

● PRAYAS

Initiatives in Health, Energy,
Learning and Parenthood

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22nd April 2013

To,
The Secretary,
MERC,
Mumbai.

Subject: Prayas comments in the matter of for adjudication of dispute u/s 86 of the Electricity Act, 2003 and for return of Performance Guarantee pursuant to the termination dated 16.02.2011.

Ref: MERC case no 68 of 2012 and the hearing dated 3rd April, 2013

Dear Sir,

This submission is regarding the matter mentioned above. We have been present for all hearings in this matter and have also submitted detail written submissions through our letters dated 9th October 2012, 23rd January 2013 and 26th February 2013. During the hearing conducted on 3rd April 2013, the commission had explicitly directed everyone concerned to submit all comments in writing within ten days of the hearing. We would like to bring it to the commission's notice that till date, neither the petitioner nor the respondent has filed any rejoinder to any of our submissions, barring the exception of letter from the petitioner regarding our last submission pertaining to the in-chamber hearing.

We request the commission to kindly take this submission on record and to direct all parties concerned to submit para-wise reply to all our submissions on affidavit, including this one. We also request the commission to allow us to make further submissions based on subsequent hearings and proceedings in this matter. Please find below written summary of submissions made during the past hearings but not captured in our earlier written submissions.

1. The petition in the present case, (case no 68 of 2012) was filed on 16.07.2012 with following prayers:
 - a. Direct the Respondent (i.e. MSEDCL) to return the Performance Guarantee No. 007GM07082270001dated (Rs. 99 crores) dated 14.08.2008 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;

Interim Prayer:

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;

2. In the subsequent hearings the petitioner has contended that cancelation of the Lohara coal blocks, for which Terms of Reference (ToR) was granted to the petitioner, effectively translated into a Force majeure event. Therefore, using the force majeure related provision under section 3.3.3 of the PPA, the petitioner decided to unilaterally terminate the contract in February 2011. While claiming to have terminated the contract, the petitioner is simultaneously making a prayer for revising the discovered tariff and has informed willingness to supply at such increased rates.
3. During the hearings regarding the present petition (case no 68 of 2012) Prayas made several submissions regarding un-tenability of the force majeure claim and hence the termination, under the present PPA and bidding framework. Our submission dated 9th October 2012 deals with this issue in detail. The entire petition is hinged on the argument of treating cancellation of Terms of Reference for Lohara coal block as a force majeure event. In this context, it is essential to note the following aspects.
4. The petitioner had participated in a **Case-1** long term bidding process undertaken by MSEDCL. The competitive bidding guidelines issued by the Ministry of Power, define case-1 as a type of bidding: *"Where the location, technology, or fuel is not specified by the procurer"*. Further under their bid submitted on 20th Feb 2008, the petitioner states the following about its fuel arrangement:

Fuel	<p>Lohara (West) and Lohara (Extn) coal blocks have been allocated to the Project, which will meet the part coal requirement of the project. The balance coal requirement of power projects shall be met from coal supply by CIL or its subsidiary and Imported coal. We have already submitted application to GoI for allocation of coal linkage.</p> <p>The expected GCV of the coal is in the range of 3800 – 5000 Kcal/Kg, whereas expected Ash Content and Sulphur Content are in the range of 30-40% and 0.2% to 0.4% respectively.</p>
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Thus, the petitioner was not solely relying on the captive blocks but also envisaged importing coal and applying for linkages to meet balance coal requirement. It is important to note that in spite of this reliance on supply from CIL and imported coal, the petitioner chose to quote a fixed

tariff for 25 years, thereby willing assuming risks involved in CIL notified price of Indian coal as well as price variations in imported coal.

