

**BEFORE THE MAHARASHTRA REGULATORY COMMISSION,
MUMBAI**

**Filing No: _____
Case No. 154 of 2013**

IN THE MATTER OF

Petition filed by Indiabulls Power Limited for compensation in tariff on account of increase in fuel and other incidental costs and dispute between a Generating Company and the Distribution Licensee, relating to the provisions of the Power Purchase Agreements (PPAs) dated 22nd April 2010 and 5th June 2010.

AND IN THE MATTER OF

Indiabulls Power Ltd.

Petitioner

VERSUS

Maharashtra State Electricity Distribution Company Ltd.

Respondent

Prayas (Energy Group)

Consumer Representative / Applicant

SUBMISSION FROM PRAYAS (ENERGY GROUP).

1. This submission is regarding the matter mentioned above. As per the hearing in this matter held on 18th February 2014, the Commission had stated that it would appoint a consultant who will assist the commission in the present matter.
2. The Commission also stated that it was open to suggestions from all the stakeholders regarding the terms of reference to be specified for the consultant. Accordingly, we had submitted the issues listed below to be considered as a part of the terms of reference for the consultant:
 - a. Whether a letter issued by the Ministry of Power to the Central Commission can be construed as a directive to a State Commission and whether it is binding on the state Commission to act on the same?
 - b. Whether an advice given by Central Commission to the Central Government can be construed as a directive to a State Commission and whether it is binding on the State Commission to act on the same?
 - c. Whether at any point of time, was the petitioner contractually assured of 100% supply of domestic coal at CIL notified prices?
 - d. Whether the events such as the CCEA approved mechanism for supply of coal to power producers and the letter from the Ministry of Power addressed to the secretary CERC, constitute 'change in law' as per the article 10 under the PPAs dated 22nd April 2010 and 5th June 2010?
3. Through an email dated 10th June 2014, the commission has shared a power point presentation prepared by the consultant. The presentation is titled as 'Framework for determining incremental coal cost pass through' and it suggests scenarios for this purpose without evaluating legal possibilities of allowing any pass through.
4. We submit that it is premature and inappropriate to discuss modalities of pass through when applicability of the provisions of 'change in law' is being contested based on evidence and analysis. As the consultant's work fails to address the legal issues, we are making this submission to once again highlight the same and to bring them to the commission's notice. Only after the applicability issues are addressed, can there be any discussion regarding the modalities of the pass through, if any.

5. We submit that 'change in law' provisions do not apply to this petition, for the following reasons:

- i. **Advice given by Ministry of Power (MoP):** On 31st July 2013 the MoP issued a letter to secretary of the Central Electricity Regulatory Commission (CERC) with respect to the impact on tariff in concluded PPAs due to shortages in domestic coal availability and subsequent changes in NCDP. Excerpts of para 4 and 5 of the said letter are quoted below for ready reference:

"4. As per the decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/ERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA of remaining four years of the 12th Plan for already PPAs based on tariff based competitive bidding."

*5. The **ERCs are advised to consider the requests of individual power producers in this regard as per due process on a case to case basis in public interest.** The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government. (**Emphasis added**)*

- ii. As the excerpts above make it clear, the ERC is merely advised to consider the request of individual power producer as per due process and on a case to case basis. Thus, it clearly means that depending on the type of bidding, fuel arrangements, PPA terms and conditions and other relevant factors, the Commission will have to evaluate whether the provisions of 'change in law' become applicable and if so, determine impact on tariff, if any. The letter issued by MoP is only advisory and not binding in nature as under the Electricity Act 2003, the Central Ministry cannot issue any directives to a State Commission.
- iii. Further, it would be pertinent to note that concerning the issue of open access, the MoP in a similar manner had issued a circular advising the ERCs on the steps to be taken to implement the certain provisions of the Electricity Act 2003. Through a Suo-motu petition (case no 50 of 2012) the Commission conducted a public hearing to decide whether it should implement the said advice given by the MoP. In the context of whether an advice given by MoP should be considered as binding by a State Commission, MERC ruled as follows:

"136. The Commission is of the view that the MoP letter based on the opinion from M/o Law and Justice on Operationalisation of Open Access in Power Sector is nature of suggestion/advisory for development of market in the Power Sector to the State Commissions and may be looked as 'Policy Vision' of the Central Government.

Conclusion- The MoP letter based on the opinion from M/o Law and Justice on Operationalisation of Open Access in Power Sector is nature of suggestion/advisory for development of market in the Power Sector to the State Commissions and may be looked as 'Policy Vision' of the Central Government."

- iv. Even in this case, as in the open access related matter, the letter issued by MoP is only advisory and not binding in nature. In any case, the letter only advises the Commission to consider such issues on a case to case basis after following due process and keeping in mind public interest. Therefore, there is no larger policy implication for all contracts signed under competitive bidding on account of this advice from MoP. In spite of this fact, if the Commission wishes to act based on the said letter issued by Ministry of Power, such decision will be solely discretionary and the Commission will have to justify the same based on legal and regulatory principles.

