17.3.2 If the Dispute arises out of or in connection with any claims not covered in Article 17.3.1, such dispute shall be resolved by arbitration under the Arbitration and Conciliation Act, 1996.

(i) The Arbitration tribunal shall consist of three arbitrators. Each party shall appoint an arbitrator and the arbitrators so appointed shall appoint the Presidind Arbitrator.

(ii) the place of the arbitration shall be Mumbai, India. The language of the arbitration shall be English.

(iii) the arbitration tribunal's award shall be substantiated in writing. The arbitration tribunal shall also decide on the costs of arbitration proceedinds and the allocation thereof.

(iv) Courts in Mumbai shall have exclusive jurisdiction to enforce any award under this agreement, subject to the applicable Laws.

(v) The provisions of this Clause shall survive the termination of the PPA for any reason whatsoever"

64. The relevant extract of the Competitive Bidding Guidelines in this regard is quoted below:

"Arbitration

5.17 Where any dispute arises claiming any change in or regarding determination of the tariff or any tariff related matters, or which partly or wholly could result in change in tariff, such dispute shall be adjudicated by the Appropriate Commission.

All other disputes shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996."

65. As can be inferred from the provisions in the PPA and the Competitive Bidding Guidelines, if there is a dispute between APML and MSEDCL related to Tariff, the same shall be adjudicated by the Commission. However, disputes related to all other matters shall be settled through Indian Arbitration and Conciliation Act, 1996.

66. However, as per Section 86 of the EA-2003, the Commission has the jurisdiction to adjudicate upon all the disputes between the generating company and the licensees with an option to refer any matter for arbitration. Relevant extracts of Section 86 are quoted below:

"86. Functions of the Commission

...

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;….”

67. The Commission notes that the Competitive Bidding Guidelines issued by the Ministry of Power or an agreement between two parties cannot supersede the jurisdiction of the Commission under the EA-2003. Therefore, the Commission rules that it has the jurisdiction to deal with and dispose of the Petition, although it has an option to refer the matter for arbitration.

68. The Commission has decided to adjudicate the present matter.

B. <u>Whether withdrawal of ToR for Lohara coal blocks can be termed as an event of force majeure affecting APML under the PPA?</u>

69. The Commission has analysed the validity of termination of PPA by AMPL under the following heads:

a) Responsibility framework for arrangement of fuel in the present case;

b) Clauses related to force majeure in the PPA;

c) Circumstances under which the ToR was withdrawn for Lohara coal blocks; and

d) Applicability of force majeure clause in the present case.

➢ **<u>Responsibility framework for arrangement of fuel in the present case</u>**

70. The Commission analysed the responsibility for arranging fuel as per the bid process and the PPA signed. The issue whether the procurement happened under Case 1 or Case 2 was debated during the hearings. Hence it was pertinent to conclude the view on the process followed for procurement pursuant to which the PPA was signed.

71. The Commission observes that MSEDCL under Case No. 38 of 2007 while seeking approval of bid documents had submitted as follows:

“The Ministry of Power, Government of India, is yet to issue Standard Bid Documents for long term power procurement under Case-1 bidding and hence MSEDCL is not in a position to highlight the deviations of Revised Bid documents vis-à-vis the Standard Bid Documents. It is further submitted that the Revised Bid Documents are in complete compliance with the Competitive Bidding Guidelines

issued by the Ministry of Power and have followed commercial principles in Case-2 Bid documents, except those that are specific to Case-1 Bidding."

72. Based on the submission made by the MSEDCL, the Commission approved certain deviations in the bid documents through the Order dated 24 January, 2008 in Case No. 38 of 2007.

73. After analysing the deliberations in Case No. 38 of 2007 and other relevant cases, the Commission concludes that the procurement was carried out under Case 1 process as envisaged in the Competitive Bidding Guidelines.

74. Further, the Commission has evaluated the bid documents with a perspective to evaluate the risk sharing framework with respect to fuel.

75. As per the Clause 2.1.1 of the RfP issued by MSEDCL, the bidder shall be responsible for arrangement of fuel. The relevant extracts of the RfP are quoted below:

"2.1.1 ..The size and location of the Power Station/s and the source of fuel and technology shall be decided by the Bidder. ***The Bidder would assume complete responsibility to tie up the fuel linkage and to set up the infrastructural requirements for the fuel transportation and its storage" (Emphasis added)***

76. Analysis of the PPA signed between MSEDCL and APML also makes it clear that the responsibility of tie-up of fuel was with APML. As a part of Conditions Subsequent to be met by the Seller, the Seller (i.e., APML) was required to execute an FSA within eighteen (18) months from the Effective date.

77. Apart from the above, the definition of FSA as per the PPA, which is quoted below for reference, further reinforces the Seller's responsibility of fuel tie-up:

"means the agreements entered into between the Seller and the Fuel supplier for the purchase, transportation and handling of the Fuel, required for the operation of the Power Station…"

78. The Commission concludes that as per the RfP and the PPA signed between the parties, the responsibility for arrangement of fuel was with the Seller, i.e., APML.

- **<u>Clauses related to force majeure in the PPA</u>**

79. The Commission has further analysed various provisions of the PPA related to a force majeure event. Article 12 of the PPA between APML and MSEDCL outlines the definition of force majeure clause.

"....

12.3 Force Majeure

A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

i. Natural Force Majeure Events:

act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years,

ii. Non-Natural Force Majeure Events:

1. Direct Non - Natural Force Majeure Events

a) Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the Seller or the Seller's contractors; or

b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consent required by the Seller or any of the Seller's contractors to perform their obligations under the Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development/ operation of the Project. Provided that an appropriate court of law declares the

revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

c) any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality which is directed against the Project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

2. Indirect Non - Natural Force Majeure Events

a) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo;, revolution, riot, insurrection, terrorist or military action; or

b) Radio active contamination or ionising radiation originating from a source in India or resulting from another Indirect Non Natural Force Majeure Event excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the site by the Affected Party or those employed or engaged by the Affected Party.

c) Industry wide strikes and labor disturbances having a nationwide impact in India."

