

# ● PRAYAS

Initiatives in Health, Energy,  
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15<sup>th</sup> April 2013

To,  
The Secretary,  
MERC,  
Mumbai.

**Subject:** Prayas submission regarding the Petition of MSEDCL for Submission of the Power Purchase Agreements (PPA) for the adoption of Tariff along with other Certificate and documents

**Ref:** MERC Case No. 24 of 2013, hearing conducted on 3<sup>rd</sup> April 2013

Dear Sir,

This letter is regarding the matter mentioned above. We were present for the hearing conducted in this case on 3<sup>rd</sup> April 2013 and have already submitted our comments orally. Please find below our submission with respect to this case.

1. MSEDCL, has filed a Petition dated 17.10.2008, for submission of the Power Purchase Agreements (PPA) for the adoption of Tariff along with other Certificate and documents with reference to the Order dated 14th Aug 2008 in Case No. 54 of 2008. The main prayers of the Petitioner are as under-
  - a. *Note the certificates index Annexure-2 and documents submitted as per the Honorable Commission's direction.*
  - b. *Approval for adoption of the tariff discovered through the bid process for the purpose of tariff determination as and when the supply from these contracted sources commence.*
  - c. *Approval of the Power Purchase Agreement signed with both APML and LMPPL.*
2. Section 63 of the Electricity Act states that – “Notwithstanding anything contained in section 62, the Appropriate Commission ***shall adopt*** the tariff if such tariff has been determined through ***transparent process of bidding in accordance with the guidelines*** issued by the Central Government.” (***Emphasis added***)
3. In this context, it is important to see what the bidding guidelines say about the tariff adoption process. Following are the relevant excerpts from the competitive bidding guidelines:

*“These guidelines have been framed under the above provisions of **section 63 of the Act**. The specific objectives of these guidelines are as follows:*

1. *Promote competitive procurement of electricity by distribution licensees;*
2. *Facilitate transparency and fairness in procurement processes;*
3. *Facilitate reduction of information asymmetries for various bidders;*

4. *Protect consumer interests by facilitating competitive conditions in procurement of electricity;*
5. *Enhance standardization and reduce ambiguity and hence time for materialization of projects;*
6. *Provide flexibility to suppliers on internal operations while ensuring certainty on availability of power and tariffs for buyers."*

*"5.9 The procurer shall constitute a committee for evaluation of the bids with at least one member external to the procurer's organisation and affiliates. The external member shall have expertise in financial matters / bid evaluation. The procurer shall reveal past associations with the external member - directly or through its affiliates - that could create potential conflict of interest."*

*"5.15 The bidder who has quoted lowest levelised tariff as per evaluation procedure, shall be considered for the award. The evaluation committee shall have the right to reject all price bids if the rates quoted are not aligned to the prevailing market prices. "*

*"6.2 After the conclusion of bid process, the Evaluation Committee constituted for evaluation of RFP bids shall provide appropriate certification on conformity of the bid process bid evaluation according to the provisions of the RFP document. The procurer shall provide a certificate on the conformity of the bid process to these guidelines."*

4. It is important to note that the commission has already approved the PPA and adopted tariff for Power Purchase Agreement initialed between MSEDCL and M/s JSW Energy Ltd through its order dated 27<sup>th</sup> November 2009 in case no 39 of 2009, which was a part of the same bidding process. Some of the important and relevant extracts from this order are reproduced below:

***"10. Commission's analysis and ruling:***

***In the Order issued on August 14, 2008, in the matter of Case 54 of 2008***, the Commission had directed MSEDCL that,

*"The Commission will consider the matter of adoption of tariff for long term procurement of power through Case-1 competitive bidding process in accordance with the provisions of Section 63 of the Electricity Act, 2003 and Competitive Bidding Guidelines notified by the Ministry of Power, after MSEDCL submits the PPAs signed with the selected bidders, along with other certificates and documents on affidavit, for adoption of the tariff by the Commission"*

***In view of the above and based on the Petition and the supporting documents submitted by MSEDCL, the Commission rules as follows:"***

