

BEFORE THE MAHARASHTRA ELECTRICITY REGULATORY COMMISSION,
MUMBAI

Filing No. _____
Case No. 167 of 2014

IN THE MATTER OF

Petition by Prayas (Energy Group) seeking review of the order dated 15th July in case nos 154 of 2013, 189 of 2013 and 118 of 2013

AND

IN THE MATTER OF

Prayas (Energy Group)
Amrita Clinic, Athvale Corner,
Lakdipool-Karve Road Junction,
Deccan Gymkhana, Karve Road,
Pune – 411 004,
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Petitioner

V/s

M/s Indiabulls Power Ltd.

...Respondent

M/s Adani Power Maharashtra Ltd

...Respondent

And Others

The petitioner respectfully submits as under:

1. This petition is filed under the section 85 of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 to seek review of the order dated 15th July 2014 in case nos 154 of 2013, 189 of 2013 and 118 of 2013. The petitioner (hereafter referred to as 'Prayas') was made a party to these cases by the Commission in capacity of a consumer representative and has participated in the proceedings pertaining to these matters. Through the impugned orders, the Commission has approved a compensatory tariff over and above the PPA agreed rate. This decision of the Commission will impose an additional tariff impact of more than Rs. 2,000 Crores per year on MSEDCL consumers.
2. On 24th February 2015, the Commission conducted a hearing in this regard. During the course of the said hearing, the respondents M/s Indiabulls Power Ltd and M/s Adani Power Maharashtra Ltd, raised several questions regarding the admissibility of this petition. This submission deals with such queries that have

been raised and also reiterates the submissions made by the petitioner orally during the course of the said hearing.

3. Objections raised by respondents: The objections raised by the respondents can be summarised as below:
 - a. The petition is not admissible as a review petition, as the grounds for review raised in the para 10 of the main petition in case no 167 of 2014 are not valid.
 - b. The issue of lack of clarity regarding exercise of jurisdiction is not valid, as the commission has enumerated instances of similar actions undertaken by other commissions.
 - c. Prayas cannot raise the issue concerning 'change in law' related claims not being addressed in the impugned orders.

4. Prayas submission in response to these objections:

- a. The para 10 of the petition in case no 167 of 2014 states as follows:

"Mere perusal of the impugned order dated 15th July 2014 in case nos 154 of 2013, 189 of 2013 and 118 of 2013 highlights the following apparent errors:

- a) The Commission has failed to make any findings that there is a 'change in law' event, or how any change in law related provision is applicable.*
- b) The foregoing being a jurisdictional fact must necessarily be decided once such an issue is raised. In any event, the same goes to the core of the matters herein;*
- c) The petitions (case no 154 of 2013 and case no 189 of 2013) were clearly and unequivocally based on applicability of change in law related provisions of the respective PPAs. In spite of this, the impugned order completely fails to address the key issue regarding enforceability / legal force of the said Ministry of Power's communication and whether it amounts to "Change in Law" as per the respective power purchase agreements.*
- d) Detail submissions challenging applicability of the change in law provisions were made before the Commission. The impugned order records that these submissions were made but fails to address them at all, much less give any reasons regarding applicability/validity or otherwise of the said contentions.*
- e) The impugned order fails to invoke any legal principles/provisions while deciding a framework for pass-through of costs over and above the PPA agreed tariff. The said order also fails to explicitly mention that under what circumstances and which legal or contractual provisions the*

said framework can be made applicable, if at all.

f) *The impugned order does not provide any reasons as to why the case no 118 of 2013 is being considered along with cases (154 of 2013 and 189 of 2013) pertaining to change in law regarding domestic coal as the said project is based on imported coal."*

b. It is important to note that Prayas is not disputing the jurisdiction of the Commission to act in such matters, but is highlighting the fact that the Commission cannot act de hors the provisions of the statute and/or the Power Purchase Agreement (PPA). The key issue is that based on mere perusal of the impugned orders, it is not clear under which provisions of the statute or the PPA, has the Commission exercised its jurisdiction to amend the tariff that has been discovered through a transparent bidding process conducted as per the provisions of section 63 of the Electricity Act 2003. Under the present scheme of things, the Commission can exercise its jurisdiction to revise a competitively discovered tariff under the following circumstances:

- i. In case of occurrence of a force majeure event, as defined under the provisions of the PPA,
- ii. In case of occurrence of a 'Change in law' event, as defined under the provisions of the PPA, or
- iii. The Commission *chooses in its sole discretion* to exercise its regulatory powers under the section 86 of the Electricity Act 2003. However, such discretion is subject to provisions of the statute i.e. the competitive bidding guidelines, the Electricity Act 2003 and the PPA.