80. The Commission notes that the withdrawal of ToR for Lohara coal blocks does not fall either under a natural or a non-natural force majeure event as per the above definition of force majeure. The Commission notes that once the ToR is issued by MoEF, there are a series of steps to be followed to obtain an environmental clearance. The process of application of an environmental clearance may lead to either award or rejection of the application for environmental clearance based on the various steps involved in the process of getting environmental clearance. These have been discussed in subsequent sections. Therefore, withdrawal of ToR cannot be termed as unlawful, unreasonable or discriminatory revocation or refusal to renew consent or unlawful, unreasonable or discriminatory refusal to grant any other consent. Moreover, ToR cannot be termed as consent.

81. Further, as can be inferred, an appropriate court of law must declare the refusal or revocation of consent as unlawful, unreasonable and discriminatory for such an event to qualify under the above clause as a force majeure event.

82. However, APML has claimed that the definition of force majeure is inclusive and may include events not elaborated in the Article 12.3. Amicus Curiae has also averred that the definition of force majeure is an inclusive definition and can include events apart from those elaborated in Clause 12.3.

83. Further, Article 12.4 of the PPA deals with the specific exclusions of force majeure events, which are reproduced below:

"12.4 Force Majeure Exclusions

Force majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of event of Force Majeure:

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Project;

b. Delay in the performance of any contractor, sub-contractor or their agents excluding the conditions as mentioned in Article 9.2;

c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;

d. Strikes or labour disturbance at the facilities of the Affected Party;

e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and

f. Non-performance caused by, or connected with, the Affected Party's:

i. Negligent or intentional acts, errors or omissions;

ii. Failure to comply with an Indian Law; or

iii. Breach of, or default under this Agreement or any Project Documents"

84. The Commission notes that unavailability or change in cost of fuel is specifically excluded from the definition of a force majeure event, unless such event itself is as a

result of force majeure event. Therefore, to determine whether the PPA dated 8 September, 2008 can be terminated based on the withdrawal of ToR for Lohara coal blocks or not, it is essential to decide whether withdrawal of ToR is a force majeure event affecting the availability/price of fuel.

- **Circumstances under which the ToR was withdrawn for Lohara coal blocks**

85. The Commission has carefully considered the sequence of events in this Case. The following table outlines the chronology of important events:

Table 12: Chronology of significant events

Date	Event
17 November, 2006	MSEDCL initiated a two-staged bid process for procurement of 2000 MW power under Case 1 route of the Competitive Bidding Guidelines
3 February, 2007	APL submitted response to RfQ issued by MSEDCL
3 April, 2007	APL was shortlisted for RfP stage based on its response to RfQ
6 November, 2007	MoC allocated Lohara West & Lohara Extension coal blocks to APL
16 February, 2008	MSEDCL issued final RfP after revising the same based on the Commission's Order
20 February, 2008	APL submitted its bid for supply of power to MSEDCL mentioning Lohara captive coal block as fuel source and also attached the copy of the allocation letter for the coal blocks along with its bid
16 May, 2008	MoEF granted the ToR for Lohara coal block
23 June, 2008	Mining plan was approved
21 August, 2008	Rapid Environment Impact Assessment (EIA)/Environment Management Plan (EMP) report was submitted
29 July, 2008	MSEDCL issued Letter of Intent (Lol) to APL based on the bid submitted by the latter in response to the RfP
8 September, 2008	APML, a subsidiary of APL, executed PPA with MSEDCL for supply of 1320 MW power from Tiroda power project based on the bid submitted by APL in response to RfP issued by MSEDCL
11 September, 2008	Public hearing for environmental clearance of Lohara captive coal block concluded
21 October, 2008	APL submitted application for forest clearance for Lohara coal block
13 January 2009	National Tiger Conservation Authority in its letter to MoEF suggested that no mining should be permitted in Lohara coal blocks citing the following reasons: • Most of the Proposed Mining Lease (ML) area is a forestland • Proposed ML Area falls within the zone of human-tiger conflict and any mining activity can jeopardize the situation, with the possibility of tigers dispersing elsewhere, which would lead to more attacks • Section 38 (O) of the Wildlife (Protection)Act 1972 as amended in 2006 provides for disallowing unsustainable land use such as mining, industry within the tiger reserve • Proposed ML area falls within the buffer zone of tiger reserve
31 August 2009	Principal Chief Conservator of Forests (PCCF), Maharashtra State in its letter

Date	Event
	to NTCA recommended the rejection of proposal for mining in Lohara coal blocks citing the following reasons • Final Conservation Plan prepared by M/s Envirosearch (Consultant of Adani Power) after several round of discussions is found to be severely wanting in addressing the core issues • The Mining lease allocated to Adani Power would completely cut off the southern corridor of Tadoba-Andheri Tiger Reserve (TATR). No mitigation measure would suffice to restore this corridor. • Any mining lease allowed around TATR would result in isolation of TATR from rest of the Central India Landscape, which would jeopardise the survival of tiger in TATR • No conservation plan can compensate the damage and devastation caused by this mining project • No efforts under any conservation plan would be able to redeem this type of mutilation and dismemberment of natural habitat • The ToR prescribed by EAC presume that the damage caused by mining activities will be compensated by a conservation plan. No conservation plan or any amount of money can redeem the damage caused to the rich eco system.
24-25 November 2009	Meeting of EAC (Thermal and Coal Mining) held. EAC decided to withdraw the ToR for Lohara coal blocks citing following reasons: • At the time of grant of ToR, EAC was not aware of the project being in the proposed buffer zone of TATR • Tiger corroder is a part of proposed ML area. Tiger Corridor is a rich forest area and forms the fringe of TATR • MoEF and MoC must work in tandem to identify Go and No-Go area while allotting coal blocks to avoid such problems in future • Adani Power can meet their coal requirement by importing coal or from other coal blocks which could be allocated to them or through linkage of coal
7 January, 2010	MoEF informed Adani power that it has decided not to consider the environmental clearance of Lohara coal blocks because the proposed coal mine project is within the proposed buffer zone of TATR and permitting mining operations in such an area would be detrimental to tiger conservation efforts in TATR, apart from the fragmentation of ecological habitat of the area. MoEF indicates that it has written to MoC for allocation of an alternate coal block

➢ **<u>Applicability of force majeure clause in the present case</u>**

86. The Commission notes that APML had yet not been granted the environmental clearance for the Lohara coal blocks, either when it submitted its RfP bid or when it signed the PPA with MSEDCL. Moreover, even the public hearing for the environmental clearance for Lohara coal mining project had not been conducted when APML signed the PPA with MSEDCL. It is also important to note that APML bid and participated in the RfP on 20 February, 2008, even before it was granted the ToR for Lohara coal blocks on 16 May, 2008.