5. Further, it is important to note that the letter of allocation dated 6th November 2007 issued by the Ministry of Coal was not a final approval but subject to certain conditions. In fact in the para no 2 of the said letter, the Ministry makes it categorically clear that allocation of mining lease of the coal block may get cancelled on grounds such as: “
- 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 mentioned above.”*

6. Subsequently, the letter stating the terms of reference for the said coal blocks was issued by the Ministry of Environment & Forests on 16th May 2008 to the petitioner. The said letter categorically notes that the coal blocks will only meet part of the coal requirement and ‘*the balance coal would be met through open purchase from CIL.*’ Further, the last section of the said letter requires the petitioner to undertake public process as per the EIA Notification 2006. The said notification defines the term Appraisal as follows:

“Stage (4) - Appraisal:

- *‘Appraisal’ means the detailed scrutiny by the EAC or SEAC of the application and other documents like the Final EIA report, outcome of the public consultations including public hearing proceedings, submitted by the applicant to the regulatory authority concerned for grant of environmental clearance.*
- *This appraisal has to be made by EAC or SEAC concerned in a transparent manner in a proceeding to which the applicant is invited for furnishing necessary clarifications in person or through an authorized representative.*
- *On conclusion of this proceeding, the EAC or SEAC concerned makes categorical recommendations to the regulatory authority concerned either for grant of prior environmental clearance on stipulated terms and conditions, or rejection of the application for prior environmental clearance, together with reasons for the same.*
- *The appraisal of an application has to be completed by the EAC or SEAC concerned within sixty days of the receipt of the final Environment Impact Assessment report and other documents or the receipt of Form 1 and Form 1A, where public consultation is not necessary and the recommendations of the EAC or SEAC has to be placed before the competent authority for a final decision within the next fifteen days.*

The members of the EAC and SEAC, concerned, may inspect any site(s) connected with the project or activity in respect of which the prior environmental clearance is sought, for the purposes of screening or scoping or appraisal.” (Emphasis added)

7. Further it also needs to be pointed that the minutes of the 59th Expert Appraisal Committee (EAC) (Thermal & Coal mining) meeting held on 24th –25th November 2009, records the following observations in relation to the said coal blocks:

“The Ministry had forwarded a copy of the TOR to the National Tiger Conservation Authority (NTCA) for their comments.

In response, the Ministry received– (i) Letter of Principal Chief Conservator of Forests (Wildlife), Government of Maharashtra dated 31.08.2009 addressed to NTCA and forwarded by NTCA vide

letter dated 01.10.2009 to the Ministry (Annexure-3) and Letter of NTCA dated 13.01.2009 with their comments on the project (Annexure-4), which were placed for discussions in the meeting.

DIG & Joint Director, NTCA informed that under the directions of Hon'ble MEF, Director, NTCA had undertaken a site visit and had recommended that no mining operations should be undertaken in the proposed buffer zone. He further informed that the NTCA has legal obligations under Section 38 (O) of the Wildlife Protection Act 1972, and is authorised to regulate the land use that can impact the Tiger Reserves in the country. **It was informed that the Ministry had, in an earlier instance, rejected a mining project in the same proposed location vide letter No.J-11015/1/96-IA.II(M) dated 03.02.1999.** He further stated that the NTCA fully endorsed the views of the PCCF, GoM vide letter dated 31.08.2009 which was read out by PCCF, GoM to the Committee (Annexure-1)

While granting TOR, the EAC (T&C) had recommended that in view of the ecological sensitivity of the area, a detailed ecological study should be carried out. The study area map delineating the shortest distance of the Tadoba-Andheri Tiger Reserve from the boundary of the ML should be got authenticated by the National Tiger Conservation Authority along with their comments on the proposed location of the project. A Conservation Plan should also be prepared for the wildlife found in the study area and furnished giving costs capital and revenue) for activities of the Plan to be implemented over the life of the project. The Plan must also include Plan for post mining land use for Habitat restoration. The comments of the Chief Wildlife Warden of the State government should also be obtained on the Conservation Plan.