*"The Commission has noted that MSEDCL had initiated the process of procurement of 2000 MW power in October 2007 under Class I, Phase-I procurement in line with the Competitive Bidding Guidelines made by the Ministry of Power. "*

*“Based on MSEDCL’s submission, and the data enclosed along with the submission, the Commission has noted that after opening the bids received in response to the said enquiry it was found that none of the bidders had quoted for supply of entire 2000 MW quantum of power for which MSEDCL had obtained approval. After evaluation of the bids of M/s Adani, M/s Lanco and M/s JSW Energy Ltd., together amounting to supply of 2000 MW power and being the lower among the qualified bids, were placed by MSEDCL in “L1” basket for further negotiations. It is noted that as per the stipulations in the Competitive Bidding Guidelines of the Ministry of Power, the bidders are free to quote Escalable or Non-Escalable charges for the components of tariff. It is further noted by the Commission that M/s Lanco and M/s Adani had quoted Non-escalable tariff and had based their quotation on use of indigenous coal fuel, while M/S JSW Energy Ltd. had quoted Escalable tariff and had based the bid on use of Imported coal fuel.”*

*“From the submission made by MSEDCL, the Commission has observed that the Non Escalable fuel charges quoted by **M/s Lanco and M/s Adani** consist of firm figures, rising by the year in a hyperbolic trajectory, which is based on the bidders’ assumed inflation rates and risk factors, over the entire period of 25 years. The Escalable tariff quoted by M/s JSW consists of Constant figures for the Escalable Energy charge, with the proviso that the same would be escalable by a formula based on actual inflation rates declared by CERC for those years.”*

*“The Commission has noted that for evaluating the bids, MSEDCL has converted the quoted prices as above into levelled tariff rates which are as follows: **Adani Power Rs 2.642 per kWh; Lanco Rs 2.70 per kWh** ; JSW Energy Rs 2.716 per kWh On the basis of the levelled tariff and price comparison, it is noted that due to the price difference between M/s JSW Energy and next lower bidder, viz., M/s Lanco, over the period of 25 years, for 300 MW power, at Load Factor of 0.85, the procurement from M/s JSW Energy will be costlier by approx. Rs 89 Crores at their quoted price as compared to the same at M/s Lanco’s price.”*

*The Commission has noted that in compliance with the directive given by the Commission, MSEDCL had sent inspection teams to the proposed power plant sites of all the above three bidders. It is further noted that as stated under Item 6 (c) above, the fact finding team of MSEDCL had visited the Lanco thermal plant site on 20th September 2009, and it has reported that the construction activity of the plant by M/s Lanco has been delayed and that the planned COD of 4.9.2012 of the Lanco plant may not be achieved. The Commission directs MSEDCL to immediately initiate action as per the terms of **approved PPA** to protect the economic interest of its consumers. (Emphasis added)*

*Accordingly, the Commission approves the procurement of 300 MW power by MSEDCL from M/s JSW Energy as above on long term basis as proposed and directs MSEDCL to submit the PPA signed with M/s JSW Energy Ltd.*

5. The section 63 of the Act read along with the bidding guidelines requires the commission to adopt the discovered tariff only if it is satisfied that due process as per bidding guidelines has been followed and if the tariff discovered is in line with the prevailing market rates. As can be seen from the excerpts of the order in case no 39 of 2009, the commission has already undertaken a detail process for tariff adoption for the L3 bidder in the same bidding process. Throughout this order, the commission has compared the JSW bid with Adani and Lanco bids as L1 and L2. Further in the last para quoted above, while referring to Lanco PPA the commission

has explicitly referred to it as the 'approved PPA'. All these facts highlight the point that there is already a legally valid and binding order approving tariff for the L3 bidder under the same bidding process for which tariff adoption is now being sought. Thus, the two main criteria for adoption of tariff under section 63, viz. compliance with process under bidding guidelines and discovered tariff to be in line with market rate, are met for this bidding process (stage 1, case- 1) and hence the only logical and legally appropriate action on part of the commission would be to adopt tariff for L1 and L2.