87. The Commission notes that the allocation letter for Lohara coal blocks dated 6 November, 2007 states that the allocation or the mining lease of the coal block may be cancelled, inter alia, on the following grounds:

a) Unsatisfactory progress of implementation of their end use sponge iron plant/power plant/cement plant;

b) Unsatisfactory progress in the development of coal mining project;

c) For breach of any of the conditions of allocation as mentioned in the allocation letter

88. The Commission further notes that, in the letter outlining the ToR for Lohara coal blocks dated 16 May, 2008; it has been clarified that:

"After the preparation of the draft EIA-EMP Report as per the aforesaid ToR, and the public Hearing conducted as prescribed in the EIA Notification 2006 and ***the proponent will take necessary action for obtaining environmental clearance*** *under provisions of the EIA Notification 2006"* ***(Emphasis Added)***

89. Further, Prayas has already highlighted in Paragraph 45.5, that during the process to be conducted as per the EIA Notification, 2006, the EAC or SEAC concerned shall make recommendation to the authority granting prior environmental clearance for either grant of clearance on stipulated terms and conditions or rejection of the application along with reasons for the same.

90. From the above, it is clear that APML was allocated the Lohara coal blocks subject to certain conditions, and was finally subject to an environmental clearance. It is also clear from the study of the procedure for obtaining environmental clearance, that the EAC can recommend rejection of an application for environmental clearance to the MoEF.

91. It may be concluded, that the coal from Lohara coal blocks was not "available" to APML as on the date of signing the PPA, and was subject to clearances from MoEF. APML took a risk at the stage of submitting its bid, by relying on a source of coal for which it was still to receive even the ToR for grant of environmental clearance. APML may have considered the possibility of using domestic/ imported coal as an alternative to coal from Lohara coal blocks, based on the prevailing prices of

domestic / imported coal at the time of bidding. APML may have also priced in the risk of unavailability of coal from Lohara coal blocks, while quoting a levellised Tariff of Rs. 2.64 per kWh.

92. Based on the above analysis, the Commission does not find any merit in the argument of APML that cancellation of ToR is a force majeure event, leading to unavailability of coal/change in price of coal, since the coal from Lohara coal blocks was not unconditionally available to APML in the first place at the time when it signed the PPA.

93. The Commission further notes that the Hon'ble CERC in the Order in Petition No. 155/MP/2012 has relied upon the Judgment of Hon'ble Supreme Court in the Case of Alopi Prashad and Sons Ltd. Vs. Union of India {(1960) AIR 588} to determine the applicability of force majeure in a situation which has not been specifically mentioned as a force majeure event in a contract. The extracts of the said Judgment are reproduced below:

Alopi Prashad and Sons Ltd. Vs. Union of India

"The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - ***a wholly abnormal rise or fall in prices****, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made.* ***If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point*** *– not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation…" (Emphasis Added)*

94. The Commission has already concluded in the above section that in a Case 1 bid process, the arrangement of fuel is Seller's responsibility. The Commission notes that in the PPA dated 8 September, 2008, the parties never agreed that APML would supply power based on fuel at a fixed price from Lohara coal blocks, and therefore

non-availability of coal from Lohara coal blocks cannot be said to have altered the original situation. In fact, APML was given a choice to quote the Tariff with escalable component during the bid process. However, APML appears to have taken a strategic decision to aggressively bid and resorted to a calculated risk by quoting the Tariff in non-escalable components, in spite of ToR not being awarded at the time of bidding.

95. The Commission concludes that sourcing of coal from Lohara coal blocks was an arrangement made by APML only and cannot bind procurer MSEDCL, since there were no conditions in RfP and the PPA that indicate that the PPA will be terminated if the coal from Lohara coal blocks is not available. Therefore, the above arguments further reinforce the conclusion that withdrawal of ToR cannot be termed as a force majeure event affecting APML in the present matter.

96. Based on the above analysis, the Commission concludes that the force majeure clause under the PPA dated 8 September, 2008 cannot be invoked on withdrawal of ToR. The Commission, therefore, rejects the plea of APML regarding occurrence of Force Majeure on account of withdrawal of ToR for Lohara coal blocks.

C. Whether other grounds of termination cited by APML are tenable or not?

97. As regards the PPA being null and void, as a result that the supply of power as per the PPA becoming impossible, the Commission notes that the Hon'ble CERC has held as follows in the Order in Petition No. 155/MP/2012:

"*….The case of the petitioner is not covered under any of the categories. Moreover, the Indonesian Regulation does not prevent the petitioner from buying coal from Indonesia or any other source. In fact, the petitioner is stated to be buying coal from Indonesia at the spot price for generation of electricity in its Mundra Power Project.* ***It is a well settled principle of law that increase in prices of a commodity does not lead to impossibility of performance under a contract…***" ***(Emphasis Added)***

98. In the present case, APML has already commenced supply of power from Units 2 and 3 and therefore, the issue is an increase in the price of coal. As can be seen from the above Order, the argument that the PPA also stands terminated based on the

doctrine of frustration, due to impossibility of performance does not merit any consideration.

99. As regards the arguments raised by APML, related to adoption of Tariff, in its amendment application and other submissions, the matter of adoption of Tariff has been taken up separately in Case No. 24 of 2013. The Commission has adopted the Tariff agreed in PPA dated 8 September, 2008 in its Order dated in Case No 24 of 2013. Therefore, the contentions of APML raised in the amendment Petition have become redundant.