DIG & Joint Director, NTCA and the PCCF, GoM requested the Committee not to look at the issue as a simple mathematics of distances and boundaries but to have an overview of the need for conserving the tiger habitat which involves not only the TATR but also the tiger corridor (which is a habit used by the tigers of TATR). PCCF, GoM informed that, in this context, a Conservation Plan had been received from M/s Adani Power Ltd. on Lohara Opencast Coal Project. He further informed that **the Plan was flawed** as the movement of tigers and their seasonality had not been reflected or adequately addressed in the Plan; **the methodology followed in the Plan is flawed** and would not suffice in conserving the tigers found in the area. He further emphasised that damage done by mining or other activities cannot be redeemed or traded in by preparation of a Conservation Plan. The State Govt. had hence rejected their Conservation Plan and recommended rejection of the mining project of M/s Adani Power Ltd. and had informed the NTCA accordingly vide letter dated 31.08.2009. The company had likewise been informed." **(Emphasis added)**

8. Thus, the above facts make it clear that:
 - a. The captive blocks, even if allocated, would have met only partial coal requirement of the plant and the petitioner will have to rely on purchase from CIL or imports to meet the balance requirement of coal.
 - b. There was always a real possibility that subject to various conditions being satisfied (or not), the said blocks may not be allocated to the petitioner.

The petitioner, in spite of being aware of the above risks and having the option to pass them on to consumers at the time of bidding, opted to quote fixed trajectory for 25 years for the fuel charge in its bid and also succeeded in winning the contract. Now that these potential risks have become a reality, the petitioner is terming it as a 'force majeure' event.

9. The clause 12.3 of the PPA defines Force Majeure event as: “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)

Thus, for a force majeure event to occur, two conditions need to be fulfilled, i.e.

- i. Such an event should wholly or partly prevent or avoidably delay performance of the affected party and,
 - ii. It should be 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.
10. In this context, it is critical to note that not only the petitioner was fully aware of the risk entailed in assuming that the blocks conditionally allocated may not be ultimately granted to it, but it has also warned its investors against the possibility of this risk materializing into a reality. We would like to bring to the commission’s notice excerpts from the draft Red herring prospectus dated July 14, 2009, submitted by the petitioner’s parent company to the Securities and Exchange Board of India. Here is a link to download the same http://www.sebi.gov.in/cms/sebi_data/attachdocs/1289882692680.pdf

11. Relevant extracts reflecting the petitioner’s understanding of risks, from the said red herring prospectus:

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“PRESENTATION OF FINANCIAL, INDUSTRY AND MARKET DATA

Financial Data

Unless stated otherwise, the financial data in this Red Herring Prospectus is derived from our restated financial statements, prepared in accordance with Indian GAAP and the SEBI guidelines, which are included in this Red Herring Prospectus.

Our subsidiary, APML is developing the Tiroda Power Project, one of the Projects for which funds are being raised through this Issue. The financial statements of APML, prepared in accordance with Indian GAAP, for the fiscal years 2009 and 2008 have also been included in this Red Herring Prospectus.

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RISK FACTORS

An investment in Equity Shares involves a high degree of risk. You should carefully consider all the information in this Red Herring Prospectus, including the risks and uncertainties described below, before making an investment in our Equity Shares. The risks and uncertainties described in this section are not the only risks that we currently face. Additional risks and uncertainties not presently known to us or that we currently believe to be immaterial may also have an adverse

effect on our business, results of operations and financial condition. **If any of the following risks, or other risks that are not currently known or are now deemed immaterial, actually occur, our business, results of operations and financial condition could suffer, the price of our Equity Shares could decline, and you may lose all or part of your investment.** The financial and other related implications of risks concerned, wherever quantifiable, have been disclosed in the risk factors mentioned below. However, there are risk factors where the effect is not quantifiable and hence has not been disclosed in such risk factors. The numbering of the risk factors has been done to facilitate the ease of reading and reference, and does not in any manner indicate the importance of one risk factor over another. In making an investment decision, prospective investors must rely on their own examination of the Company and the terms of the Issue, including the merits and risks involved.

...

Risk Related to our Business

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6. The construction and operation of our power projects or mining operations may face significant opposition from local communities and other parties, which may adversely affect our results of operations and financial condition.