For the sake of record, it needs to be noted that to what extent and whether, a Commission can use its regulatory powers to reduce the so-called hardship faced by a winning bidder who is seeking post facto modification to the discovered tariff, is a contentious issue and such actions of the Commission are presently being challenged before the Appellate Tribunal for Electricity (Appeals no 296 of 2013, 218 of 2014 and 166 of 2014).

c. In case of occurrence of a change in law or force majeure event, the PPA provides for a framework and methodology for pass through of costs arising on account of such an event. Therefore, if the Commission is satisfied that such an event has occurred, it will have to rely on the specific provisions of the PPA to deal with the costs arising on account of the said event. However, if the Commission feels compelled to exercise its regulatory powers under the section 86 of the Electricity Act 2003, it will have to first establish the need and extent of such relief and also provide enough reasons to justify such action. Thus, it follows that the choice of

framework or methodology to be adopted for granting relief, if any, concerns with the issue of exercise of jurisdiction, i.e. under which provisions of the statute or the PPA, the Commission has chosen to grant relief.

- d. However, the impugned orders fail to provide any reasons for the Commission's decision to develop a framework for granting compensatory tariff over and above the PPA agreed rates. Further, the impugned orders merely cite judgements of other Commissions as well as the decision of the CCEA, advice by the CERC to the Ministry of Power and a letter written by the Secretary, Ministry of Power to various state Commissions. However, none of these orders or letters or decisions, are binding on the Commission in any manner. Neither can these mere citations qualify as a reason for developing the framework for granting compensatory tariff. Further, the need to clearly and unambiguously establish the jurisdiction becomes even more crucial in such a matter where such actions of the Commission are:
- a) Likely to impose large scale tariff burden on the consumers;
 - b) May result in significant financial benefit to the project developers who have knowingly and willingly taken such risks to win contracts, and are seeking post-facto changes to competitively discovered tariff;
 - c) The relief being granted in beyond the scope and provisions of the PPA and,
 - d) The action may set a precedent for future competition in the sector.

In light of the above factors, it becomes extremely critical for the Commission to clearly and unambiguously establish the reasons, along with the clear legal provisions under which it is providing relief over and above the PPA agreed terms and conditions. Unfortunately, the impugned orders while imposing large tariff burden on the consumers, fail to provide adequate reasons for any of the issues enumerated above.

- e. Therefore, providing such large scale financial relief to project developers over and above the competitively discovered tariff without invoking specific legal or statutory provisions for granting such relief, is a serious violation of principles of natural justice, and also a decision that is bad in law and an error apparent on the face of record and hence merits review by the commission. This also is a serious violation of the Commission's conduct of business regulations, which mandates that all orders issued by the Commission shall be reasoned orders. In this regard, the Supreme Court of India in CIVIL APPEAL NO. 9439 OF 2003 (Sant Lal Gupta & Ors. Versus Modern Co-operative Group Housing Society Ltd. and Ors.) has ruled as follows:

*...An error apparent on the face of the record means an error which strikes one on mere looking and does not need long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. **Such errors may include the giving of reasons that are bad in law or inconsistent, unintelligible or inadequate. It may also include the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence.** (Emphasis added) The said judgement is annexed as annexure 6 of the petition in case no 167 of 2014.*

- f. Lastly, the submission made by the respondents that though the change in law related claims have not been addressed in the impugned orders, Prayas cannot raise this issue, as it is not impacted by this decision, is highly inappropriate and legally untenable. The decision of the Commission to grant compensatory relief, over and above the PPA agreed tariff will impose an additional tariff burden of more than Rs. 2,000 Cr per year on the MSEDCL consumers. Therefore, the consumers are the primary party affected on account of the impugned orders. Further, there is no question of locus standi of Prayas, as it is at the behest of the Commission that Prayas was made a party to the proceedings pertaining to case nos 154 of 2013 and 189 of 2013 and has made studied submissions, which though not dealt with, are well documented in the impugned orders. In fact the regulation 85 of the Conduct of Business regulation clearly states that:

“85. (a) Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission. (Emphasis added)

Thus, there is no issue of locus standi as any person aggrieved by an order or decision or direction can file a review petition, so long as the conditions for review are fulfilled. Not issuing a reasoned order and/or not addressing key prayers of any of the parties concerned (not just the petitioners), is an error apparent on the face of record

and hence merits a review, as is being sought in the present case by Prayas. Therefore, the argument of the respondents that Prayas cannot raise such issues is not only legally untenable but also highly inappropriate and objectionable, as it seeks to prevent consumers from participating in such crucial regulatory processes. Moreover, such demand of the respondents is clearly against the letter and spirit of the Electricity Act 2003, which explicitly encourages the Commissions to designate individuals and/or organisations to participate in the regulatory processes and represent consumer and public interest.

5. In light of the above points, our main submissions are as follows:
 - a. The commission should first decide the review petition in case no 167 of 2014 and provide clarity regarding the exact legal provisions under which it has chosen to act in the impugned orders.
 - b. In consequence, the implementation of the Orders passed in case nos 140 of 2014, 145 of 2014 and 147 of 2014 after the impugned Orders under review should be stayed till this present matter is decided. Based on the review of the impugned order, the said orders may be accordingly recalled, set aside or reviewed.
 - c. Allow us to make additional submissions, in case of further proceedings in this matter, if any.
 - d. Pass any other order or orders as may be deemed necessary or required.

Place: Pune

Date : 9th March 2015

Signature of the Petitioner