100. As regards the arguments of APML that the PPA is void as it has been executed based on a mistake of fact, the Commission notes that both parties signed the PPA on 8 September, 2008 after obtaining the approval of the draft PPA. Subsequently APML has made considerable progress in the Project and has obtained the coal linkages based from MoC and CIL / CIL subsidiaries citing the PPA. The MoC / CIL does not consider request for coal linkage without a valid PPA. Further the Commission notes that the adoption of Tariff, per se, does not principally affect the bargain, which resulted in PPA (valid contract) between the two parties i.e., MSEDCL and APML. Moreover the Tariff for the PPA has already been adopted vide Order dated in Case No. 24 of 2013. Therefore, the argument of APML regarding the PPA being void due to a mistake of fact at the time of execution is not tenable.

101. Therefore, the Commission concludes that other grounds of termination of the PPA dated 8 September, 2008 cited by APML are devoid of any merit and hence rejected.

D. <u>Were adequate efforts made by APML to ensure fuel supply in lieu of Lohara coal blocks?</u>

102. APML (with reference to Paragraph 5.35) has made several efforts with various agencies including MoC, MoEF, MoP, PMO, etc., to get an alternate coal block or to reconsider the environmental clearance for Lohara coal blocks by redefining the boundaries. APML has also submitted a proposal to use alternative mining techniques at Lohara coal blocks. APML has also requested for conversion of

tapering linkage to long-term permanent linkage to SLC-LT. However, since neither the policies for coal block allocation nor NCDP addresses such an issue, APML has not been able to make an alternate arrangement for domestic coal. Further, from the chronology of events discussed in the last section, the Commission notes that although APML was allocated Lohara coal blocks by MoC, it does not have environmental clearance to mine coal from the these blocks. Even the EAC has highlighted the need for the MoEF and MoC to work in tandem to avoid such situations in future.

103. The Commission notes that as on the date of issuance of this Order, APML has long-term coal linkage for only 1180 MW to cater to the fuel supply for Unit 1 and 2 of Tiroda TPS. The Commission notes that for the balance generation capacity of Units 2 and 3, i.e., 800 MW, APML only has tapering linkage as on date, which will no longer be available after three years from the normative date of operation of the coal mine.

104. The Commission notes that APML has made adequate efforts to restore the supply of domestic coal in lieu of Lohara coal blocks. However, the Commission observes that, remedial measure for such a situation do not exist in the current policy framework, leading to a situation where APML has not been able to restore adequate fuel supply arrangements for Unit 2 and 3 of Tiroda TPS.

E. Whether the withdrawal of ToR for Lohara coal blocks has affected the viability of the Unit 2 and 3 of Tiroda TPS? How will it impact the stakeholders?

105. APML's consultants made a presentation on the financial impact of supplying power at the quoted Tariff on APML during the hearing held on 3 July, 2013. APML submitted the back-up workings and the presentation to the Commission on 4 July, 2013.

106. APML has projected an annual loss of Rs. 2,345 Crore on account of under recovery of energy charges considering a scenario where 24% of the fuel requirement for Tiroda TPS would be met from domestic coal. The losses projected under various scenarios by APML's consultant can be referred in Table 11.

However, the Commission notes that the above mentioned loss is for all the five units. APML has estimated the energy charges of domestic coal at Rs. 1.51 per kWh and the energy charges of imported coal at Rs. 3.15 per kWh.

107. Considering only the 1412 MW (net capacity of 1320 MW plus auxiliary consumption) contracted under the PPA dated 8 September, 2008, the annual loss on account of under recovery of energy charges is estimated at Rs. 1,063 Crore. The Commission notes that the losses have been computed based on an assumption of 95% PLF. The Commission notes that as per the PPA dated 8 September, 2008, normative availability is 80%. Maintaining availability at 80% would enable APML to recover 100% of the capacity charges. Therefore, the estimate of loss needs to be worked out at 80% PLF rather than 95% PLF. Since the Unit 2 and 3 have commenced commercial operation recently and audited data for the same is not available at this stage, the Commission is not in a position to verify the other assumptions considered by APML for arriving at the estimate of under-recovery of energy costs. The Commission observes that at 80% PLF, which is the normative availability as per the PPA, and based on other assumptions as provided by APML, the annual loss will be lower than the amount of Rs. 1,063 Crore as submitted by APML.

108. Further, the above assessment is based only on projections and actual audited data for the same is not available at this stage. Therefore, the Commission believes that a detailed scrutiny of actual costs incurred by APML needs to be carried out to arrive at the impact of withdrawal of ToR of Lohara coal blocks on APML. Prima facie, it appears that APML could incur financial losses by supplying power at the quoted Tariff. The financial losses may impact the ability of APML to operate the plant and meet debt service obligations until the issues with respect to coal supply are resolved.

109. The Commission believes that the coal supply issues of Unit 2 and 3 of Tiroda TPS may be a temporary in nature and the Units would be in position to secure long-term coal arrangement either by way of long-term linkage or allocation of an alternate coal block or possibility of mining coal from Lohara coal blocks using advanced alternate mining techniques. The Commission notes that the PPA dated 8

September, 2008 is a 25 year Contract. Therefore, the viability of the units under consideration is a long-term issue, whereas the coal supply constraint is a temporary issue. . The Commission, therefore, believes that there is a need for detailed evaluation of the impact of withdrawal of ToR for Lohara coal blocks on Unit 2 and 3 of Tiroda TPS by analysing all the relevant factors.

110. As regards the impact of Tiroda TPS becoming a stranded asset on stakeholders, the Commission notes that Tiroda TPS is a 3,300 MW project, having 5 Units of 660 MW each, located in Tiroda in Maharashtra. Its entire capacity has been tied up with MSEDCL under various PPAs. The PPAs for power supply from Units 1, 4 and 5 are contracted at a levellised Tariff of Rs 3.28/kWh with escalable components. Units 2 and 3 of Tiroda TPS, from which power has been tied up with MSEDCL through the PPA dated 8 September, 2008 at a levellised Tariff of Rs. 2.64/kWh is without escalable components. The Units 2 and 3 have already achieved commercial operation on 30 March, 2013 and 14 June, 2013 respectively. Further, Tiroda TPS has availed various benefits under the GoM policy for power projects, i.e., “Maharashtra State Policy for investment in power generation for capacity addition of 500 MW and above”. The stranding of the largest private sector power project in Maharashtra is likely impact adversely the investment climate in the State.