The construction and operation of power projects and mines may face opposition from the local communities where these power projects are located and from special interest groups. In particular, local communities, the forest authorities and other authorities may oppose mining operations due to the perceived negative impact mining may have on the environment. Significant opposition by local communities, non-governmental organizations and other parties to the construction of our power projects and mining operations may adversely affect our results of operations and financial condition. In the future, as our mining activity increases and we start to infringe on local habitations, we may have to resettle the local inhabitants. We may have to incur significant expenditure on any such resettlement, which may adversely affect our financial condition and result of operations.

15. Our operations will have significant fuel requirements, and we may not be able to ensure the availability of fuel at competitive prices, which could have an adverse effect on our results of operations.

The success of our operations will depend on, among other things, our ability to source fuel at competitive prices. We have entered into long-term coal supply agreements with AEL for supply of coal for the Mundra Power Projects. Our Tiroda Power Project will source a significant portion of its coal requirements from captive mines. We received a letter from Mahanadi Coalfields on June 25, 2009, wherein Mahanadi Coalfields provisionally agreed to supply approximately 6.4 MTPA of Grade 'F' coal for our Mundra Phase IV Power Project. Additionally, APML received letters from South Eastern Coalfields and Western Coalfields on June 6, 2009 and June 1, 2009, wherein South Eastern Coalfields and Western Coalfields provisionally agreed to supply approximately 2.5 MTPA of Grade 'F' coal and 2.2 MTPA of Grade 'E' coal for our Tiroda Power Project, respectively. The coal quantity agreed to be supplied by Mahanadi Coalfields, South Eastern Coalfields and Western Coalfields is conditional upon us achieving certain milestones over the next 24 months and then signing of definitive coal supply agreements. For details of the fuel arrangements for our power projects see the section "Our Business" on page 64 of this Red Herring Prospectus. The coal supply agreements with AEL do not restrict AEL from selling coal to our competitors or other consumers. The coal supply agreements with AEL may be on terms favourable to us, and any amendment or termination of such agreements could adversely affect

our results of operations and business. In case AEL is unable to fulfil its obligations under the terms of the coal supply agreements, our ability to renegotiate the terms of such agreements or seek remedy may be limited as AEL will continue to be our largest shareholder after the Issue. Further, our coal suppliers may default on their obligations to us under the coal supply agreements, which may adversely affect our business and results of operations. There can be no assurance that we will be able to obtain coal supplies either in sufficient quantities, acceptable qualities and on commercially acceptable terms, or at all. We may also have to purchase coal at a significantly higher spot price from the market for carrying out our operations, which could have an adverse effect on our business, financial condition and results of operations.

16. Estimates of coal reserves are subject to assumptions, and if the actual amounts of such reserves are less than estimated, our results of operations and financial condition may be adversely affected.

We have entered into 15-year coal supply agreements with AEL for our Mundra Power Projects. We have been awarded two coal blocks with combined estimated reserves of approximately 170 million tons for our Tiroda Power Project. Estimates of coal reserves from where we intend to source coal from are subject to various assumptions such as interpretations of geological data obtained from sampling techniques and projected rates of production in the future. Actual reserves and production levels may differ significantly from estimates. If the quantity or quality of our coal reserves has been overestimated, we would deplete our coal reserves more quickly than anticipated and may have to source the required coal in the open market. Also, our PPAs typically last for 25 years and we have only secured coal supplies for a period of 15 years with AEL. Therefore, we will have to renegotiate the coal supply agreements with AEL or find alternative coal suppliers and there is no assurance that we will be able secure coal supplies either in sufficient quantities or on commercially acceptable terms, or at all. Prices for coal in the open market may exceed the cost at which we might otherwise be able to extract coal, which would increase our operating costs and adversely affect our business, financial condition and results of operations.

17. The supply of coal for our Tiroda Power Project and Mundra Phase IV Power Project is subject to certain conditions. In case we are unable to fulfil such conditions, our results of operations may be adversely affected.