6. Thus, the important issue that arises from this petition is not regarding the tariff adoption per se, but the governance lapse on part of the commission in not issuing a clear and unambiguous tariff adoption order for L1 and L2 at appropriate point of time. It is also important to note that not just the commission but also the petitioner and the project developers have conducted business in the intervening period (from October 2008 till date) assuming existence of valid tariff adoption order. In this context it needs to be pointed out that absence of such order was categorically brought to the petitioner's as well as commission's notice through formal written submissions on at least two occasions. Below are the details of the correspondence with the commission highlighting this issue:

- a. Prayas submission dated 6<sup>th</sup> August 2010 regarding Petition of MSEDCL for adoption of the tariff for procurement of 2000 MW (-20% / +30%) power on Long Term Basis under International Competitive Bidding Process (Case 1 Stage 2) Case No. 22 of 2010. Para 7 on this submission states: *"MSEDCL is referring to the current matter as stage-2 of case-I bidding process however it is not clear whether tariff discovered through stage-1 of this process has been adopted by the commission. The commission should kindly clarify this point."* The order issued by the commission in this case captures all other points raised by Prayas except the tariff adoption related issue.
- b. Thereafter Prayas submission dated 24<sup>th</sup> October 2010 regarding the petition of MSEDCL for approval of 125 MW PPA with Adani Power Maharashtra Ltd and adoption of its tariff, (case no 56 of 2010) reiterated the earlier query: *"MSEDCL is referring to the current matter as stage-2 of case-I bidding process however it is not clear whether tariff discovered through stage-1 of this process has been adopted by the commission. The commission should kindly clarify this point."*

7. The petitioner, in its response to the issues raised by Prayas in case no 56 of 2010, has also submitted a clarification to the commission. Through its response on affidavit, dated 29<sup>th</sup> October 2010 (No. CE /PP/ Add. 125MW / 33308), the petitioner replied to each question raised by Prayas in a tabulated manner. As per the petitioner's reply, the answer to the query regarding whether tariff for case-1 stage 1 bidding process has been adopted by the commission or not, following reply was given:

		provisions of the PPA and non-Commission will be appraised about it.
vii	Case I Stage 2: Tariff adoption. Case I Stage I: Tariff adopted or not? Its not clear	Case I stage I Tariff is adopted for all the three cases i.e. Adani, Lanco and JSW as per Case no. 39 of 2009 dated 27 <sup>th</sup> November, 2009.
viii	Detailed status report of completed and	MSEDCL has completed competitive bidding

However, even in its order regarding this case (56 of 2010), the commission did not comment on the issue of absence of the tariff adoption order and/or whether it agrees with MSEDCL's contention or not. Reply file by MSEDCL is also attached here with for ready reference.

8. Above submissions make it clear that it would be factually incorrect to say that absence of tariff adoption order in this regard is a 'mere procedural lapse' on part of the commission, as this issue was categorically brought to the commission's notice during several important cases pertaining to power purchase and the commission has refrained from commenting on the same. In fact, the circumstances stated above raise very serious concerns regarding regulatory governance and the functioning of the commission itself. Given these circumstances, we demand that the commission should initiate a thorough investigation to identify specific reasons which prevented the commission from taking up the tariff adoption matter at appropriate time or at least after this lapse was clearly pointed out to it on several occasions and also to fix responsibility for the same.
9. Therefore, to summarize our comments, we would like to pray as follows:
  - a. On account of existence of valid tariff adoption order for the L3 bidder in the same bidding process, the commission should issue a clear and unambiguous order adopting tariff for L1 and L2 and also declare the PPAs signed with L1 and L2 as legally valid and binding.
  - b. Initiate a thorough investigation to identify specific reason which prevented the commission from taking up the tariff adoption matter at appropriate point of time or at least, after the lapse was categorically pointed out, and also fix responsibility for the same.
10. During the hearing conducted on 3<sup>rd</sup> April, one of the project developers, M/s Adani Power Maharashtra Ltd, had raised certain issues with which we do not agree. However, we have not yet received any submissions from them, although the commission had explicitly directed everyone concerned to submit comments in writing within ten days of the hearing. We will submit our rejoinders as soon as we receive written submissions from concerned parties.

We request the commission to kindly take this submission on record and allow us to make such further submissions.

Thanking you

Sincerely



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