111. The Commission further observes that the Tariffs discovered during the recent bids are considerably higher than the levellised non-escalable Tariff of Rs. 2.64 per kWh quoted by APML in the Case 1 Stage-I bid process. The Hon’ble CERC in its Order in Petition No. 155/MP/2012 has also evaluated the Tariffs discovered in other recent bids. The extract of the Order is reproduced below:

“55. It is pertinent to mention that the levelized tariffs discovered at present in the bids invited by the distribution companies in various States are on the higher side and range from 3.50/kWh to as high as 7.00/kWh. It is understood that the recent bid invited by Uttar Pradesh Power Corporation Limited (UPPCL) under Case-1 (long term), the financial bids opened in December, 2012, reveals that the levelized tariff has been quoted by the bidders in the range of 4.4486/kWh to 7.100/kWh. (Tariff discovered over the bid is yet to be adopted by UPERC).”

112. Therefore, the Commission notes that the non-availability of energy from the Tiroda TPS would not only lead to an increase in the demand-supply gap in the State, but would also lead to an increase in the Tariff for consumers, since MSEDCL would need to procure power at substantially higher Tariffs on short-term basis.

F. What is the role of the Commission if an operating project faces the risk of becoming a stranded asset due to special circumstances?

113. The Commission notes that Units 2 and 3 of the Tiroda TPS are already operational and supplying power to MSEDCL at a levellised Tariff of Rs. 2.64 per kWh. Prima facie, it appears that APML would incur significant financial losses by supplying power from Units 2 and 3 of Tiroda TPS at the quoted Tariff as per the PPA dated 8 September, 2008, which may lead to the project becoming a stranded asset. An operational asset becoming stranded does not serve the purpose of the stakeholders involved, i.e., Consumers, MSEDCL, Lenders or the State Government. The Commission notes that APML had been allocated a coal block for meeting part of its fuel requirements, but the ToR for the environmental clearance was withdrawn much later after it signed the PPA. The Commission also notes that MoEF and EAC have recommended an alternate coal block, looking at the circumstances under which the ToR for the Lohara coal blocks was withdrawn. Further, there is a strong possibility of the project securing long-term coal through allocation of an alternate coal block, approval for mining from Lohara coal blocks through underground mining technologies, or by obtaining a long-term coal linkage from CIL.

114. The next question that arises is whether the Commission has a role to play in such a situation. The Commission notes that Section 61 of EA-2003 deals with the principles that the appropriate Commission should consider while determining the Tariff. The principles outlined in the said Section are as given below:

"(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) ***safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner****;*

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier." ***(Emphasis Added)***

115. Further, the Commission notes that the major objectives of the Tariff Policy notified by Ministry of Power are as follows:

"(a) Ensure availability of electricity to consumers at reasonable and competitive rates;

(b) Ensure financial viability of the sector and attract investments;

(c) Promote transparency, consistency and predictability in regulatory approaches across jurisdictions and minimise perceptions of regulatory risks;

*(d) Promote competition, efficiency in operations and improvement in quality of supply****."(Emphasis Added)***

116. The Commission also notes that Tariff Policy highlights the significance of reasonable return to investors in the power sector. Extracts of the Tariff Policy regarding this aspect are highlighted below:

*"**a) Return on Investment***

Balance needs to be maintained between the interests of consumers and the need for investments while laying down rate of return. ***Return should attract investments at par with, if not in preference to, other sectors so that the electricity sector is able to create adequate capacity****. The rate of return should be such that it allows generation of reasonable surplus for growth of the sector."* ***(Emphasis Added)***

117. The Commission further notes that the National Electricity Policy also emphasises the need for reasonable return to attract private sector investment in the power sector. The relevant extracts of the National Electricity Policy are provided below:

"5.8.4 Capital is scarce. Private sector will have multiple options for investments. Return on investment will, therefore, need to be provided in a manner that the sector is able to attract adequate investments at par with, if not in preference to, investment opportunities in other sectors. This would obviously be based on a clear understanding and evaluation of opportunities and risks. ***An appropriate balance will have to be maintained between the interests of consumers and the need for investments."(Emphasis Added)***

118. As can be inferred from the above, the EA-2003, Tariff Policy and National Electricity Policy stress upon the fact that it is not only necessary to protect the interest of the consumers, but also ensure recovery of cost of generation in a reasonable manner. The Commission believes that the recovery of cost of generation in a reasonable manner not only serves the interest of the Generating Company and its stakeholders including lenders, but also ensures that the consumers' interest is protected considering the long-term goal of sustainable development. A stranded asset is neither in the interest of the Generating Company nor in the interest of Consumers, lenders or the State Government.

119. Based on the above observations, the Commission believes that along with the objective of protecting the interest of Consumers, the Commission also needs to

exercise its regulatory powers to prevent an operational generating asset from becoming stranded.

120. Further, a number of Judgments of Hon'ble Supreme Court have clarified the wider scope of the regulatory powers available to the Commission. Some of the Judgments along with relevant extracts are quoted below:

D.K. Trivedi & Sons and Ors. v. State of Gujarat and Ors., reported in AIR 1985 SC 1323

"30. Bearing this in mind, we now turn to examine the nature of the rule-making power conferred upon the State Governments by Section 15(1). Although under Section 14, Section 13 is one of the sections which does not apply to minor minerals, the language of Section 13(1) is in pari materia with the language of Section 15(1). ***Each-of these provisions confers the power to make rules for "regulating". The Shorter Oxford English Dictionary, Third Edition, defines the word "regulate" as meaning "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings".*** *....*

The expression "regulate" occurs in other statutes also, as for example, the Essential Commodities Act, 1955, and it has been found difficult to give the word a precise definition. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions, *and as has been repeatedly observed, the Court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied."* ***(Emphasis Added)***

K Ramanathan Vs. State of Tamil Nadu And Anr.