The Government of India has allocated two coal blocks with combined estimated reserves of approximately 170 million tons for generating up to 1,000 MW of power at our Tiroda Power Project. We received a letter from Mahanadi Coalfields on June 25, 2009, wherein Mahanadi Coalfields provisionally agreed to supply approximately 6.4 MTPA of Grade 'F' coal for our Mundra Phase IV Power Project. Additionally, APML received letters from South Eastern Coalfields and Western Coalfields on June 6, 2009 and June 1, 2009, wherein South Eastern Coalfields and Western Coalfields provisionally agreed to supply approximately 2.5 MTPA of Grade 'F' coal and 2.2 MTPA of Grade 'E' coal for our Tiroda Power Project, respectively. The coal quantity agreed to be supplied by Mahanadi Coalfields, South Eastern Coalfields and Western Coalfields is conditional upon us achieving certain milestones over the next 24 months and then signing of coal supply agreements. We cannot assure you that pursuant to these letters, we will be able to sign coal supply agreements on timely and acceptable terms, if at all. In the event, we do not enter into coal supply agreements or the quality of coal allocated to us is not of expected calorific value, we may be required to make alternative arrangements for coal supply for these power projects. Under the letter of allocation from the Government of India for the coal mines for our Tiroda power project, we are required to adhere to certain schedules for the development

of the mines. We are also required to guarantee certain amount of production of coal during the tenure of the allocation. In the event of a delay in the development of mines or a deficiency in the production of coal, the Government of India is entitled to deduct a specified amount from the bank guarantee. In the event of unsatisfactory progress in the development of the coal mines, the coal allocation may also be cancelled, each of which may affect our business and operation. (Emphasis added)

- 12.** Thus, the risk declaration made by the petitioner under the Red herring prospectus highlights the following:
- a. The petitioner 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 also from the Forest authorities as well as other concerned authorities.
 - b. Even if the coal blocks were allocated, the petitioner makes it clear that there is no assurance that coal from them will be sufficient for generation over the term of the PPA.
 - c. The petitioner was also fully aware that coal supply tied up by them (whether in the form of captive blocks or linkages) may not be sufficient and they will need to rely on imported coal and/or open purchases from CIL and its subsidiaries to meet the balance requirement of coal.
 - d. The petitioner has also informed its potential investors about these risks and advised them to invest in its Initial public offer after accounting for the same.
- 13.** In light of the above facts, it will be blatantly false to term the cancelation of (conditionally allocated) coal blocks as 'force majeure' event under the PPA for the following reasons:
- a. The first and foremost being that the force majeure clause of the PPA explicitly excludes unavailability or change in price related issues from force majeure considerations, as the bidding framework gives the bidder complete flexibility in terms of choosing the fuel source and allows them to partially or completely pass through these costs, if they choose to do so.
 - b. The petitioner submitted a bid for the case-1 bidding process with a categorical statement that the conditionally allocated captive coal blocks, will only meet its coal requirement partially and the balance requirement will be met through linkage based coal supply from CIL or its subsidiary and imported Coal.
 - c. In spite of this self-stated dependence on coal to be procured at market rates (internationally or domestically or both), the petitioner willfully choose to quote fixed fuel cost 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 in the same proposed location.
 - e. Further, the decision of the concerned Ministry, to cancel the terms of reference for the said coal blocks is legally valid and entirely within its jurisdiction, (as the allocation was anyway conditional) and the same has not been challenged or questioned by the petitioner before any forum.

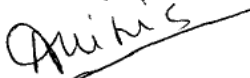
14. Therefore, considering the above facts, it becomes evident that cancellation of conditionally allocated coal blocks cannot constitute force majeure event under the article 12 of the PPA. As stated by us in the beginning, this submission is in addition to our other submissions and covers issues that have been raised during various hearings related to this matter but not captured in the earlier written submissions. Finally, we would like to reiterate our following main prayers to the commission:

- 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 assess power purchase planning of MSEDCL with emphasis on 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 capacity contracted through MoU processes with IPPs, centre and state 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 at which power is being currently purchased, if at all.

15. We request the commission to kindly take this submission on record and to direct all parties to submit para-wise reply on affidavit to this submission as well as our previous submissions. We request the commission to allow us to make further submissions, if any, and also include all our submissions in its final order in this matter.

Thanking you

Sincerely



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