- v. **Applicability of change in Law:** Now let us consider the issue of 'Change in Law'. The article 10 of the PPA which deal with the issue of change in law, states the following:

"10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:

- *the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- *a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*
- *any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.*

but shall not include

- (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or*
- (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or*
- (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability."*

- vi. A case is being made to project that any change in supply of domestic coal as assured in the LoA was never envisaged. Now that the shortfall in domestic coal availability has become a reality, it is being projected as 'change in scenario' it is being claimed that this issue of shortages is now being redressed by the Government through the CCEA approved mechanism and amendment to the NCDP 2007. But before getting into these issues, it becomes essential to first establish whether there is indeed any change in the nature of assurance that was contractually guaranteed to the petitioner, before and after the said events occurred.
- vii. The petitioner has stated that its bids were based on LoAs issued under the NCDP 2007. In this case it is pertinent to note the following clauses of the LoA dealing with scope of assurance and price of coal: (excerpts are from page 369 of the petition, Annexure 4, LoA issued by SECL dated 06.06.2009)

"1. Scope of Assurance

1.1 Quantity, Grade and Source of coal

- *Subject to the Assured fulfilling its obligations in accordance with Clause 2 to the satisfaction of the Assurer within the period of validity of this LOA and the signing of the Fuel Supply Agreement (FSA) within three (3) months thereafter, the Assurer shall endeavour to supply, as per the normative requirement of the Plant **27,47,000 tonnes per annum (mtpa) of F Grade. coal to the Assured, which shall be subject to review and assessment by the Assurer of the actual coal requirement of the Assured as well as the incremental availability of coal from the mines of the Assurer and of imported coal. It is expressly clarified that in the event that the incremental coal supplies available with the Assurer (after***

meeting out the commitments already made) is less than the incremental coal demand, such incremental availability shall be distributed on pro-rata basis and the balance quantity of coal requirement shall be met through imported coal available with the Seller, which too shall be distributed on pro-rata basis.

• Parameters in case of imported coal shall be specified by GIU Assurer.

1.2 Price of coal

*The price of coal assured herein shall be as per the notified price of GIL from time to time. Notwithstanding, in case the quantity of normative requirement, as stated in Clause 1.1 above, necessitates opening of a dedicated mine, then coal shall be priced at the higher of the cost plus reasonable return or such notified price. **The quantity of imported coal that may be supplied to the Assured, as mentioned in Clause 1.1, shall be charged at the landed cost plus service charge. Such service charge shall be notified by the Assurer from time to time. The Assured shall be liable to pay all applicable taxes and statutory levies.** (Emphasis added)*

viii. Based on the above excerpts the following can be deduced:

1. As per the LoA, the assurance regarding coal quality and quantity is subject to actual availability and certain time-bound conditions to be met by the petitioner. Strictly speaking, the coal supplier does not assume any contractual obligation to supply domestic coal as per the grade and/or quantity mentioned in the LoA.
2. The LoA makes it very explicit that in case of shortages, coal would be imported to meet such shortfall and the price of such imports will have to be entirely borne by the petitioner.
3. There is absolutely no break-up in terms of quantity of domestic and/or imported coal will be supplied to the petitioner at any point of time.

Thus, based on the LoA, it becomes clear that there is no contractual assurance being given to the petitioner with regard to either quality, quantity or price, as in case coal is imported to meet the domestic supply shortfall, the petitioner is required to bear the entire cost of such imports.

- ix. It should be noted that it is based on such assurance that the petitioner decided to design its bid. The petitioner seems to have assumed that the entire quantity of coal mentioned in the LoA would be made available as per the stated grade and at price notified by CIL, although there is no contractual reason to assume so. Such assumption, therefore, is clearly a risk that has been knowingly and willingly taken by the petitioner to win the contract. It is important to highlight that the bidding framework gave the petitioner the option of passing through such risk transparently at the time of bidding.
- x. Following the LoAs, the petitioner has signed Fuel Supply Agreement (FSA) with the SECL dated 22nd December 2012. The FSA states the percentage of Assured Coal Quantity that the coal supplier will endeavor to supply domestic coal from its sources and the possibility of importing the remaining quantity, if necessary. Following is an extract from the page no 396, Annexure 5 of the petition which is relevant in this regard:

4.3 Sources of Supply	
4.3.1	The Seller shall endeavor to supply Coal from own sources as mentioned in Schedule I. In case the Seller is not in a position to supply the Scheduled Quantity (SQ) of Coal from such sources as indicated in Schedule I, the Seller shall have the option to supply the balance quantity of Coal through import which shall not, unless otherwise agreed between the parties, exceed 15% of the ACQ in the year 2012-13, 13-14 and 14-15, 10% of ACQ in the year 2015-16 and 5% of the ACQ for the year 2016-17 and onwards. Seller may at its discretion, make such arrangement for supply of imported coal through CIL, and /or other enterprises. Accordingly, the Purchaser has to enter into a Side Agreement with CIL and/or Seller, as the case may be, in addition to this Agreement. The Side Agreement dealing with the terms and conditions for supply of Imported Coal would be an integral part of this Agreement.
4.3.2	For supply of coal through import as stated in clause 4.3.1 above, the Purchaser shall agree to have back to back arrangements, if so required with the Importing agency (ies) to be notified by the Seller/CIL and deposit 100% of payable amount in advance. The commercial terms and conditions for such supply shall be regulated as per the Side Agreement.
4.3.3	The Seller may also offer coal from loading points / coal stocks to be lifted by the Purchaser by his own/ their transport arrangement by road / road-cum-rail or any other mode up to 5% of the ACQ.
4.3.4	CIL reserves the right to transfer part of the ACQ from the Seller to another coal producing company (Subsidiary of CIL) based on the proposal received from the Seller, which would be binding on the Purchaser.

xi. Now let us look at what the amended NCDP states with regard to the percentage of Annual Contracted Quantity (ACQ) that the coal supplier will now endeavor to supply through domestic coal from its sources and the possibility of importing the remaining quantity, if necessary. The para two of the amendment to NCDP dated 26th July 2013 states as follows:

*“2. Government has now approved a revised arrangement for supply of coal to the identified Thermal Power Stations (TPPs) of 78,000 MW capacity Commissioned or likely to be Commissioned during the period from 01.04.2009 to 31.03.2015. **Taking into account the overall domestic availability and the likely actual requirements of these TPPs, it has been decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of ACQ for the remaining four years of the 12th Plan for the power plants having normal coal linkages.** Cases of tapering linkage would get coal supplies as per the Tapering Linkage Policy. To meet its balance FSA obligations towards the requirement of the said 78,000 MWTPPs, CIL may import coal and supply the same to the willing power plants on cost plus basis. Power plants may also directly import coal themselves, if they so opt, in which case, the FSA obligations on the part of CIL to the extent of import component would be deemed to have been discharged.” (Emphasis added)*

xii. Now let us consider the changes that have been suggested to be made to the FSA on account amendment to the new coal distribution policy. The table below lists the changes:

Financial year	Domestic coal quantity to be supplied in a year as per:		
	Letter of Assurance	FSA dated 22 Dec 2012	FSAs to be signed as per amended NCDP
FY 13-14	No specific assurance	65% of ACQ*	65% of ACQ
FY 14-15	No specific assurance	65% of ACQ	65% of ACQ
FY 15-16	No specific assurance	70% of ACQ	67% of ACQ
FY 16-17	No specific assurance	75% of ACQ	75% of ACQ
FY 17-18 onward	No specific assurance	75% of ACQ	No specific assurance

*ACQ stands for Annual Contracted Quantity and is defined in the clause 4.1 of the FSA

xiii. As the table above shows, there is hardly any change in the FSA that the petitioner has signed and the modifications to the FSAs proposed as per the amendment to NCDP dated 26th July 2013. In fact, the FSA signed by the petitioner at least provides a better terms and more clarity in terms of the

percent of the ACQ that will be met through domestic coal supply post FY 16-17. In any case, the petitioner submitted its bid based on the LoA, which gave absolutely no assurance in terms of the quantity, quality or price of coal that would be supplied to the petitioner and hence the provisions as per the Change in Law article of the PPA do not apply.

- xiv. In light of the above points, following can be concluded:
1. The analysis above highlights that the petitioner was contractually never assured supply of domestic coal at CIL notified prices for its entire requirement.
 2. In order to win the contract, the petitioner knowingly and voluntarily took the risk of assuming domestic coal availability at notified prices, though the bidding framework gave the option of passing through such costs transparently at the time of bidding.
 3. Further, the recent changes to the coal distribution policy do not change or alter the nature of the assurance given to the petitioner and/or nature of the contract (i.e. the FSA) signed by the petitioner and hence the provisions of the Change in Law article of the PPA do not apply.
- xv. In light of the above points, we pray to commission as follows:
1. As there is no case for 'change in law' as per the PPA, the petition should be dismissed without any changes to the PPA agreed tariff.
 2. Without prejudice to the above prayer, if the Commission decides to proceed further then following process must be followed:
 - a. Frame issues regarding applicability of the provisions of 'change in law' as per the article 10 of the PPA.
 - b. Allow all stakeholders to make submissions on the issues framed.
 - c. Issue an interim order clarifying commission's decision regarding applicability of change in law related provisions and need for tariff revision, if any.
 - d. Conduct due public hearing based on public notice inviting suggestions and comments from public, before deciding any change in tariff.
6. We once again request the Commission to kindly take this submission on record and also allow us to make further submissions in this matter, if any.

Date: 12 June 2014

(Signature)

Place: Pune