"19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word 'regulate' is not synonymous with the word 'prohibit'. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. ***At the same time, the power to regulate carries with it full power over the things subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject.*** *It implies the power to rule, direct and control, and involves the adoption of a rule or*

guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. ***It would therefore appear that the word 'regulation' cannot have any inflexible meaning as to exclude 'prohibition'. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation,*** *and the Court must necessarily keep in view the mischief which the legislature seeks to remedy."* **(Emphasis Added)**

Sri Venkata Seetaramanjaneya Rice and Oil Mills and Ors Vs. State of Andhra Pradesh etc.:

"21. Then, it was faintly argued by Mr. Setalvad that the power to regulate conferred on the respondent by s. 3(1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is entirely misconceived. ***The word "regulate" is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. The concept of fair prices to which s. 3(1) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate. The power to regulate can be exercised for ensuring the payment of a fair price, and the fixation of a fair price would inevitably depend upon a consideration of all relevant and economic factors which contribute to the determination of such a fair price.*** *If the fair price indicated on a dispassionate consideration of all relevant factors turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase the price so as to make it fair. That is why we do not think Mr. Setalvad is right in contending that even though the respondent may have the power to regulate the prices at which electrical energy should be supplied by it to the appellants, it had to power to enhance the said price. We must, therefore, hold that*

the challenge to the validity of the impugned notified orders on the ground that they are outside the purview of s. 3(1) cannot be sustained." ***(Emphasis Added)***

121. The Commission also notes that the Attorney General of India in his response to queries raised by the Forum of Regulators has clarified that the Commission has the jurisdiction to alter the Tariff of an already executed agreement. The extracts of the Opinion are given below:

"22. ***The next question is as to whether the Central Commission can re-look at the tariff even in cases where there has been a Power Purchase Agreement specifying tariff obtained through a transparent process of bidding in accordance with guidelines issued by the Central Government.*** *This aspect has two dimensions. On the one hand there is the argument of sanctity of contracts. It is argued that a long term contract fixes tariff for supply for a long period and parties enter into such contracts knowingly and consciously. On the other hand emphasis is laid on the necessity to approach the appropriate Commission for relief by way of "Regulation".*

…….

29. The word "regulate" has a wide import. ***If the word "regulate" does not include the power to revise/amend/alter or change the tariff then it could be argued that the Appropriate Commission will not be able to effectively discharge its functions under the Electricity Act, 2003****. The case of Tata Power Co. vs. Reliance Energy Ltd. - (2009) 16 SCC 659 was in relation to the power of the Appropriate Commission to adjudicate upon disputes between licensees and generating companies. It was held that the power of regulation also encompasses fixation of rates.*

30. There is another way of looking at this matter also. All these cases of concluded PPAs are now arising by reason of one aspect, namely, increase in the price of inputs which has led to the demand for revising tariff. However, the matter can be looked at from a converse point of view also. If a tariff is fixed under a PPA on the higher side and then there is a sharp decline in the cost of the inputs for generating power and an application is made to the Commission for downward revision of the

tariff, a Commission may not decline to interfere merely on the ground of a concluded PPA being sacrosanct, without considering the statutory duty to act as a Regulator.

31. ***What relief is to be granted is ultimately a matter for the appropriate Commission to consider in the light of its powers, functions, role and duties under the Electricity Act, 2003.*** *" (Emphasis Added)*

122. The above Judgments confirm the opinion that the Commission has the powers to revise the Tariff under an executed PPA to discharge its functions under EA-2003, in special circumstances. Given the special circumstances in this case, the Commission deems it appropriate to look into the matter of providing a relief to prevent an operational asset from becoming stranded.

G. What are the issues to be considered while providing relief?

123. The Commission observes that there are various issues involved in this Case which require careful scrutiny while outlining the principles of relief.

124. APML, as on date, continues to hold the allocation of Lohara coal blocks, but without an environmental clearance. It is possible that in the future, APML may be allowed to mine coal from Lohara coal bocks through alternate techniques in a way that meet the requirement of conservation of the forests and without causing any harm to the tiger reserve, i.e., TATR. APML has already submitted a proposal for underground mining which, till date, has is yet to be processed by MoEF.

125. APML has already submitted a request for converting the existing tapering linkage for 800 MW to long-term permanent linkage. While the SLC (LT) has not rejected the application of APML, it has recommended that since this matter involves issues which are not covered in the current policy framework, the MoC may take a decision on this aspect, after laying down general principles in this regard.

126. APML has also made several requests for allocation of an alternate coal block to MoC. However, the same have neither been rejected nor accepted till the date of issuance of this Order. Therefore, the possibility of allocation of an alternate coal block to APML in lieu of Lohara coal blocks also cannot be ruled out.

127. There may also be other possibilities of reducing the cost of generation for Tiroda TPS, which may include using domestic coal available from other subsidiaries of Adani Group, that may be supplying power on merchant basis, improving operational efficiency, financial restructuring, using coal rejects, etc. Since the prices of imported coal are dynamic, the possibility of reduction of prices of imported coal in future cannot be ruled out.

128. Further, APML is a subsidiary of the Adani Group (including Adani Enterprises) which has substantial interest in imported coal trading business. Hence there is a need to evaluate the possibility of using the expertise of the group to procure imported coal at a discount to market prices in the interest of the viability of the project.

129. Further, the Commission notes that the Ministry of Power in its letter dated 31 July, 2013 addressed to the Hon'ble CERC has clarified that modalities will be worked out to allow IPPs to recover higher cost of imported coal as a result of changes in NCDP regarding fixing of lower thresholds for levy of disincentive on CIL for not meeting the coal commitments under FSAs.

130. Further, as regards the mode of relief, the Commission notes that the Hon'ble CERC in its Order in Petition No. 155/MP/2012 has ruled as follows with respect to renegotiation of Tariffs:

"Though the study provides sufficient guidelines for renegotiation of all long-term contracts in the light of the international practice, we are not inclined to favour any re-negotiation of the tariff discovered through the process of competitive bidding as in our view, the sanctity of the bids should be maintained. The parties should not renegotiate the tariff discovered through the competitive bidding as that will bring uncertainty to the power sector and is prone to misuse."

131. The Commission is also of the opinion that a renegotiation of Tariffs discovered through a competitive bid process may adversely impact the future bidding processes and may lead to the present case being misused as a precedent. The Commission is, therefore, of the opinion that sanctity of the bidding process under Competitive Bidding Guidelines are to be maintained.

132. Due to the reasons mentioned above, any decision on relief to be provided to APML needs to be taken after evaluating the impact of all the above aspects. The present matter involves significant issues which may require detailed analysis to evaluate the impact of withdrawal of ToR of Lohara coal blocks on Units 2 and 3 of Tiroda TPS along with due considerations to ensure minimal impact on consumers of MSEDCL. Therefore, the Commission believes that there is a need to direct the parties to set down to a consultative process to find out an acceptable solution in the form of a compensatory charge to mitigate the hardship arising to the project due to withdrawal of ToR for Lohara coal blocks.

Issues related to regulatory governance

133. The Consumer Representatives have raised concerns of regulatory governance citing the fact that the issue of termination of PPA/dispute was not brought to the notice of the Commission and the consumers of MSEDCL, when such dispute happened.

134. While APML is not obligated under regulatory framework or the PPA to inform the Commission or the consumers of MSEDCL regarding the termination of the PPA, MSEDCL should have brought the dispute to the notice of the Commission during the proceedings of Case No. 19 of 2012 in the matter of Tariff Determination of MSEDCL for FY 2012-13, since that matter specifically dealt with sources for procurement of power and the Tariffs at which power was to be procured. MSEDCL did not give indication of any such dispute during the proceedings of Case No. 19 of 2012 and rather averred that it has considered the power supply projections from PPA dated 8 September, 2008 based on the commissioning schedule provided by the generator.

135. The Commission directs MSEDCL to appraise the Commission regarding any disputes related to PPAs while presenting the power supply position and projections on power procurement cost in the matters of Tariff Determination/ARR Determination in future.

Commission's ruling

136. Based on the analysis carried out in paragraph 62 to 68, the Commission rules that it has the powers to adjudicate the current dispute with an option to refer the matter for arbitration. The Commission has decided to adjudicate the present dispute.

137. Based on the analysis carried out in Paragraph 69 to 78, the Commission concludes that the PPA between MSEDCL and APML dated 8 September, 2008 was signed based on a Case 1 bid process and the responsibility of fuel tie-up as per the bid documents and the PPA rests only with APML.

138. The Commission has deliberated on the arguments of all the parties regarding applicability of force majeure in Paragraphs 79 to 96 and other grounds of termination in Paragraphs 97 to 101. The Commission after going through the provisions of PPA, rules that force majeure clause cannot be invoked on withdrawal of ToR for Lohara coal blocks by MoEF. Other grounds of termination cited by APML are also without any merit and hence, not tenable. The Commission therefore, rules that the termination of PPA by APML through its letter dated 16 February, 2011 is ab-initio null and void. Therefore, the prayer of APML regarding return of performance guarantee has become redundant. The Commission directs the parties to restore the performance guarantee arrangement as per the PPA dated 8 September, 2008 including additional guarantees as per PPA terms.

139. The Commission has noted in Paragraph 102 to 104 that APML has made several efforts to restore the coal supply arrangement but has not been successful till date. The Commission has further noted that APML has not been able to get an alternate arrangement of coal as the policy framework does not address the issue of giving an alternate coal block in lieu of a coal block being inaccessible due to environmental reasons. Looking at the need to set down the parties to a consultative process as described in Paragraphs 123 to 132, the Commission has decided to form a Committee to look into the details of the case, evaluate the impact of withdrawal of ToR on Unit 2 and 3 of Tiroda TPS and accordingly determine a compensatory charge to be provided to APML, if required. The compensatory charge agreed should be over and above the Tariff agreed in the PPA and should be admissible for

a limited period till the event which occasioned such compensation continues to exist and should be subject to the periodic review by the parties to the PPA.

140. Accordingly, the Commission directs APML and MSEDCL to constitute a Committee within 10 days from the issuance of this Order. The Committee shall consist of Principal Secretary (Energy), Government of Maharashtra/Managing Director of MSEDCL, Chairman of APML, or their nominees, an independent financial analyst, an independent technical expert and an eminent banker of repute. The financial analyst, technical expert and the banker will be selected based on mutual consent between APML and MSEDCL.

141. The Committee shall consider all the aspects highlighted in this Order, inter-alia, as outlined below and submit its final report outlining principles and on the precise mechanism for calculation of compensatory charge within three (3) months from the date of this Order:

- Impact of non-availability of coal from Lohara coal blocks on Unit 2 and 3 of Tiroda TPS, if APML continues to supply power at the quoted Tariff as per the PPA;
- Availability of coal from Lohara coal blocks in future considering options of under-ground mining and other alternative mining techniques;
- Availability of coal from an alternate coal block or long-term linkage in lieu of coal from Lohara coal blocks;
- APML accessing imported coal at a discount to market prices given their expertise as one of the largest trader of coal;
- Availability of coal by diverting coal from other projects of the group companies of APML;
- Separate coal accounting process for Unit 2 and 3 and audited data based on the same to be submitted by APML; and
- Reducing the impact through efficient operations, debt restructuring and other similar measures.

142. Once the Committee submits its report, the Commission will initiate the proceedings to consider a compensatory charge, if required.

143. In prayer b (ii), APML has requested the Commission as follows:

"consider the revised fuel cost for generation and supply of power from the Petitioner's power plant in order to enable revision of tariff"

144. During the hearings, APML has highlighted that if it continues to make losses by supplying power at the quoted Tariffs, it will face severe hardships for repayment of loans in the immediate future. APML during the presentation on 18 January, 2013, stated that the hardship, though temporary in nature, will last for three to five years till the coal supply situation improves. But during these years, there is a genuine fear that the project will be declared a non-performing asset by its lenders and subsequent actions forced by the lenders. The Commission has assessed in Paragraphs 105 to 112 that prima facie, it appears that APML could incur financial losses, although temporary, by supplying power from Unit 2 and 3 of Tiroda TPS at the Tariff quoted in the PPA, which is clear considering the present situation of coal supply for the project.

145. The Commission has also concluded in Paragraphs 113 to 122 that under the statutory scheme outlined in EA-2003, Tariff Policy and National Electricity Policy, the Commission needs to intervene in the present case, so as to prevent an operational generating asset from getting stranded.

146. While the final view of the Commission will be based on the report submitted by the Committee, in the interim, till the same is finalised, the Commission observes the need to intervene to ensure that the project continues to operate and supply power to the State.

147. The Commission, in order to address the issues of the Petitioner in its Prayer b (ii), has decided to form a Committee to scrutinise the issues in detail as can be inferred in paragraphs 140 and 141 . However, the final decision on the matter of relief based on the recommendations of the Committee may take a few months. Therefore, there is a need to address the prayer b (ii) in the interim period till the final decision is

taken in this matter by providing an interim relief so as to ensure continuous supply of power to the State from the project.

148. The Commission feels that an appropriate method for deciding the interim relief would be to determine the same based on the Tariffs discovered from the Units of the same project, i.e., Tiroda TPS. The Commission is also of the opinion that APML has to bear some of the burden arising from its inability to firm up coal supply for Unit 2 and 3. The Commission notes that there are two different Tariffs that have been discovered from Tiroda TPS through competitive bid processes: (a) Tariff stream for Unit 2 and 3 discovered in Case 1 Stage-I bid process with a first year capacity charge of Rs. 1.11 per kWh and energy charge of Rs. 1.44 per kWh and (b) Tariff stream for Unit 4 and 5 discovered in Case 1 Stage-II bid process, with a first year capacity charge of Rs. 1.336 per kWh and first year energy charges of Rs. 2.136 per kWh worked out based on applicable escalation rates till September, 2013.

149. The Commission has decided that the energy charges for interim relief should be the applicable energy charges of Unit 4 and 5, as these Units are based at the same location and the PPA for these Units were executed within a period of 18 months of signing of the PPA for Unit 2 and 3. Therefore, the energy charges of Unit 4 and 5, which have also been discovered through a transparent bid process, will be a close estimate of the energy charges of Unit 2 and 3, as the energy charges of Unit 2 and 3 are being scrutinised.

150. Since the Commission feels that APML should also bear some burden arising due to its inability to firm up coal supply for Unit 2 and 3, capacity charges for interim relief has been computed by reducing 50% of Return on Equity as per the information submitted by APML as a back-up document for the presentation made during the hearing held on 18 January, 2013. The capacity charge for the interim relief applying this principle works out to Rs. 0.989 per kWh.

151. Accordingly, interim relief has been worked out at Rs. 3.124 per kWh consisting of a capacity charge of Rs. 0.989 per kWh and energy charge of Rs. 2.136 per kWh. The interim relief in the form of the above mentioned capacity and energy charges shall be applicable only for sale of power above the initial 520 MW (for which the

FSAs have already been signed) supplied from Units 2 and 3 and shall be limited to the remaining 800 MW. This interim relief shall be applicable from the date of commercial operation. This shall mean that the quantity of power supplied beyond 520 MW, in any time block, shall be billed at Rs. 3.124 per kWh (comprising of capacity charge of Rs. 0.989 per kWh and energy charge of Rs. 2.136 per kWh). For the initial 520 MW, Tariff shall be applicable as per PPA dated 8 September, 2008. This direction of the Commission shall not alter any other terms and conditions of the above-mentioned PPA.

152. However, the differential amount allowed to be recovered by APML through the approved interim relief as mentioned above is an interim measure to ensure smooth operation of the project till such time the Commission takes a decision on compensatory charge, if any, based on the report of the Committee. This will, in turn be adjusted when the final decision in the matter is taken subsequent to the submission of the report of the Committee. The provision of interim relief shall be applicable for twelve (12) months from the date of this Order or the decision taken by the Commission (subsequent to the submission of the report of the Committee), whichever is earlier.

153. The Commission, while arriving at the decision in this case has been fully conscious of the significant issues involved in the present case regarding the sanctity of contracts, Section 63 of EA-2003 and issues arising out of implementation of a 25 year long contract. Notwithstanding these, what has weighed with the Commission is the need to keep in mind the necessity to, inter-alia, ensure reliable power supply to the consumers, prevent stranded assets and NPAs on the books of the lenders and boost investor confidence in the sector. A stranded asset is neither in the interest of the Generating Company nor in the interest of Consumers, lenders or the State.

154. APML is directed to carry out detailed coal accounting from the date of commercial operation for the capacity supplying power under the PPA dated 8 September, 2008. This accounting shall be from the point of purchase to the coal bunkers following best industry practices for the capacity supplying power under the PPA. The details regarding the coal accounting process followed by APML shall be submitted to the Commission within one month from the date of issuance of this Order.

155. Further, the Commission through daily Order dated 20 February, 2013 had allowed APML to sell power to MSEDCL at the levellised Tariff of Rs. 2.642 per kWh from Unit 2 and 3. Therefore, the prayer (c) of the Petitioner to allow it to sell power within or outside Maharashtra till the disposal of the present Petition has already been addressed during the proceedings of the present case vide daily Order dated 20 February, 2013.

156. The Commission directs APML to continue its efforts with MoC and other agencies to restore the fuel supply arrangement for Units 2 and 3 of Tiroda TPS and submit a quarterly report on the same.

157. With the above, the Petition in Case No. 68 of 2012 along with Miscellaneous Application No. 4 of 2013 is disposed of.

sd/-	sd/-
(Chandra Iyengar) Member	(V. P. Raja) Chairman